



Case Western Reserve Law Review

Volume 41 | Issue 3

1991

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Recommended Citation

Dennis L. Murphy, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 Case W. Res. L. Rev. 969 (1991)

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THE EXCLUSION OF ILLEGAL ALIENS FROM THE
REAPPORTIONMENT BASE: A QUESTION OF REPRESENTATION

Illegal aliens are included in the population count that determines congressional reapportionment. The author argues that, since illegal aliens are not eligible to vote, their inclusion in the reapportionment base violates the constitutional principle of one person one vote. In support of this argument the author examines Supreme Court reapportionment jurisprudence and various models of representation.

IN THE 1990 census, illegal aliens¹ were enumerated by the Census Bureau. The census count is used for several purposes,² including apportionment of seats in the House of Representatives among the several states.³

The Constitution does not grant illegal aliens the right to vote.⁴ Nevertheless, illegal aliens were counted in the 1980 census and included in the reapportionment base that year.⁵ As a result, Georgia and Indiana each lost a seat in the House of Representatives.⁶ If an equal or greater number of illegal aliens are counted in 1990 and included in the reapportionment base, it has been predicted that Pennsylvania, West Virginia, and Kansas will each lose a seat in the House of Representatives.⁷

Because of this effect of including illegal aliens in the reapportionment base, a group of Representatives, along with the Fed-

1. For the purposes of this note, "illegal aliens" refers to all individuals who are unlawfully present in the United States. See *Ridge v. Verity*, 715 F Supp. 1308, 1310 n.1 (W.D. Pa. 1989).

2. See generally A. SCOTT, *CENSUS, U.S.A. 185-200* (1968) (Census Bureau statistics are used for both political apportionment and for the allocation of federal funds). This note does not discuss the propriety of including illegal aliens in Census Bureau statistics used to allocate federal funds. For a discussion of the use of the census to apportion federal funds, see Note, *Numbers that Count: The Law and Policy of Population Statistics Used in Formula Grant Allocation Programs*, 48 GEO. WASH. L. REV. 229 (1980).

3. U.S. CONST. art. I, § 2, cl. 3; *Id.* amend. XIV, § 2.

4. *Sugarman v. Dougall*, 413 U.S. 634, 648 (1972) ("This Court has never held that aliens have a constitutional right to vote or to hold high public office").

5. See *Ridge*, 715 F Supp. at 1313 (the 1980 census included 2,056,000 illegal aliens in its apportionment statistics).

6. *Id.*

7. *Id.* at 1315.

eration for American Immigration Reform ("FAIR"), brought a suit challenging the constitutionality of the 1980 census shortly before it was to start.⁸ A three-judge district court panel held that the plaintiffs lacked standing to bring the constitutional challenge and granted summary judgment in favor of the government.⁹ In 1989 a similar group of Representatives, FAIR, and the Coalition for Constitutional Reapportionment ("CCR") filed a complaint challenging the inclusion of illegal aliens for the purpose of congressional reapportionment.¹⁰ This case also ended in summary judgment because of the plaintiffs' failure to meet the injury-in-fact and redressability elements of standing.¹¹ As a result of the plaintiffs' inability to establish standing, no court has ruled on the constitutionality of including illegal aliens in the reapportionment base.

Congress has recently considered several bills that would exclude illegal aliens from the reapportionment base.¹² While the constitutionality of legislation excluding illegal aliens from the reapportionment base raises some slightly different questions than constitutional challenges in the courts over the present practice of including illegal aliens for reapportionment, the basic issues are the same.

At first glance, the central issue might appear to be the right of illegal aliens to representation in the House of Representatives and the potential loss of that right if illegal aliens were excluded from the reapportionment count. However, the inclusion of illegal aliens in the reapportionment count is irrelevant to their direct

8. *Federation for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F Supp. 564 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980).

9. *Id.* at 578.

10. *Ridge v. Verity*, 715 F Supp. 1308 (W.D. Pa. 1989).

11. *Id.* at 1322.

12. *See, e.g.*, H.R. 744, 101st Cong., 1st Sess., 135 CONG. REC. H144 (1989) (providing for prevention of the distortion in the reapportionment of the House of Representatives caused by the use of census figures that include illegal aliens); H.R. 1468, 101st Cong., 1st Sess., 135 CONG. REC. H709 (1989) (calling for the exclusion of illegal aliens from the census for purposes of congressional apportionment); H.R. 2661, 101st Cong., 1st Sess., 135 CONG. REC. H2816 (1989) (requiring exclusion of illegal aliens from the decennial census); H.R.J. Res. 199, 101st Cong., 1st Sess., 135 CONG. REC. H648 (1989) (proposing a constitutional amendment to include only natural citizens in census counts undertaken to determine the apportionment of members of the House of Representatives); S.358, 101st Cong., 1st Sess., 135 CONG. REC. S7939 (1989) (proposing an amendment to S.B. 358 in order to exclude illegal aliens in census counts because of the impact on reapportionment).

representation, since they cannot vote.¹³ The question actually presented is whether there are any reasons for including illegal aliens that outweigh the problems inevitably attending such inclusion.

Part I of this note discusses those problems.¹⁴ Part II addresses the constitutional dimensions of the problem of unequal representation, examining the Supreme Court's reapportionment cases. This section also examines issues of Congress' constitutional ability to remedy the problem and concludes that Congress has been entrusted with the power to exclude illegal aliens from the reapportionment base and that such exclusion would not be unconstitutional.¹⁵ Political theories of representation reviewed in part III suggest that including illegal aliens in the reapportionment base is not necessary to preserve any indirect representation they now enjoy.¹⁶ This note concludes that the problems created by including illegal aliens in the reapportionment base outweigh any benefits.

Because of the standing problems involved in past attempts to resolve this issue in the courts,¹⁷ Congress may be the only branch of government able to resolve the problems created by illegal alien inclusion in the reapportionment base. When doing so, however, Congress must take into account the effects of any suggested resolution in other contexts, including the representation of minority citizens, the treatment of illegal aliens with regard to rights outside of the apportionment controversy, and the overall accuracy and legitimacy of census figures.¹⁸

I. PROBLEMS CREATED BY INCLUDING ILLEGAL ALIENS IN THE REAPPORTIONMENT BASE

The Constitution controls the census and apportionment procedures in this country.¹⁹ The Census Bureau presently counts il-

13. See *supra* note 4.

14. See *infra* text accompanying notes 19-29.

15. See *infra* text accompanying notes 30-112.

16. See *infra* text accompanying notes 113-39.

17. See *supra* text accompanying notes 8-11.

18. See *infra* text accompanying notes 140-68.

19. The first clause of the Constitution relating to the census and apportionment is found in Article I:

Representatives 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

legal aliens along with all other people when taking the census.²⁰ Since Congress uses census figures for apportionment, it includes illegal aliens in the base number from which seats in the House of Representatives are apportioned.

The inclusion of illegal aliens in the reapportionment base has not been an issue until recently.²¹ Before 1980 illegal immigration was minimal and the Census Bureau did not seek out illegal aliens to be counted in the census.²² Now, however, the number of illegal aliens has grown, and during the 1980 census illegal aliens were encouraged by the Census Bureau to come forward and "be counted."²³ As a result, it is estimated that the Census Bureau counted 2,056,000 illegal aliens in 1980.²⁴ These illegal aliens were included in the figures used to reapportion representatives among the states.²⁵

The problem raised by including illegal aliens in the reapportionment base is not merely that some states lose seats in the House of Representatives while others gain.²⁶ Including illegal aliens also affects individual citizens' rights, creating inequality of voting power between citizens in districts with large numbers of

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.

U.S. CONST. art I, § 2, cl. 3. Section two of the fourteenth amendment modified the census and apportionment procedure, stating: "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." *Id.* amend. XIV, § 2.

20. The Census Bureau is governed by statute, 13 U.S.C. § 1 (1988). "The tabulation of *total population* by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b) (emphasis added).

21. In recent years, the subject of illegal aliens has become a controversial issue in many respects, as evidenced by the 1986 passage of an amendment to the Immigration and Nationality Act, 8 U.S.C. §§ 1 (1988). This amendment, the Immigration Reform and Control Act, 8 U.S.C. § 1324 (1988), imposes criminal and civil sanctions on employers who employ undocumented aliens. *Id.* § 1324(a).

22. *1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing Before the House Comm. on Post Office and Civil Service*, 100th Cong., 2nd Sess. 53 (1988) [hereinafter *Michigan Census Hearing*] (statement of Daniel A. Stein, Executive Director, Federation for American Immigration Reform (FAIR)).

23. *Id.* at 54.

24. *Ridge v. Verity*, 715 F. Supp. 1308, 1313 (W.D. Pa. 1989).

25. *Id.*

26. See *supra* text accompanying notes 5-7.

illegal aliens and citizens who live in districts with small numbers of illegal aliens. A numerical example may be helpful. Suppose there are two congressional districts, A and B, each consisting of 10,000 people.²⁷ District A is made up of 8,000 voting citizens and 2,000 illegal aliens. District B contains 10,000 voting citizens and no illegal aliens. The vote of a citizen in district A is worth more than that of a citizen in district B.²⁸ More important, citizens in district A have a greater representation in Congress than citizens in District B.

The Constitution, however, requires that the voting power and representation of citizens must be equal.²⁹ Because the inclusion of illegal aliens in the reapportionment count causes disparity in voting power and representation among citizens, Congress should take measures to correct this constitutional infirmity — if it can do so without offending any other terms of the Constitution.

II. CONSTITUTIONAL ISSUES IN EXCLUDING ILLEGAL ALIENS FROM THE REAPPORTIONMENT BASE

Including illegal aliens in the reapportionment base promotes differences in voting power and representation among citizens who reside in different districts. In the reapportionment cases, the Supreme Court prohibited the drawing of voting districts that create such differences. The inclusion of illegal aliens, therefore, is in direct conflict with the principles underlying these cases.

The Constitution contains provisions that govern the taking of

27. For the purposes of the example, it does not matter whether these two districts are within the same state.

28. 4001 votes are necessary for a majority in district A while 5001 are necessary in district B. Since more votes are needed to produce a majority in District B, each citizen's vote in District B carries less relative weight. For another example, see Slattery & Bauleke, "The Right to Govern is Reserved for Citizens:" *Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes*, 28 WASHBURN L.J. 227, 235 (1988) (citing *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation and Government Processes of the Senate Comm. on Governmental Affairs*, 99th Cong., 1st Sess. 49 (1985) (statement of John Noonan)).

29. See, e.g., *Board of Estimate v. Morris*, 489 U.S. 688 (1989) (extending one person one vote local legislative districts); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the fourteenth amendment mandates that the "one person, one vote" standard be applied to state representative district lines); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that the doctrine of "one person, one vote" mandates perfectly proportional representation when drawing national representative district lines). See also *infra* text accompanying notes 32-47.

the census and the reapportionment process.³⁰ If excluding illegal aliens from the reapportionment base would violate these provisions, any law excluding them would be unconstitutional. It can be argued, however, that illegal aliens are not "persons" within the meaning of the census and apportionment clauses. Exclusion is therefore a permissible exercise of congressional power.

A. "One Person, One Vote": The Reapportionment Cases

In 1961 the Supreme Court entered the "political thicket"³¹ of the reapportionment controversy despite Justice Frankfurter's warning that "[w]hat is actually asked of the Court in this case is to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy"³² In *Baker v Carr*,³³ the Court held that voters who alleged a denial of equal protection because of a state's refusal to reapportion the seats in a house of the state's legislature presented a justiciable cause of action. Only sixteen years earlier, the Court had refused to enter the reapportionment debate, holding that "[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."³⁴ In the cases following *Baker*, the Supreme Court proceeded to define the rights of American citizens to equal representation and voting power

In *Wesberry v Sanders*,³⁵ the Court ordered the Georgia legislature to redraw its congressional districts because of large differences in population between the districts. The Court stated:

[T]he command of Art. I, section 2, that Representatives be chosen "by the People of the several States" means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention.³⁶

30. U.S. CONST. art. II, § 1, cl. 2; *Id.* amend. XIV, § 2.

31. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

32. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

33. 369 U.S. 186 (1962).

34. *Colegrove*, 328 U.S. at 556.

35. 376 U.S. 1 (1964).

36. *Id.* at 7-8 (footnotes omitted).

The Court traced the history of the "one person, one vote" principle of voting equality to the constitutional convention: "The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter."³⁷ The Court believed that to allow the creation of districts giving some voters a greater voice in choosing representatives than others would defeat the principle embodied in the "Great Compromise," that is, "equal representation in the House for equal numbers of people."³⁸

In *Reynolds v Sims*,³⁹ the Court held that the equal protection clause prohibited malapportioned state legislative districts. The Court noted that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."⁴⁰ The Court went on to state that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."⁴¹

While *Reynolds* dealt with state legislative districts rather than congressional districts, the general principles articulated by the Court also apply to federal districting and reapportionment.⁴² The *Reynolds* decision stands for the principle that the Constitution mandates equal voting power for all citizens: "To the extent that a citizen's right to vote is debased, he is that much less a citizen."⁴³ The Court concluded by noting that the "basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to de-

37. *Id.* at 14.

38. *Id.* The Great Compromise was the decision that the Senate would be composed of two members from each state (a rule that gave small states the same votes as large states) while representation in the House of Representatives would be apportioned on the basis of population (a rule that favored populous states). This compromise between the interests of the small and large states was approved by the Constitutional Convention in July of 1787. See C. COLLIER, *DECISION IN PHILADELPHIA* 95-100, 132 (1986).

39. 377 U.S. 533 (1964).

40. *Id.* at 555 (citing *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

41. *Id.* at 562-63.

42. "In fact, Supreme Court decisions regarding Congressional districting have adhered more stringently to the one person, one vote doctrine than the Court's decisions regarding state and local legislative bodies." Slattery & Bauleke, *supra* note 28, at 236 (citations omitted).

43. *Reynolds*, 377 U.S. at 567.

pend on where he lives."⁴⁴

The Supreme Court has not moved away from the principles first set forth over twenty-five years ago in the reapportionment cases. In *Board of Estimate v Morris*,⁴⁵ the Court considered a challenge to the apportionment scheme of the New York City Board of Estimate, a body which controlled the city budget. Reviewing the equal protection guarantee of one person, one vote, the Court reminded all legislative bodies that "[e]lectorate systems should strive to make each citizen's portion equal."⁴⁶ In *Board of Estimate*, the Court reiterated that when legislative districting is challenged, "the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen,' the aim being to provide 'fair and effective representation for all citizens.'"⁴⁷

B. The Population Base in the Reapportionment Cases

In the reapportionment cases, the Supreme Court seemed to require strict population equality in the construction of legislative districts, reasoning that with this requirement, states could not dilute the votes of some of their citizens through the device of unequal districts.⁴⁸ In fact the Court may not have gone that far. A strict adherence to the use of a total population base for reapportionment could frustrate the requirement that each citizen's vote be equal to every other citizen's.⁴⁹ The Court may have realized this in deciding the cases of *Burns v Richardson*⁵⁰ and *Kirkpatrick v Preisler*.⁵¹

In *Burns*, the Court indirectly examined a districting scheme in the Hawaii state legislature that apportioned members on the basis of the number of registered voters in each district.⁵² The Court stated that "the Equal Protection Clause does not require the States to use total population figures derived from the federal

44. *Id.*

45. 489 U.S. 688 (1989).

46. *Id.* at 693.

47. *Id.* at 701 (quoting *Reynolds*, 377 U.S. at 579, 565-66).

48. Silva, *One Man, One Vote and the Population Base*, in REPRESENTATION AND MISREPRESENTATION 53, 55-56 (R. Goldwin ed. 1968).

49. See *id.* at 56; see also *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (the Constitution requires "equal representation in the House for equal numbers of people").

50. 384 U.S. 73 (1966).

51. 394 U.S. 526 (1969).

52. 384 U.S. at 81.

census as the standard by which this substantial population equivalency is to be measured.”⁵³ The Court then noted that it had “discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population”⁵⁴ and recalled that it had never “suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.”⁵⁵ However, the Court did not directly address the issue in its holding in *Burns*.

*Kirkpatrick v Preisler*⁵⁶ represents the Court’s only decision to directly address the question of “whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2.”⁵⁷ Missouri argued that the differences in population among its congressional districts resulted, in part, from the use of eligible voter population rather than total population in redistricting.⁵⁸ The Court, however, “assum[ed] without deciding that apportionment may be based on eligible voter population rather than total population” and invalidated Missouri’s plan on the ground that no effort was made “to ascertain the number of eligible voters in each district and to apportion accordingly”⁵⁹ While the Court indicated in *Burns* that reapportionment on some basis other than total population might be acceptable, no Supreme Court decision has directly held this to be true. Without guidance on the issue of whether the total population base must be used, the definition of individual “persons” required to be counted under the Constitution becomes more important.

C. Illegal Aliens as “Persons” under the Constitution

The Constitution provides that “Representatives shall be apportioned among the several States . . . according to their re-

53. *Id.* at 91.

54. *Id.*

55. *Id.* at 92.

56. 394 U.S. 526 (1969).

57. *Id.* at 534.

58. *Id.*

59. *Id.* at 534-35.

spective Numbers"⁶⁰ and that "the whole number of persons in each State"⁶¹ shall be used for apportionment. If illegal aliens are considered "persons" for the purposes of the census and apportionment clauses, it follows that they must be counted in the reapportionment base. Illegal aliens are not necessarily included in this particular use of the word "persons," however. If they are not, it is permissible—and, in light of the reapportionment cases, it may even be mandatory—for illegal aliens to be excluded from the reapportionment base.

1. Illegal Aliens as "Persons" under the Due Process and Equal Protection Clauses

Over one hundred years ago, the Supreme Court held that illegal aliens are "persons" within the meaning of the due process and equal protection clauses of the fifth and fourteenth amendments.⁶² In more recent years, the Court has held that illegal aliens are "persons" entitled to attend public schools⁶³ and are "employees" entitled to rights under the National Labor Relations Act.⁶⁴ It has been argued that logic requires that illegal aliens be included in the meaning of "persons" in section 2 of the fourteenth amendment as well as article I, section 2.⁶⁵

60. U.S. CONST. art. I, § 2, cl. 3.

61. *Id.* amend. XIV, § 2.

62. *See, e.g.,* Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) ("The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.").

63. Plyler v. Doe, 457 U.S. 202, 215 (aliens can claim the benefit of the equal protection clause in challenging public school admission policies), *reh g denied*, 458 U.S. 1131 (1982).

64. *Sure-Tan, Inc. v. National Labor Relations Bd.*, 467 U.S. 883 (1984) (interpreting the National Labor Relations Act, 29 U.S.C. § 151 (1988)). *See generally* Note, *Undocumented Does Not Mean Unprotected: The Status of Undocumented Aliens Under the NLRA Since the Passage of the IRCA*, 39 CASE W. RES. L. REV. 609 (1989) (discussing illegal alien status and the National Labor Relations Board's policies in light of the Immigration Reform and Control Act).

65. *Census Equity Act: Hearings on H.R. 2661 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 101st Cong., 1st Sess. 160 (1989) [hereinafter *H.R. 2661 Hearings*] (statement of Arturo Vargas, National Director, 1990 Census Program, Mexican American Legal Defense and Educational Fund). Vargas's argument is similar to one made by Justice Frankfurter in the incorporation debate. Frankfurter argued that because the language of the due process clause was the same in both the fifth and fourteenth amendments, the clause could not mean something different in the fourteenth than it does in the fifth. *See Adamson v. California*, 332

This argument carries little weight in the apportionment context. The term "persons" is not intended to be interpreted the same way each time it is used in the Constitution.⁶⁶ For example in *Santa Clara County v Southern Pacific Railroad Co.*,⁶⁷ the term "persons" in the due process and equal protection clauses of the fourteenth amendment was held to include corporations.⁶⁸ "Yet no one has ever suggested that corporations should be counted as part of the population base for apportionment under the Fourteenth Amendment."⁶⁹

The Supreme Court itself has distinguished cases involving representation from other precedent that extends constitutional rights to aliens. "As the Court's alienage cases demonstrate, [aliens] may not be denied rights that are granted to citizens, excepting only those rights bearing on political interests."⁷⁰ The term "persons" in the census and apportionment clauses has implications and meanings different than the same term in the equal protection and due process clauses.

2. Illegal Aliens as "Persons" under the Census and Apportionment Clauses

Unfortunately, there is no clear definition of person for the purposes of the census and apportionment clauses. The term persons in these clauses has been interpreted at least once as including all biological persons within the United States. In *Federation for American Immigration Reform (FAIR) v Klutznick*,⁷¹ the court found that the constitutional language on this point is not ambiguous.⁷² The Constitution "requires the counting of the 'whole number of persons' for apportionment purposes, and while

U.S. 46, 66 (Frankfurter, J., concurring), *reh g denied*, 332 U.S. 784 (1947).

66. Professor Cook made the following observation about variations in the meaning of a word from one context to another:

The tendency to assume that a word which appears in two or more legal rules in connection with more than one purpose should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933), *quoted in* *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 118 n.36 (D.C. Cir. 1982).

67. 118 U.S. 394 (1888).

68. *Id.* at 396.

69. *H.R. 2661 Hearings*, *supra* note 65, at 80 (statement of Robert L. Byer).

70. *Plyer v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring).

71. 486 F Supp. 564 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980).

72. *Id.* at 576.

illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'"⁷³

This "principle of usual residence," that is, counting all biological persons within the United States, is not strictly followed even by the Census Bureau, however.⁷⁴ The Bureau excludes foreign diplomats and foreign tourists from the census.⁷⁵ Foreign tourists are considered nonresidents, and foreign diplomats living on embassy grounds are considered residents of "foreign soil."⁷⁶ Thus, at least some "whole persons" who are actually living within this country are not counted for purposes of reapportionment. Conversely, the Census Bureau counts the overseas military population and its dependents for purposes of reapportionment.⁷⁷ Under this procedure, some nonresidents are counted for reapportionment. The exclusion of illegal aliens from the reapportionment base would be but another deviation from the loose "rule of usual residence."

It is difficult to argue that the framers of either article I or the fourteenth amendment intended to include illegal aliens within the term persons in the census and apportionment clauses.⁷⁸ There were no legal conditions for residency in the United States until 1875, when the first restrictive immigration law was passed.⁷⁹

73. *Id.* There are two counterarguments. First, illegal aliens are not "clearly 'persons'" for purposes of political rights. *See supra* text accompanying note 70. Second, the court's statement is dicta because it is not necessary to its holding. The court held that the plaintiffs in the action lacked standing and also had failed to demonstrate that they were entitled to equitable relief. *FAIR*, 486 F Supp. at 578.

74. *Slattery & Bauleke, supra* note 28, at 230.

75. *FAIR*, 486 F Supp. at 567.

76. *Id.*

77. The Census Bureau formerly excluded military and civilian employees of the Department of Defense and their families who were assigned to posts outside the United States. *H.R. 2661 Hearings, supra* note 65, at 178 (statement of Jacob S. Siegel, Department of Demography, Center for Population Research, Georgetown University). The Census Bureau announced its change in policy on the day Siegel spoke at the hearing. *Id.* at 184.

78. It can be argued that the founders did intend the legal aliens living in the country at the time to be counted for purposes of reapportionment. For example, the word "inhabitants" was used by James Madison in the *Federalist Papers* and by the first Congress to describe those to be counted. *Michigan Census Hearing, supra* note 22, at 43 (statement of T. Alexander Aleinikoff, Professor of Law, University of Michigan Law School) (citing Act of March 1790, 1 Stat. 101, and THE FEDERALIST No. 54 (J. Madison)). But "[i]t is illogical to transform an intent to include legal aliens into a presumption that the Framers of the Constitution and the drafters of the Fourteenth Amendment also intended to include illegal aliens." *H.R. 2661 Hearings, supra* note 65, at 83 (statement of Robert L. Byer).

79. The Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, prohibited the immigration of

There were no requirements for citizenship included in the Constitution because the founders wanted to encourage the free flow of immigration.⁸⁰ As neither the founders nor the framers of the fourteenth amendment had any concept of illegal aliens,⁸¹ they cannot be said to have intended to include illegal aliens in the term persons as used in the Census and Apportionment clauses of the Constitution.

The best argument for including illegal aliens within the meaning of persons in the census and apportionment clauses derives from the problem that the apportionment formula may have been designed to solve. The "territorial approach" argues that "the enumeration clause is not about a 'right to be represented' on behalf of individuals [but] [r]ather, it is a clause that regulates the distribution of power among states."⁸² "[T]he framers intended to measure a state's right to representation by the number of persons within its territory"⁸³ Under this theory, the founders "conceived of representation, even in the House, as a function of federalism [believing that] states, and not the individuals within them, constituted the polity to be represented."⁸⁴ The founders then chose population as the best measure of representation for each state.⁸⁵ Under this view of the apportionment and census clauses, illegal aliens should be counted in the reapportionment base because they reside within a state's borders and therefore should be included when determining how much power a particular state is allocated in the federal government.

persons for purposes of slavery or prostitution and disallowed the immigration of certain felons. See Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 846 (1981) (discussing the 1875 immigration act). See generally 1 C. GORDON & S. MAILMAN, *IMMIGRATION LAW & PROCEDURE* § 2.02(1) (rev. ed. 1988) ("The first 100 years of our national existence was a period of unimpeded immigration.").

80. One delegate to the constitutional convention stated that the reason for this inattention to immigration control was to "encourage the immigration of able, skilful, and industrious" people. *H.R. 2661 Hearings*, *supra* note 65, at 83 (statement of Robert L. Byer) (quoting 3 M. FERRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 444 (1911)).

81. The fourteenth amendment was ratified in 1868, seven years prior to the 1875 immigration act.

82. *Michigan Census Hearing*, *supra* note 22, at 42 (statement of Prof. Aleinikoff); see *H.R. 2661 Hearings*, *supra* note 65, at 113-14 (statement of David W. DeBruin) (discussing the historical intention of the framers of the Constitution and of the fourteenth amendment).

83. Note, *A Territorial Approach to Representation for Illegal Aliens*, 80 MICH. L. REV. 1342, 1353 (1982).

84. *Id.* at 1348.

85. *Id.* at 1352.

This "territorial approach" has lost its force in recent years. While the framers may have intended representatives to represent states rather than people, the Supreme Court has made it clear that representatives must represent people. In *Reynolds v Sims*,⁸⁶ the Court said, "Legislators represent people, not trees or acres."⁸⁷ "States" can easily be added to this list of items that legislators do not represent.⁸⁸ The Court has stated that "ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people."⁸⁹ The territorial approach is simply outdated and has been effectively negated by the Supreme Court's one person, one vote jurisprudence.⁹⁰

The last and least persuasive argument for including illegal aliens within the term persons under the apportionment and census clauses is that illegal aliens historically have been included in the reapportionment base and thus should be considered persons as a matter of precedent. However, the Supreme Court has frequently expressed that it is "not persuaded by arguments that explain the debasement of citizens' constitutional right to equal franchise based on exigencies of history or convenience."⁹¹ Inclusion of illegal aliens causing impermissible disparity in voting power and representation between citizens should not be allowed merely because of historical custom. Logic and the one person, one vote standard dictate that, while illegal aliens are certainly persons for the purposes of most constitutional rights, they should not be counted as persons in the reapportionment base.

86. 377 U.S. 533 (1964).

87. *Id.* at 562.

88. In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court asserted that the interests of "states as states" are protected primarily through the structure of the federal government, in particular the structure of Congress. *Id.* at 550-54. This statement, however, lends little support to the argument that legislators actually represent states as a whole rather than the voters and constituencies within them. See, e.g., Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15-17 (1988) (noting that the Court's structural argument in *Garcia* is weak because representatives represent their own constituencies, not necessarily the interests of state or local governments).

89. *Reynolds*, 377 U.S. at 563.

90. See *infra* notes 31-47 and accompanying text.

91. *Board of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989).

D. The Reapportionment Cases and the Controversy over Excluding Illegal Aliens

The inclusion of illegal aliens in the reapportionment base causes a disparity in voting power and representation between citizens hinging on the number of illegal aliens residing in a given district.⁹² This is precisely the type of vote dilution held unconstitutional by the Court in *Wesberry v Sanders*⁹³ and the other reapportionment cases.⁹⁴

Some forms of vote dilution are necessary under the Constitution. For example, the Constitution provides that "each State shall have at Least one Representative."⁹⁵ The votes of citizens in a very small state may have greater weight than those of other states because of this requirement. The reapportionment cases do not address this constitutionally required disparity.⁹⁶ Similarly, the Senate will always be malapportioned because of the constitutional requirement that two senators represent each state, regardless of the state's population.⁹⁷

The reapportionment cases do, however, address voting disparity that is not constitutionally required. Such a disparity occurs when illegal aliens are counted in the reapportionment base. Because illegal aliens are included, *Wesberry's* mandate of "complete equality for each voter" is violated.⁹⁸ Including illegal aliens in the reapportionment base causes disparity in citizens' voting power "merely because of where they happen to reside," a procedure that the *Reynolds* Court prohibited.⁹⁹ "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote."¹⁰⁰ This is precisely the result of including illegal aliens in the reapportionment base.

92. See *supra* notes 26-29 and accompanying text.

93. 376 U.S. 1 (1964).

94. See *H.R. 2661 Hearings, supra* note 65, at 93 (statement of Robert L. Byer); *supra* text accompanying notes 31-47.

95. U.S. CONST. art I, § 2, cl. 3.

96. "'Equal representation' is only a rough goal in national apportionment [for several reasons:] every state must have at least one representative, state lines must be respected in allocating congressional seats, and each state has the right to establish its own voting requirements, within constitutional limits." Federation for Am. Immigration Reform (FAIR) v. Klutznick, 486 F Supp. 564, 577 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980).

97. U.S. CONST. art. I, § 3, cl. 1; see *supra* note 38.

98. 376 U.S. at 14.

99. *Reynolds v. Sims*, 377 U.S. 533, 563 (1964).

100. *Id.* at 555.

Illegal aliens are included in the reapportionment base, diluting the strength of citizens' votes, despite the fact that there is no strict requirement to use total population as the base for reapportionment. The Supreme Court has never said that other bases are unconstitutional.¹⁰¹ In fact, the Court has never dealt directly with the question of alternative bases for congressional reapportionment. When examining alternative bases for state reapportionment, the Court noted that it found no distinction in acceptability between the bases of voter or citizen population and total population.¹⁰²

Excluding illegal aliens from the reapportionment base would not represent a significant deviation from the total population base.¹⁰³ It can be argued that a total population base has not been used in the past for reapportionment. Military and civilian employees of the Department of Defense who were assigned to posts outside the United States and their dependents were long excluded from the reapportionment base, despite the fact that the legal residence of these citizens may have been within a legislative district.¹⁰⁴

Excluding illegal aliens from the reapportionment base would serve the goals articulated in the reapportionment cases better than the present system of including them. While this exclusion may mean that something less than a total population base will be used for reapportionment, a strict population base is not presently used, and the Supreme Court has not found that the Constitution mandates a total population base for congressional apportionment. It is also unlikely that illegal aliens fall within the definition of persons to be counted under the Constitution. Tolerating the creation of districts with unequal representation runs "counter to our fundamental ideas of democratic government."¹⁰⁵ Congress should act affirmatively to exclude illegal aliens from the reapportion-

101. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) (questions persist as to "whether distribution of congressional seats except according to population can ever be permissible").

102. *Burns v. Richardson*, 384 U.S. 73, 91 (1966).

103. The total population base for reapportionment in 1980 was 225,867,174. *Michigan Census Hearing*, *supra* note 22, at 173 (table). An estimated 2,057,000 illegal aliens were included in this number. *Id.* at 151 (statement of Jennifer D. Williams and David C. Huckabee, analysts, American National Government). Illegal aliens therefore comprised less than one percent of the total population in 1980.

104. *But see* H.R. 2661, 101st Cong., 1st Sess. (1989) (proposing inclusion of these citizens in the reapportionment base); *supra* text accompanying note 77.

105. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

ment base and cure the constitutional infirmities created by our present system.

E. Congressional Power to Exclude Illegal Aliens

The Constitution grants Congress extensive powers with regard to the census, apportionment, and immigration. These powers enable Congress to exclude illegal aliens from the reapportionment base.

In article I, Congress is given power to regulate the conduct of the census: "The actual Enumeration shall be made within three Years of 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."¹⁰⁶ While section 2 of the fourteenth amendment contains apportionment guidelines for that amendment, section 5 states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."¹⁰⁷ Article I also gives the Congress the power to "establish an uniform Rule of Naturalization."¹⁰⁸ Under these constitutional provisions, Congress has the power to exclude illegal aliens from the reapportionment base.

In *Harisiades v Shaughnessy*,¹⁰⁹ the Supreme Court ruled that the power to regulate illegal immigration was entrusted to the nation's political branches:

It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.¹¹⁰

Congress can not leave the duty of enforcing constitutional norms to the judiciary because federal courts have found, and will likely continue to find, that the issue of including illegal aliens in the reapportionment base is nonjusticiable.¹¹¹ The duty of interpreting the Constitution and enforcing constitutional norms de-

106. U.S. CONST. art. I, § 2, cl. 3.

107. *Id.* amend. XIV, § 5.

108. *Id.* art. I, § 8, cl. 4.

109. 342 U.S. 580 (1952).

110. *Id.* at 588-89.

111. See *supra* text accompanying notes 8-11.

rived from that interpretation rests with Congress.¹¹² Moreover, Congress is not bound by the judiciary's refusal to adjudicate this issue.¹¹³ The inclusion of illegal aliens causes disparity in voting power and representation among citizens, which offends the one person, one vote doctrine of the reapportionment decisions. As the only branch of government with the power to address this problem, Congress should act to exclude illegal aliens from the reapportionment base in order to promote the concepts of equal voting power and representation.

III. REPRESENTATION OF ILLEGAL ALIENS IN THE HOUSE OF REPRESENTATIVES

One of the most popular and sympathetic perspectives of those who wish to continue to include illegal aliens in the reapportionment base is that illegal aliens will lose some form of representation if they are not included.¹¹⁴ The argument is that by their inclusion in the reapportionment base, "noncitizens are at least indirectly represented, even if they cannot vote."¹¹⁵ This contention, however, deserves closer scrutiny. Illegal aliens may not be represented in Congress even though they are included in the reapportionment base. If they are not, their inclusion serves only to foster the unconstitutional ends of giving some citizens greater representation than others.

A. Theories of Representation

Representation is a very difficult term to define. "[T]here is not and never has been, at least in recent times, any general theory of representation that could with any warrant be seen as dominant."¹¹⁶ Some of the theories and aspects of representation that

112. See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975) (legislators have a duty to ascertain the constitutionality of proposed legislation).

113. See Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978) ("When the federal courts restrain themselves for reasons of competence and institutional propriety rather than reasons of constitutional substance, it is incongruous to treat the products of such restraint as authoritative determinations of constitutional substance.").

114. See, e.g., Limpinen, *When is a Person not a Person?*, 17 STUDENT LAW. 4 (1988).

115. *Id.*

116. Black, *Representation in Law and Equality*, in REPRESENTATION 131, 139 (J. Pennock & J. Chapman eds. 1968).

may be helpful in understanding the representation of illegal aliens in Congress are the traditional roles of a representative as "delegate" or "trustee" and the concept of constructive representation.

1. The Delegate and Trustee Theories

An analysis of the theory of representation to which individual representatives ascribe may help to determine whether they actually represent illegal aliens residing in their districts. Representatives behave either according to the will of their constituents or according to their own will. Representatives acting on their own will may act according to their perception of the good of their district, or according to their perception of the good of the nation as a whole.

One model of representative behavior is the trustee model. Under this model, legislators act according to what they believe is appropriate.¹¹⁷ The representative, "upon due study and reflection, [will] make an independent judgment on the merits of the issue at hand, including any necessary accommodation of constituency interest and national interest, and vote accordingly—the so-called free-agent model of representation."¹¹⁸ British statesman Edmund Burke espoused the trustee model of representation:

Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole—where not local purposes, not local prejudice, ought to guide, but the general good, resulting from the general reason of the whole.¹¹⁹

At the opposite end of the spectrum from the trustee theory is the delegate theory, under which the legislator is to "poll his constituency before each legislative vote and faithfully record the majority feeling—the so-called delegate model of representation."¹²⁰ Under this model, legislators are governed by what their constituents believe is appropriate.¹²¹

117. *Id.* at 141.

118. R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 31 (1968).

119. V KEY, *PUBLIC OPINION AND AMERICAN DEMOCRACY* 481-82 (1961).

120. R. DIXON, *supra* note 118, at 31.

121. Black, *supra* note 116, at 141.

Each model has certain advantages and disadvantages. "[T]he theory that representatives are primarily trustees rather than delegates implies a view of democracy in which the interests of the whole community, including the interests of minorities, are to be protected."¹²² The disadvantage is that under the trustee model there is "no representative function; in grossest legal terms, no democracy. One might as well set up a Platonic philosopher-king."¹²³ On the other hand, the delegate model of representation "implies a view of democracy in which the interest and will of the majority are to prevail without restriction."¹²⁴

Descriptively, it is difficult to determine which model of representation, delegate or trustee, is more accurate, particularly as to members of the House of Representatives. "[T]he dichotomy between acting as a delegate and acting as a trustee is most fundamental [but] neither pole of this dichotomy is adequate to explain democratic representation in the modern Anglo-American tradition."¹²⁵ Normatively, neither model is, in itself, wholly appropriate. It is generally held that the proper role of a representative must fall somewhere between these two poles.¹²⁶ For example, "[e]ven Burke did not contend that it was the proper function of a representative to act without any consideration of the desires of those whom he represented."¹²⁷

In trying to determine which model more accurately fits our form of government, one commentator suggests that "the principle [of] 'one-voter, one-vote' implies this latter view of democracy, in which representatives are to be conceived as delegates rather than trustees."¹²⁸ The "very fact that representatives are severally related to distinct localities strongly implies that they have a special obligation to look after the desires and interests of the people in those localities (or the national interest as seen by the voters in those localities)."¹²⁹ Under this reasoning, representatives should be oriented toward satisfying the goals of their individual constitu-

122. Brown, *Black on Representation: A Question*, in REPRESENTATION, *supra* note 116, at 144, 147.

123. R. DIXON, *supra* note 118, at 31.

124. Brown, *supra* note 122, at 147.

125. Pennock, *Political Representation: An Overview*, in REPRESENTATION, *supra* note 116, at 3, 14-15.

126. *Id.* at 16.

127. *Id.* at 15.

128. Brown, *supra* note 122, at 148.

129. Pennock, *supra* note 125, at 12.

encies. The Supreme Court has also commented on this normative debate: "Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will."¹³⁰

The importance of including illegal aliens in the reapportionment base depends on the model of representation. Illegal aliens may receive some form of representation under the trustee model. If representatives act according to their perception of the common good of their constituencies, they may be acting for the good of illegal aliens as well. On the other hand, if representatives act according to their perception of what is good for the nation as a whole, including illegal aliens, it does not matter if illegal aliens are included in the reapportionment base. Since representatives would be looking beyond their own immediate constituencies, under the trustee model all representatives, at least theoretically, could take the interests of illegal aliens into account whether their districts included illegal aliens or not. Inclusion in the reapportionment base is thus irrelevant under the trustee theory, because illegal aliens would have no more representation if they were counted than if they were not.

The importance of inclusion under the delegate model of representation depends on how the "constituents" of a representative are defined, since their views determine the behavior of the representative.¹³¹ "Insofar as either the interests or the views of his constituents are relevant, is [the representative] to regard only those who voted for him, or all those in the district, or those among whom he thinks he can form a successful re-election coalition?"¹³² If everyone in a representative's district is considered a constituent, then a legislator may indeed act according to the will of illegal aliens. To deprive illegal aliens of inclusion in the reapportionment base would deny their existence within the district

130. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

131. *Black's Law Dictionary* defines "constituent" as one who gives authority to another to act for him. It is also used in the language of politics as a correlative to 'representative,' the constituents of a legislator being those whom he represents and whose interests he is to care for in public affairs; usually the electors of his district.

BLACK'S LAW DICTIONARY 281 (5th ed. 1979). Unfortunately, this definition is somewhat circular in that one is a constituent if one is represented, and one is represented if one is a constituent. The definition used in the delegate model is much narrower, focusing on the question of whether illegal aliens are constituents in the sense that when representatives look to the will of their constituents, they look to the will of illegal aliens.

132. Black, *supra* note 116, at 142.

and might deprive them of representation. However, if constituency includes only the voting residents of a district, illegal aliens will not have effective representation under a delegate model because they do not have the right to vote.¹³³ Given the political self-interest of representatives, this latter conception of constituency is descriptively more accurate; they are less likely to listen to nonvoting illegal aliens than to voting citizens. Since illegal aliens are not a part of the constituency to whom representatives typically look for guidance, excluding illegal aliens from the reapportionment base would not deprive them of representation under the delegate model.

Under either the trustee or delegate models of representation, it is doubtful that illegal aliens receive any greater representation in the House of Representatives because of their inclusion in the reapportionment base. Under the trustee model of representation, some form of representation may extend to illegal aliens, but their inclusion in the apportionment base is not necessary to preserve this representation. The delegate model, which more accurately reflects representation in our country according to the reapportionment cases, may not offer illegal aliens any representation at all. If representatives do not take the views of illegal aliens into account, which is likely because they are not voters, it does not matter whether illegal aliens are included or excluded from the reapportionment base. Thus, inclusion of illegal aliens is irrelevant to representation under either the trustee or the delegate model.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹³⁴ The Supreme Court’s reapportionment decisions emphasize the right of citizens to vote and to have each vote receive equal weight. These decisions cast a serious doubt on the right of nonvoters to representation.¹³⁵

The element of control over a legislator by constituents that the right to vote confers is a second reason to protect citizens’ interests in equal voting power “Accountability enforced by elec-

133. See *supra* text accompanying note 4.

134. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

135. Note, *supra* note 83, at 1361 (from the Supreme Court’s position that most citizens can only participate in the democratic process by voting, “it takes only a small step to equate representation with voting”).

tions is one device, a crude one, for making government representative."¹³⁶ Representatives must respond to the will of their constituents or accept the consequences at the ballot box. "The constituency by its refusal to re-elect a legislator may express its disapproval of his record; or by returning him for another term it may express its approval."¹³⁷ If citizens' voting power is diluted, this accountability mechanism will be weakened.

2. Constructive Representation

Other members of our society apart from illegal aliens do not have the right to vote yet are counted for the purpose of reapportionment. Legal aliens, children, and convicts fall into this group.¹³⁸ These groups differ from illegal aliens, however. First, the members of these groups theoretically may gain the right to vote before the next census and thus should be counted since they are potential voters. Second, these individuals are in the country legally, so they may be more deserving of being counted for reapportionment purposes than illegal aliens. Lastly, these groups may be effectively represented in Congress, even if they do not have the right to vote, under the theory of "constructive representation." Under this theory, some nonvoters are represented, either because their interests coincide with the interests of voters due to their close relationship to the voters, or because voters have an interest in their representation, as with children. Neither of these rationales is likely to hold true for illegal aliens.

The theory of constructive representation does not really have a place in our form of government. "Acceptance of the one-man-one-vote criterion logically precludes the assumption that nonvoters are constructively represented by voters"¹³⁹ If the constructive representation theory were accepted there would be no need to insist that all votes be weighted equally, since those with diluted votes would still be represented by other voters. In adopting the one person, one vote standard in the reapportionment cases, the Supreme Court essentially rejected the theory of con-

136. Pennock, *supra* note 125, at 27.

137. V KEY, *supra* note 119, at 497. Of course, a constituency must be informed of its representative's record in order to exercise an electoral judgment about that representative's performance. *Id.*

138. See Silva, *supra* note 48, at 66.

139. *Id.* at 67.

structive representation.¹⁴⁰

It is hard to argue that illegal aliens have any type of effective representation in the House of Representatives that would be harmed or lost if illegal aliens were excluded from the reapportionment base. Representatives are believed to act according to either the delegate or trustee model, or somewhere in between. Illegal aliens may have some form of representation under the trustee model, but what little representation they may receive would not be affected by exclusion from the reapportionment base. Inclusion in the base is necessary only for representation under the delegate model. Illegal aliens probably will not be represented under this model either, as representatives are unlikely to respond to the will of nonvoters. That illegal aliens are not represented derives solely from their inability to vote; this lack of representation will persist whether illegal aliens are included in the apportionment base or not. The doctrine of constructive representation will not function in the context of illegal aliens unless voting citizens are sympathetic to their interests. Thus, exclusion of illegal aliens from the reapportionment base should not harm their representation, or current lack of representation.

The issue is not whether excluding illegal aliens from the reapportionment base deprives them of representation in the House of Representatives. The real concern is the need to change the present system of apportionment because it creates differences in representation and voting power among citizens. These differences violate the Constitution as interpreted by the Supreme Court in the reapportionment cases.¹⁴¹ Congress must use its constitutional powers to correct this violation and exclude illegal aliens from the reapportionment base.

140. In some situations, constructive representation may have some application. A good example is children. While they cannot vote, it would not be surprising if voters, namely their parents and other relatives, were to communicate children's views to their representatives, who then act for the benefit of children. It may make sense to include children and others who are constructively represented in the reapportionment base, because in a sense they are part of the legislator's constituency. By contrast, the interests of illegal aliens are less likely to be represented by other voters. *See supra* text accompanying note 138. Some type of relationship must be shown between the nonvoter and the representing voter for constructive representation to take place.

141. *See supra* text accompanying notes 31-47.

V CONCERNS CONGRESS MUST KEEP IN MIND IF IT EXCLUDES ILLEGAL ALIENS

If Congress excludes illegal aliens from the reapportionment base, it must be prepared to deal with resulting problems and concerns. Three basic problems might arise from an attempt to exclude illegal aliens: preserving the integrity of the census as an accurate count of the American people, avoiding undercounting minorities in the census, and dealing with the effects of exclusion on other rights of illegal aliens.

A. Preserving the Integrity of the Census

If Congress decides to exclude illegal aliens from the reapportionment base, it must devise a means of accurately counting the illegal aliens that live in each state in order to exclude them, since they have been included in the 1990 census. Such a method has not yet been found.¹⁴²

One method that has been proposed to determine the number of illegal aliens in state-by-state estimates is the method used at the national level to estimate the number of illegal aliens in the 1980 census.¹⁴³ This procedure would subtract the estimated number of legal aliens in the country at the time of the census from the adjusted total number of aliens, legal and illegal, included in the census, the difference representing illegal aliens. The problem with such a method is that an alien's legal or illegal status cannot be determined from census data as it is presently collected.¹⁴⁴ An estimate of legal aliens (based on adjusted alien registration data from the Immigration and Naturalization Service ("INS")) therefore must be substituted for a census count of legal aliens, with the possibility of a discrepancy between the estimate and the actual number of legal aliens that would distort the number of illegal aliens.¹⁴⁵ Further, the INS presently does not have the necessary data on legal aliens to be used in this formula.¹⁴⁶ The number of illegal aliens gathered through this procedure would be an esti-

142. See *H.R. 2661 Hearings*, *supra* note 65, at 43 (statement of C. Louis Kincannon, Deputy Director, Bureau of the Census).

143. *Michigan Census Hearing*, *supra* note 22, at 160 (report of Williams & Huckabee).

144. *Id.* at 161.

145. *Id.*

146. See *H.R. 2661 Hearings*, *supra* note 65, at 44 (statement of C. Louis Kincannon).

mate, which would mean that the total apportionment figure might not exclude all illegal aliens or might not include all legal residents.¹⁴⁷

A second proposed method of excluding illegal aliens from the apportionment base would be to ask census respondents whether they are legal residents and include only legal residents for apportionment purposes, counting all residents for other purposes.¹⁴⁸ Under this method, however, illegal residents may avoid the census or lie on the census forms and legal residents may misunderstand or mistrust the census and fail to respond.¹⁴⁹

A third proposed exclusion method would add an instruction to the census questionnaire directing the respondent to list only citizens and legal residents as members of the household.¹⁵⁰ Under this method, the number of illegal aliens would not have to be subtracted to yield an appropriate reapportionment base.¹⁵¹ The main disadvantage to this proposal is that illegal aliens would not be counted for other purposes, such as determining federal grants to states and localities.¹⁵² In order to include illegal aliens for nonreapportionment purposes, their numbers would have to be estimated and then added to the reapportionment base figure.¹⁵³ Use of this system, as with the other proposed exclusion methods, could decrease census accuracy.¹⁵⁴

All of the proposed methods of excluding illegal aliens present the risk of distorting the census enumeration. The apportionment of Congress "is indeterminate, [however, based on] an approximate tool or proxy for calculating it called a census 'count.'"¹⁵⁵ The census count itself is only an estimate, affected by omissions, erroneous inclusions, and imputations.¹⁵⁶ While the

147. *Id.*

148. *Id.* at 43. Federal law states in part: "In connection with any such census, the Secretary is authorized to obtain such other census information as necessary." 13 U.S.C. § 141(a) (1988).

149. *H.R. 2661 Hearings, supra* note 65, at 44 (statement of C. Louis Kincannon).

150. *See Michigan Census Hearing, supra* note 22, at 191 (report of Williams & Huckabee).

151. *Id.* at 192.

152. *Id.* at 193.

153. *Id.* Surveys conducted contemporaneously with the census could provide a basis for such an estimate.

154. *Id.* at 192-93 (discussing ways in which the addition of this instruction "could adversely affect census coverage and accuracy").

155. *H.R. 2661 Hearings, supra* note 65, at 179 (statement of Jacob S. Siegel).

156. *Id.* ("In 1980, the estimated net undercount of 1.4 percent (3.2 million) consisted of 2.6 percent omissions and 1.2 percent duplications and other improper addi-

estimate of illegal aliens made under these proposed methods may be rough, "their use should still bring the census figures closer to the defined goal of excluding illegal residents."¹⁵⁷ It would be a "specious argument to say that an *estimate* of illegal aliens is being used and the law requires the use of a *count* of the population."¹⁵⁸

A proper procedure for determining how many illegal aliens are present in each state must be devised in order to exclude illegal aliens from the reapportionment base. Otherwise, the problems created by inclusion may not be resolved, and the public perception of the reliability of census data will be undermined.

B. The Effect of Exclusion on the Undercounting of Minority Groups

Undercounting of minority groups is a recurring problem faced by the Census Bureau.¹⁵⁹ Through its own studies of the past several censuses, the Bureau has found that the accuracy of the count varied based on sex, age, and, most notably, race.¹⁶⁰ The 1980 census produced a great deal of litigation brought by residents of areas with high minority populations, demanding that the census be adjusted to correct the undercount.¹⁶¹ Since the census figures are used to apportion federal funds as well as for reapportionment of Congress, the undercount has an even greater impact than the inclusion of illegal aliens, which only creates differences in voting power.¹⁶²

Congress must be especially wary of any possible effect the exclusion of illegal aliens might have on the undercount of minorities legally in the country. The use of any technique that would identify the citizenship and immigration status of every person counted in the census could have a "chilling effect" on the census by discouraging many Hispanic citizens and legal residents from

tions ").

157. *Id.* at 183.

158. *Id.* (emphasis in the original).

159. See Note, *The Census Undercount: Issues of Adjustment*, 18 COLUM. J.L. & SOC. PROBS. 381, 382 (1984).

160. *Id.*

161. See *Carey v. Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981) (listing approximately fifty lawsuits brought by plaintiffs claiming regional or local undercount), *cert. denied sub nom. Carey v. Baldrige*, 455 U.S. 999 (1982).

162. Note, *supra* note 159, at 382-84.

participating in the 1990 census."¹⁶³ An accurate count of Hispanic citizens is necessary to ensure that the states and cities in which they live receive their fair share of public funds and representation.¹⁶⁴

C. The Effect of Exclusion on Illegal Aliens

While excluding illegal aliens will not deny them representation in Congress, other problems may arise. Congress must make sure it does not set an "unfortunate precedent when it states, as a matter of national policy, that undocumented aliens are not 'persons' under a clause in the Constitution."¹⁶⁵ While excluding illegal aliens from the reapportionment base cannot affect other decisions holding constitutional provisions applicable to illegal aliens,¹⁶⁶ it may play into anti-alien emotions in the nation at large.¹⁶⁷ This country has, and will most likely continue to have, a large number of illegal aliens. Not counting them in the apportionment base is the appropriate decision, but Congress must make sure that this decision is not seen as a symbolic step toward depriving illegal aliens of substantive rights.¹⁶⁸

CONCLUSION

Including illegal aliens in the reapportionment base causes disparity in voting power and representation between citizens of different Congressional districts. This disparity violates the basic principles of one person, one vote and equal representation announced by the Supreme Court in the reapportionment cases.

The Constitution does not require that illegal aliens be included in the reapportionment base. Exclusion would not affect their representation under either the trustee or delegate models of representation, or under the constructive representation theory Congress has the power to exclude illegal aliens from the reapportionment base, and should begin to take steps in this direction.

163. *H.R. 2661 Hearings, supra* note 65, at 162 (statement of Arturo Vargas).

164. *Id.* at 163.

165. *Michigan Census Hearing, supra* note 22, at 50 (statement of Prof. Aleinikoff).

166. *See supra* text accompanying notes 62-64.

167. *Michigan Census Hearing, supra* note 22, at 50 (statement of Aleinikoff).

168. *See id.* at 50-51.

However, Congress must be sure that all possible problems associated with exclusion are dealt with before enacting such legislation.

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