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Vote Dilution and the Census Undercount: A State-by-State Remedy

Christopher M. Taylor

INTRODUCTION

Every ten years the federal government conducts an official census in an attempt to count every man, woman, and child in America. The quality of this enumeration is tremendously important, for the census must be accurate if all members of our representative democracy are to have an equal voice in the governmental process.¹ For example, state legislatures use census figures in the construction of congressional districts, and if those figures misrepresent the true population, the voting power of citizens will vary from district to district. Despite the importance of numeric accuracy, the U.S. census has never produced a correct tally. Each of the twenty-one censuses conducted since the nation's founding has undercounted substantially the actual population.² A random undercount would not present a significant controversy because its impact would diffuse evenly throughout the nation.³ But the actual undercount disproportionately affects identifiable groups and thus

1. The delegates to the Constitutional Convention hoped to ensure the accuracy of the census by giving states the positive incentive of increased congressional representation combined with the negative pressure of proportional direct taxation. *Compare* U.S. CONST. art. I, § 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.") with U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."). Madison wrote:

As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree, on the disposition . . . of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. Were their share of representatives alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality.

THE FEDERALIST NO. 54, at 340-41 (James Madison) (Clinton Rossiter ed., 1961). This small-scale system of checks and balances may have dissuaded various states from tampering with their census reports, but it did not then and does not today guarantee an accurate census.

2. See generally MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* (1988). The net undercount does not represent gross error but instead reflects the difference between erroneous enumerations and omissions. See Stephen E. Fienberg, *The New York City Census Adjustment Trial: Witness for the Plaintiffs*, 34 JURIMETRICS J. 65, 69 (1993).

3. Such an undercount still would affect adversely municipalities that rely upon reaching a certain population threshold (e.g. one million) to become eligible for some federal programs. See *City of Camden v. Plotkin*, 466 F. Supp. 44, 48 (D.N.J. 1978); Arthur J. Maurice & Richard P. Nathan, *The Census Undercount: Effects on Federal Aid to Cities*, 17 URBAN AFFAIRS Q. 251, 265 (1982).

generates serious constitutional questions regarding the consequences of this faulty enumeration.

The differential undercount leads to inaccuracies in population-based governmental functions such as congressional apportionment and redistricting,⁴ state apportionment and redistricting,⁵ and the distribution of certain federal funds,⁶ and thus adversely affects undercounted groups. Although census takers have failed consistently to avoid the differential undercount in their initial enumeration, statistical methods exist that would substantially correct census figures.⁷ The Secretary of Commerce, who oversees the census, however, has chosen not to make this adjustment.

Efforts by affected groups to force the Secretary to reverse this decision have been rejected by two circuits that have held that plaintiffs do not have standing to sue the Secretary based on a claim of vote dilution.⁸ These circuits held that the claimed injury — unequal representation — springs from the state legislatures' independent decisions to use unadjusted census data in formulating election districts, rather than directly from the Secretary's failure to adjust the official census.⁹ In contrast, these plaintiffs generally do have standing to challenge the Secretary's decision when their alleged injury is a deprivation of federal funds. But because there is no fundamental right to receive federal funds, the "arbitrary and capricious" standard of review applicable to ordinary administrative decisions sufficiently shields the Secretary from judicial reversal.¹⁰

One vote dilution suit against the Secretary, however, has met with some initial success. The Second Circuit, in *City of New York v. United States Department of Commerce*,¹¹ held that the trial court

4. Congressional *apportionment* refers to the federal government's distribution of representatives among the several states, and *redistricting* refers to the periodic intrastate process of a state legislature's dividing its state into congressional election districts.

5. *Apportionment* in the state context generally describes the state constitution's allocation of state legislators among the people of the state, which in turn is effected by subsequent redistricting.

6. See generally *infra* text accompanying notes 10, 79.

7. See *infra* section I.C.

8. See *City of Detroit v. Franklin*, 4 F.3d 1367, 1373 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994); *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411, 1416-19 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992). An individual suffers from vote dilution when he votes in an election district whose population exceeds the population of another district. For example, in a given state, if congressional district X has a population of 1000, each person's vote in X is "worth" 1/1000th of the total, whereas in congressional district Y, with a population of 2000, each person's vote is "worth" 1/2000th of the total. Voters in district Y, therefore, have proportionately less power than voters in district X — their votes have been diluted.

9. See *infra* section II.A.

10. See *infra* text accompanying notes 66-68, 93-95. This Note does not address claims of deprivation of federal funds resulting in the differential undercount.

11. 34 F.3d 1114 (2d Cir. 1994) [hereinafter *NYC v. DOC IV*], *cert. granted*, 116 S. Ct. 38 (1995).

should have applied equal protection analysis in its review of the Secretary's decision not to adjust the census. The Second Circuit predicated this position on its assertion that the census directly affects voting rights and that the judiciary must subject actions that impair the exercise of such a fundamental right to strict scrutiny.¹² The logical structure of this decision, however, is suspect because the Second Circuit failed to state why the plaintiffs had standing to sue the Secretary or to explain fully its unusual application of equal protection analysis in this vote-dilution context.

This Note argues that groups seeking to correct underrepresentation caused by the differential undercount do not have standing to sue the Secretary of Commerce but that they can sue their *state governments* in an effort to force them to use the best population data available in the construction of congressional districts. Part I details the deeply rooted character of the differential undercount, describes statistical means that could have been employed to adjust the 1990 census, and demonstrates that the adjusted count surpasses the official census as an accurate representation of the true population. Part II examines recent litigation that has attempted to force the Secretary of Commerce to reverse his decision not to adjust the 1990 census and concludes that these efforts have failed because the plaintiffs suffered no injury directly related to the Secretary's decision and therefore lacked standing to challenge it. Part III argues that plaintiffs can prevail in actions against their *state governments* by challenging their state's use of unadjusted figures for congressional redistricting. The Supreme Court has required states to use the "best population data available" when drawing congressional districts. Because the unadjusted census no longer represents the "best population data available" for most Americans, states must use adjusted data.

I. THE CENSUS AND THE DIFFERENTIAL UNDERCOUNT

In order to solve the problem caused by the differential undercount, it is necessary to understand the magnitude, complexity, and ramifications of that undercount. Accordingly, section I.A briefly places the undercount in its historical context and describes its broad outlines. Section I.B discusses and explains the Census Bureau's effort to adjust the census by means of the 1990 post-enumeration survey (PES) and a dual-system estimate (DSE) of population based on the 1990 PES. Section I.C demonstrates that the adjusted census surpasses the official census in both numeric and distributive accuracy.

12. See 34 F.3d at 1131. The Supreme Court heard oral arguments on *NYC v. DOC IV* on January 10, 1996.

A. Pre-1990 Differential Undercount

Thomas Jefferson, who led the first U.S. Census in 1790, recognized the impossibility of accurately counting every single American. Nevertheless, the tally of 3.9 million,¹³ surprised Jefferson,¹⁴ who attributed the undercount to a fear of population-linked taxes. Jefferson estimated an actual population of closer to 4.1 million,¹⁵ and, while he may have overstated the case, few disagree that problems of administration and institutional capability caused census takers to undercount the actual population.

The problems in the eighteenth century centered on the massive task of individually polling an extremely large population with little centralized control or direction.¹⁶ Two hundred years later, the census undercount stems from poverty, a lack of education, transitory residential patterns, language obstacles, and hostility toward government.¹⁷ These factors tend to occur disproportionately in urban and minority communities.¹⁸ Consequently, the census consistently has produced a larger undercount of these populations than of more stable, homogeneous groups.¹⁹

The Department of Commerce, which has overseen the Bureau of the Census since 1903,²⁰ began documenting the undercount in 1940, when it first determined that the undercount differentially affected white and nonwhite populations to nonwhites' substantial disadvantage.²¹ In the years that followed, subsequent studies

13. Report on Census (Oct. 24, 1791), in 22 THE PAPERS OF THOMAS JEFFERSON 227 (Charles T. Cullen ed., 1986) [hereinafter PAPERS OF JEFFERSON]. See generally ANDERSON, *supra* note 2, at 241.

14. See Letter from Thomas Jefferson to David Humphreys (Aug. 23, 1791), in 22 PAPERS OF JEFFERSON, *supra* note 13, at 61, 62; see also Abby L. Jennis, Note, *The Census Undercount: Issues of Adjustment*, 18 COLUM. J.L. & SOC. PROBS. 381, 381-82 (1984).

15. See Letter from Thomas Jefferson to John Paul Jones (Aug. 31, 1791), in 22 PAPERS OF JEFFERSON, *supra* note 13, at 111.

16. See ANDERSON, *supra* note 2, at 13-14.

17. See Jennis, *supra* note 14, at 382 n.10.

18. See, e.g., S. Gregory Lipton & Leo F. Estrada, *Factors Associated with Undercount Rates in Los Angeles County*, in BUREAU OF THE CENSUS, 1993 RESEARCH CONFERENCE ON UNDERCOUNTED ETHNIC POPULATIONS 83 (1993); see also Manuel de la Puente, *Why Are People Missed or Erroneously Included by the Census: A Summary of Findings from Ethnographic Coverage Reports*, in BUREAU OF THE CENSUS, *supra*, at 29; Nathan Judish & Julia E. Judish, *Falling Through the Cracks: Voting Rights and the Census—City of New York v. United States Department of Commerce*, 34 F.3d 1114 (2d Cir. 1994), 30 HARV. C.R.-C.L. L. REV. 199, 200-01 (1995).

19. Equal protection analysis is inappropriate in this context, despite the fact that the undercount affects groups recognized by equal protection analysis as "suspect" classes. See *infra* section II.B.2.

20. See generally ANDERSON, *supra* note 2, at 114-15.

21. See Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 6-7 (1993); see also Donald T. Deyo, Comment, *To Adjust or Not to Adjust: That is the Legal and Political Question*, 13 CHICANO-LATINO L. REV. 114, 117-18

demonstrated that the undercount consistently produced skewed results in favor of whites as compared to all minorities, particularly African Americans.²²

TABLE 1. DIFFERENTIAL CENSUS UNDERCOUNTS OF AFRICAN AMERICANS AND WHITES: 1940-1980

	Percent Missed	
	Whites	African Americans
1940	5.1	10.3
1950	3.8	9.6
1960	2.7	8.3
1970	2.4	8.1
1980	1.3	6.2

B. *The Evolution of the 1990 Adjusted Census*

In response to the 1980 census's differential undercount and the massive amount of litigation that followed,²³ the Census Bureau undertook to study the issue and to determine the feasibility of statistically adjusting the 1990 census. In 1984, the Bureau created the Undercount Steering Committee and Undercount Research Staff to direct the inquiry,²⁴ and, by May 1987, the Bureau had determined that it could and would adjust the 1990 census using a broadbased PES.²⁵ Top Department of Commerce officials, however, swiftly reversed this decision.²⁶ This reversal resulted in another spate of litigation. The Secretary of Commerce eventually settled these claims by agreeing to conduct a PES and a DSE after the 1990 census and to consider *de novo* — after the new data were collected — whether to adjust the official enumeration.²⁷

(1993) (discussing the political disadvantages to minorities resulting from the 1990 census undercount).

22. See Issacharoff & Lichtman, *supra* note 21, at 8.

23. Following the 1980 census, a total of 54 suits challenged the census's accuracy and demanded that the Census Bureau correct the differential undercount. See ANDERSON, *supra* note 2, at 230.

24. See *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114, 1117 (2d Cir. 1994), *cert. granted*, 116 S. Ct. 38 (1995).

25. See 34 F.3d at 1118.

26. See 34 F.3d at 1118; Judish & Judish, *supra* note 18, at 202-03.

27. After the Department of Commerce announced its decision not to adjust the upcoming census, New York City, joined by several other cities, groups, and individuals, sought to force the Department to revise its position and to correct the differential undercount. See *City of New York v. United States Dept. of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989) [hereinafter NYC v. DOC I]. The Department moved to dismiss the complaint, arguing that the court did not have jurisdiction over the Secretary's decision not to adjust. The district court rejected this motion, ruling that "the State and municipal plaintiffs have established an injury in the form of loss of federal funding" and that the court "is vested with power to review the Secretary's decision not to adjust the 1990 census" under the "arbitrary and capri-

The PES conducted by the Census Bureau divided the population into 1392 categories or “poststrata” covering age, gender, region, race, geographical area, and owner-renter status in an attempt to eliminate “capture bias” — the differing probabilities of being counted. Officials then examined in detail 5300 “blocks” and determined how many households and individuals from each poststratum lived in each block.²⁸ The Census Bureau then compared these data with figures from the census and thus estimated rates of omission and erroneous overcounting for each poststratum. From this comparison, the Bureau determined an appropriate adjustment for each poststratum. These adjustment factors then underwent “smoothing” to reduce sampling error, and, finally, the Bureau multiplied each poststratum within each census block by the appropriate adjustment rate to create a final adjusted population estimate — a DSE.²⁹

A DSE uses the “capture-recapture” method to ascertain the quality of an initial measurement. The classic example of capture-recapture involves estimating the number of fish in a lake. The procedure operates as follows: (1) capture 1000 fish from a lake, tag them, and release them; and (2) capture 100 fish from the same lake. If fifty of those fish have tags, then you estimate that your initial sweep captured fifty percent of all the fish. The total estimated population — the DSE — therefore, is 2000 fish.³⁰ In the

cious standard as set forth in § 706 of the [Administrative Procedure Act].” 713 F. Supp. at 50, 53, 54 (referring to 5 U.S.C. §§ 701-06 (1994)).

In an effort to avoid disruption of the 1990 census, the parties entered into a stipulation in July 1989, whereby the Secretary of Commerce agreed to conduct a full scale PES, create an eight-member Special Advisory Panel, and draw up guidelines that would provide the Secretary with criteria by which he would decide anew whether to adjust the 1990 enumeration using the completed PES. The Secretary chose four members of the Panel outright and selected the remaining four members from a pool of seven nominees recommended by the plaintiffs. See *City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906, 915 n.8 (E.D.N.Y. 1993) [hereinafter NYC v. DOC III]. The Secretary released the guidelines in March 1990, but the plaintiffs challenged them on the grounds that the criteria were impermissibly vague and that, to the extent they were clear, they favored nonadjustment. Judge Joseph M. McLaughlin noted that the “issue [was] indeed close” but ultimately concluded that the Secretary’s formulation achieved a “bare minimum” of compliance. *City of New York v. United States Dept. of Commerce*, 739 F. Supp. 761, 769-70, 790 (E.D.N.Y. 1990) [hereinafter NYC v. DOC II].

28. “Blocks” are the “minimal units of census geography.” David A. Freedman, *Adjusting the Census of 1990*, 34 JURIMETRICS J. 99, 102 (1993). The Census Bureau generates these divisions, which do not correspond to any geographical or political pattern relevant to this Note. There were 4,830,514 inhabited blocks in the 1990 census. See Robert A. Mosbacher, *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population*, in 56 Fed. Reg. 33,582, 33,587 (1991).

29. See generally 56 Fed. Reg. at 33,626-34 (discussing the procedure used by the Census Bureau in arriving at the DSE); NYC v. DOC IV, 34 F.3d at 1121. For a detailed account of “smoothing,” see John E. Rolph, *The Census Adjustment Trial: Reflections of a Witness for the Plaintiffs*, 34 JURIMETRICS J. 85 (1993).

30. See NYC v. DOC III, 822 F. Supp. at 914 n.4.

example, the initial census corresponds to step (1), the PES corresponds to step (2), and the DSE corresponds to the final adjusted population estimate.³¹

In 1990, the Census Bureau made a rigorous and meticulous effort to avoid an undercount.³² Despite this effort, the August 1992 revised version of the 1990 DSE indicates that the initial enumeration undercounted African Americans by 4.43%, Hispanics by 4.96%, Asian-Pacific Islanders by 2.33%, American Indians by 4.52%, and non-Hispanic Whites by 1.18%. Renters as a group suffered a 4.32% undercount.³³ The Census Bureau conducted a concurrent Demographic Analysis (DA) in an effort to help evaluate the accuracy of the DSE. The DA measures changes in the nation's aggregate population by tracking births, deaths, immigration, and emigration.³⁴ In 1990, the DA confirmed the DSE's broad outlines.³⁵ The DSE's finding of an approximately 1.6% net undercount exceeded the estimated 1980 undercount,³⁶ an embarrassing fact that the Secretary of Commerce alluded to when

31. The success of this method in the census context rests on a number of assumptions. These include: perfect matching — the assumption that "individuals in the census can be matched with those in the PES, without error"; independence — the assumption that the "probability of an individual being included in the PES does not depend on whether the individual was included in the census"; and homogeneity — the assumption that the "probabilities of inclusion do not vary from individual to individual." Fienberg, *supra* note 2, at 75. For a more detailed description of the 1990 PES and the subsequent DSE, see *infra* section I.C.

32. This effort included a multilevel mail campaign, targeted at households of various races and languages; a follow-up phase involving many additional mailings; at least six attempts at in-person follow up in cases where a known address had not returned its census forms; and finally a "Coverage-Improvement Program" which sought to raise public awareness of the enumeration's importance, as well as to focus additional energies on blocks that had particularly scant response rates. See generally 56 Fed. Reg. at 33,623-26. See also *NYC v. DOC IV*, 34 F.3d at 1120-21; Fienberg, *supra* note 2, at 69.

33. See Barbara E. Bryant, *Decision of the Director of the Bureau of the Census on Whether To Use Information From the 1990 Post-Enumeration Survey (PES) To Adjust the Base for the Intercensal Population Estimates Produced by the Bureau of the Census*, in 58 Fed. Reg. 69, 70 (1993). As Director of the Bureau of the Census between 1989 and 1993, Dr. Bryant presided over the 1990 census and PES.

34. The DA estimates change in the population by the following formula:

$$\text{Population}_{t+1} - \text{Population}_t = \text{Births}_t - \text{Deaths}_t + \text{Immigration}_t - \text{Emigration}_t,$$

Where t denotes year, the right side of the formula, and the left side of the formula "can be summed to provide estimates of population in successive years." William R. Bell, *Using Information From Demographic Analysis in Post-Enumeration Survey Estimation*, 88 J. AM. STAT. ASSN. 1106, 1113 (1993). For an extensive discussion of a DA's usefulness in coverage evaluation, see J. Gregory Robinson et al., *Estimation of Population Coverage in the 1990 United States Census Based on Demographic Analysis*, 88 J. AM. STAT. ASSN. 1061 (1993).

35. For the 1990 census, the DA "showed an estimated net undercount of 1.8%" in comparison to the 1.6% undercount indicated by the initial PES. "The closeness of the two undercount measures reinforced them both, although they did not match in every detail . . ." Barbara Everitt Bryant, *Census-Taking for a Litigious, Data-Driven Society*, 6 CHANCE 44, 46 (1993).

36. The 1990 census exhibited a gross error of more than 10%, while, using the same measure, the gross error for the 1980 census was 7%. See Fienberg, *supra* note 2, at 69-70.

he referred to the 1990 census as “one of the two best censuses ever taken in this country.”³⁷

Ultimately Secretary of Commerce Robert A. Mosbacher decided against statistical adjustment of the 1990 census.³⁸ Some commentators have speculated that given the strong Democratic inclinations of the undercounted population, political considerations influenced the Secretary’s decision not to adjust the 1990 census,³⁹ but, whatever the core motivation,⁴⁰ the Secretary’s choice meant that an estimated four million persons⁴¹ would suffer vote dilution and underrepresentation in the construction of congressional districts.

C. *The Superiority of an Adjusted Census*

Given the magnitude of the task and the powerful barriers to full coverage,⁴² there can be no *absolutely accurate* accounting of the nation’s population, so any enumeration must bear “some degree of uncertainty.”⁴³ Some data sets, however, are more accurate than others. There exist two basic measures of census accuracy: “numeric accuracy” — how closely a data set approximates the actual number of people in a particular jurisdiction; and “distributive accuracy” — how closely a data set approximates the true distribution of population shares among the states. Section I.C.1 demonstrates that the adjusted census surpasses the official census with regard to numeric accuracy. Section I.C.2 argues that the bulk of the available evidence indicates that the adjusted census also achieves a more accurate distribution of the population among the states than the unadjusted census. Section I.C.3 shows that, in the

37. 56 Fed. Reg. 33,582 (1991). *But see* Fienberg, *supra* note 2, at 79 (arguing that, in terms of gross error, the 1990 census “may well be the worst since the Census Bureau began the careful measurement of undercount in 1940”).

38. *See generally* 56 Fed. Reg. at 33,582.

39. *See, e.g.,* Judish & Judish, *supra* note 18, at 203. But consider Judge McLaughlin’s comments in *City of New York v. United States Department of Commerce*, 822 F. Supp. 906, 918 n.16 (E.D.N.Y. 1993), where he addressed the plaintiffs’ arguments that contacts made by then-White House Chief of Staff John Sununu and a member of his staff to Commerce Department officials other than Mr. Mosbacher tainted the decision. . . . While it does appear that Mr. Sununu and his subordinates expressed their contempt for adjustment to Department of Commerce personnel, I cannot, on the record before me, conclude that such contacts represented improper influence. Moreover, the plaintiff’s attack on the integrity of Mr. Mosbacher — who was never a party to these conversations — does not warrant extended discussion here.

40. Dr. Bryant attributes the Secretary’s decision against adjustment to institutional inertia: “If something has never been adjusted in [200 years] and there is a controversy . . . that speaks to not making the change . . . [E]verything favored the status quo, unless it was just absolutely clear cut.” Interview with Dr. Barbara E. Bryant in Ann Arbor, MI (Oct. 27, 1995) (tape of interview on file with *Michigan Law Review*).

41. *See* Bryant, *supra* note 35, at 44.

42. *See supra* text accompanying note 17.

43. 58 Fed. Reg. 69, 71 (1993).

presence of these findings, the vast majority of knowledgeable observers favored adjustment.

1. *Numeric Accuracy*

The DSE produces a better estimate of the nation's actual population than the official census in terms of numeric accuracy. The DSE undoubtedly generates a better aggregate national figure than the unadjusted census because analysis on this level mitigates any theoretical error from the small sample size of the PES's 1392 post-strata.⁴⁴ Furthermore, there is a broadbased consensus that the DSE also produces more accurate numbers on the state level.⁴⁵ Finally, even Secretary Mosbacher concedes that fully two-thirds of the nation's population "live in jurisdictions where the adjusted counts appear more accurate."⁴⁶ Because no census or adjustment is perfectly accurate, the Census Bureau should use the data set that best represents the true population.⁴⁷ The DSE is that data set because of the consensus that it produces a more accurate count of the nation's total population and because it is more likely to be numerically accurate on the state level.

Although nearly all scholars agree that the DSE is superior for national and state figures, whether the DSE significantly improves on the census's substate findings remains in equipoise.⁴⁸ This diver-

44. See, e.g., 58 Fed. Reg. at 70 ("[I]t is the unanimous opinion of senior statisticians and demographers at the Bureau of the Census comprising the Committee on Adjustment of Postcensal Estimates (CAPE) that adjustment would improve the accuracy of the 1990 census base at the national level."); 56 Fed. Reg. 33,582, 33,583 (1991) ("There is general agreement that at the national level, the adjusted counts are better . . .").

45. See, e.g., Mary H. Mulry & Bruce D. Spencer, *Accuracy of the 1990 Census and Undercount Adjustments*, 88 J. AM. STAT. ASSN. 1080, 1085 (1993) (finding that, under loss functions approved by the Office of Federal Statistical Policy and Standards, the total error model showed that, as compared to the unadjusted census, the DSE was likely more accurate in either 33 or 40 states).

46. 56 Fed. Reg. at 33,583.

47. One commentator has written:

The principal motivation should be to produce the most accurate estimates possible. That no estimates are the truth should not prevent use of the best, whatever their source. That there is not complete agreement on which estimates are the best should not prevent use of estimates that are widely regarded as better than some other estimates currently used or under consideration.

Allen L. Schirm, *The Effects of Census Undercount Adjustment on Congressional Apportionment*, 86 J. AM. STAT. ASSN. 526, 539 (1991).

48. Potential substate error in the DSE comes from the correlation bias caused by the "homogeneity" assumption — the assumption that "the probabilities of enumeration are the same for all members of the population." Juha M. Alho et al., *Estimating Heterogeneity in the Probabilities of Enumeration for Dual-System Estimation*, 88 J. AM. STAT. ASSN. 1130, 1130 (1993). This equivocal error should not cause fear that a DSE would inflate unreasonably the population in compensation for the undercount since "[t]he [correlation] bias is usually downward, leading to underestimation of the population." Bell, *supra* note 34, at 1106. Alho finds that statisticians feasibly can correct census data for heterogeneity using "imputation" and "logistic" techniques. See Alho et al., *supra*, at 1136; see also Mulry & Spencer, *supra* note 45, at 1084 (finding that for metropolitan and nonmetropolitan "counties of less

sity of opinion prevents an unqualified endorsement of the DSE, but it does not logically lead to the adoption of the unadjusted census. The Secretary argued that in the presence of this uncertainty, discretion compels the use of the unadjusted census.⁴⁹ This position ignores the undisputed fact that the DSE demonstrably surpasses the census on the national and state level. Furthermore, even its critics admit that *two-thirds* of the population live in jurisdictions where adjustment would improve upon the census. These attributes, when balanced against the lone fact that scholars cannot determine conclusively whether the DSE bests the census on substate levels, do not compel a decision in favor of the unadjusted census, particularly considering the impossibility of finding perfect data. Instead, they lead to the conclusion that the DSE's numeric accuracy surpasses the numeric accuracy of the unadjusted census on the national, state, and possibly local level, and that at no level of analysis is the DSE demonstrably *worse* than the unadjusted census data. The DSE is, therefore, a better estimate of the nation's true population than the unadjusted census figures.⁵⁰

than 200,000 population, counties of 200,000 or greater population, places with less than 25,000 population, places with 25,000-49,999 population, and places with 50,000 or greater population . . . the risk . . . was smaller for the DSE than for the census" and that "these results strongly indicate that the DSE is more accurate than the census". Fienberg, specifically addressing the substate accuracy of the DSE, concluded that "the Bureau's calculations show the superiority of the adjusted counts at the level of the states and below." Fienberg, *supra* note 2, at 79. *But see* Kenneth W. Wachter, *The Census Adjustment Trial: An Exchange*, 34 JURIMETRICS J. 107, 114 (1993) ("[T]he adjusted state and local share are very likely worse than the original census figures.").

49. Secretary Mosbacher stated:

What all these tests show . . . is that the adjusted figures for some localities will be an improvement and for others the census counts will be better. . . . [W]e don't really know how much better or how much worse. If the scientists cannot agree on these issues, how can we expect the losing cities and states as well as the American public to accept this change?

56 Fed. Reg. at 33,583; *see also* Freedman, *supra* note 28.

50. Even if apprehensions about substate error within the DSE outweighed its demonstrated advantages, other statistical methods exist that produce figures that exceed the accuracy of the unadjusted census. One scholar has demonstrated that a combination of the DSE and DA can produce population estimates that reduce the amount of correlation bias in the ordinary DSE, by essentially using strong DA population estimates as a check for the DSE. *See* Bell, *supra* note 34, at 1107.

Others have used an Administrative List Supplement (ALS) in combination with census figures and the PES to produce "triple-system models that allow for heterogeneous catchability among individuals" in a manner that corrects some of the theorized errors in the DSE. "Heterogeneous catchability" refers to the differing probabilities that each individual will be "captured" (counted) by the census or the PES and is, therefore, another term for correlation bias. *See* John N. Darroch et al., *A Three-Sample Multiple-Recapture Approach to Census Population Estimation With Heterogeneous Catchability*, 88 J. AM. STAT. ASSN. 1137, 1145 (1993). The ALS consists of "pre-census administrative records of state and federal government agencies, including Employment Security, driver's license, Internal Revenue Service, Selective Service, and Veteran's Administration records." *Id.* at 1138. Another method fuses census data with data from the PES to create estimates that "have less bias than the unadjusted counts, but less variance than the DSE." Alan M. Zaslavsky, *Combining Census, Dual-*

2. *Distributive Accuracy*

Despite the evidence that the adjusted census improved upon the census's numeric accuracy, Secretary Mosbacher favored the initial, unadjusted enumeration.⁵¹ He refused to permit adjustment because he decided that the "primary criterion for accuracy should be distributive accuracy — that is, getting most nearly correct the proportions of people in different areas."⁵² In the end, therefore, he decided not to correct the census because, in his estimation, it remained unclear whether alteration definitively and comprehensively would improve the distribution of population shares among all the states.⁵³

The Secretary's decision to disregard numeric accuracy in deference to distributive accuracy falters both factually and conceptually. According to Mosbacher, "28 or 29 states were estimated to be made less accurate if the adjustment were to be used."⁵⁴ But in order to reach this conclusion, the Secretary had to more than double the variance of the smoothed adjustment factors. By artificially increasing the variance and then using that new figure in his calculations, the Secretary warped the DSE's adjustment factors and made them appear significantly less effective than their actual variance indicates.⁵⁵ By doubling the adjustment factors' variance in his calculations, the Secretary made a very conservative estimate

System, and Evaluation Study Data to Estimate Population Shares, 88 J. AM. STAT. ASSN. 1092, 1092 (1993).

In the end, "[t]he most striking feature of the[se] estimates is the close agreement between the different estimators for each EPS [Evaluation Poststrata]. In every EPS, every estimate is closer to the DSE than to the census," and each "[is] at least as accurate as the better of the two original alternatives." *Id.* at 1101, 1103. Evaluation Poststrata are 13 aggregates of the 1392 poststrata used by a number of commentators to evaluate the integrity of the PES. These groupings give analysts sufficiently large data subsets to support a wide range of inquiries. See generally Mulry & Spencer, *supra* note 45, at 1081. Although none of the above methods has received the broad scrutiny imposed upon the DSE, each promises to make substantial improvements upon unadjusted census figures, demonstrating that, even if the DSE does not satisfy all its critics, there exist real and better alternatives to the unadjusted census.

51. For articles supporting the Secretary's decision, see Freedman, *supra* note 28, at 105 (arguing that, although the census contains regrettable error, "there is no strong evidence on the table to show that adjustment will improve the distributional accuracy for states or other areas"); Wachter, *supra* note 48, at 114 (maintaining that the DSE "introduces new errors into the population shares of states, cities, counties, and other jurisdictions"). For broad-gauged criticism of the Secretary's statistical findings, see Fienberg, *supra* note 2, at 82 (finding that the evidence supported the "superiority of the adjusted counts when compared to those from the basic and flawed enumeration. The Secretary ignored, misrepresented, or rejected the evidence adduced by the Census Bureau. The arguments marshaled in support of his decision were badly flawed and . . . did not follow from the administrative record.").

52. 56 Fed. Reg. at 33,584.

53. See 56 Fed. Reg. at 33,583.

54. 56 Fed. Reg. at 33,583.

55. See Mulry & Spencer, *supra* note 45, at 1085. The variance (the sum of the squared deviations from the mean divided by n) measures the dispersion of results in a sample.

of the DSE's accuracy and essentially assumed that which he sought to prove. Without this manipulated variance and in using loss functions approved by the Office of Federal Statistical Policy and Standards,⁵⁶ the total error model showed that, as compared to the unadjusted census, the DSE was more accurate for *at least* thirty-three states.⁵⁷ Additionally, the DA conducted by the Census Bureau indicated that the vast majority of the DSE's state figures comports with demographic expectations in both direction and degree.⁵⁸ This demographic support, when combined with official error models, indicate that, with respect to distributive accuracy, the DSE produces a better result than the official census.

Even if the Secretary's opinion concerning the relative distributive accuracy of the two censuses is correct, the adjusted census still would be the better data set on account of its superior numeric accuracy. Numeric accuracy must be the primary consideration when evaluating census data because the Court has declared that the apportionment of congressional seats " 'among the several States . . . according to their respective Numbers,' . . . requires, by virtue of § 2 of the Fourteenth Amendment, 'counting the whole number of persons in each State.' The number of persons in each State is to be calculated by 'actual Enumeration,' conducted every ten years."⁵⁹ The Secretary's focus on the distribution of the population among the states, therefore, cannot withstand scrutiny because its open disregard for numeric accuracy undermines the Constitution's require-

56. Dr. Bryant stated:

Loss function analysis depends upon first, building an estimate of the true population then comparing the census and the PES/dual-system estimate to this estimate. Although the test indicates whether the PES or the census produces the more accurate distribution of population between states, it does not show which state estimates are improved or whether any are made less accurate.

58 Fed. Reg. 69, 71 (1991).

57. See Mulry & Spencer, *supra* note 45, at 1085. Using another federally approved loss function, the total-error model indicated that the DSE was more accurate than the unadjusted census in 40 states. Since loss-function analysis *only* indicates whether the DSE is more accurate than the census, it is incorrect to conclude that the DSE makes 10 or 17 states *less* accurate. In these 10 or 17 states, the DSE very well may equal the unadjusted census. See *supra* note 56; see also 58 Fed. Reg. at 70 ("There is substantial consensus, but not unanimity of opinion, among [many expert advisors] that adjustment would improve the distribution of population shares among the states.").

58. Dr. Bryant also reported:

As a check on the loss function analysis result, Census Bureau demographers and a demographer expert from outside the Census Bureau reviewed each state's estimated undercount to see if it made demographic sense, given what they know about the demographic composition of each state. For 44 states and the District of Columbia, the PES/[DSE] estimates of undercount appear logical. That is, given the proportions and concentrations of different demographic groups in each state, the mix of rental and owner-occupied housing, and measured undercount patterns for these, the undercount in relation to other states was what demographers might expect.

58 Fed. Reg. at 71.

59. Franklin v. Massachusetts, 505 U.S. 788, 791 (1992) (citations omitted).

ment that the decennial enumeration "count[] the whole number of persons in each state."⁶⁰

3. Expert Observers

In addition to the persuasive power of the figures themselves, a consensus of informed commentators also indicates that the DSE better approximates the true population than the unadjusted census.⁶¹ Among the Secretary's advisors from the Census Bureau, recommendations unambiguously favored adjustment. The Undercount Steering Committee voted seven to two in favor of adjustment and argued that "an adjustment based on the PES would ameliorate the undercount of minority groups and improve the accuracy of counts for the Nation, States, and places of 100,000 population or more."⁶² Dr. Barbara E. Bryant, the Director of the Census between 1989 and 1993, counseled in favor of statistical correction, after concluding that the DSE would improve the accuracy "of the count — both numerically and proportionally."⁶³

Another significant independent assessment of the DSE came in *City of New York v. United States Department of Commerce*,⁶⁴ a thirteen-day bench trial before Second Circuit Judge Joseph M. McLaughlin, sitting by designation in the Eastern District of New York.⁶⁵ Although Judge McLaughlin eventually ruled in favor of

60. U.S. CONST. amend. XIV, § 2.

61. The Special Advisory Panel, composed of four experts nominated by the plaintiffs in NYC v. DOC I and four experts selected by the Secretary, predictably split four to four on the issue, with the four Commerce Department appointees voting against adjustment and the four members recommended by the plaintiffs voting for correction. See 56 Fed. Reg. 33,582, 33,610-23 (1991). The Secretary's position also found support from two political appointees — the Under-Secretary of Commerce for Economic Affairs and the Administrator of the Economics and Statistics Administration. See *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114, 1123 (2d Cir. 1994), cert. granted, 116 S. Ct. 38 (1995).

62. UNDERCOUNT STEERING COMMITTEE, BUREAU OF THE CENSUS, TECHNICAL ASSESSMENT OF THE ACCURACY OF THE UNADJUSTED VERSUS ADJUSTED 1990 CENSUS COUNTS 2 (1991). The Committee further advised that "the improvement in counts on the average for the Nation, States, and places over 100,000 population outweighs the risk that the accuracy of adjusted counts *might* be less for some smaller areas." *Id.* (emphasis added). The Census Bureau created the Undercount Steering Committee in 1984 to explore potential remedies for the differential undercount. See generally *supra* text accompanying notes 23-27.

63. BARBARA EVERITT BRYANT, BUREAU OF THE CENSUS, RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS 11 (1991). In early 1993, Dr. Bryant chose not to use the 1990 PES to adjust the base for the intercensal population estimates produced by the Bureau of the Census. Dr. Bryant "reluctantly made the decision that in the litigious atmosphere in which U.S. census and population estimates must be defended the census base for intercensal population estimates could not adjusted." Bryant, *supra* note 35, at 48. This fear of litigation stemming from a change in position, therefore, "overrode her 'best statistical judgment.'" *Id.*

64. *City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993).

65. After the Secretary's decision not to adjust the census, New York City sought to overturn that decision by asserting that it was both "arbitrary and capricious" and therefore void under the Administrative Procedure Act's standard of review. See 822 F. Supp. at 910.

the Department because of the extremely permissive “arbitrary and capricious” standard dictated by the Administrative Procedure Act (APA),⁶⁶ he declared that the plaintiffs had proven that “adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of [the] differential undercount.”⁶⁷ Perhaps most tellingly, the Judge declared that “[p]laintiffs have made a powerful case that discretion would have been more wisely employed in favor of adjustment. Indeed, were this Court called upon to decide this issue de novo, I probably would have ordered the adjustment.”⁶⁸

II. STANDING TO SUE THE DEPARTMENT OF COMMERCE

The Secretary’s final decision not to adjust the census sparked a new round of litigation.⁶⁹ These actions all sought to force the Secretary of Commerce to reverse his decision and to adjust the official census. Section II.A demonstrates that such efforts generally have failed because the plaintiffs lack standing to challenge the Commerce Department on this issue. The injury that lies at the heart of their complaints — underrepresentation — does not spring directly from the Secretary’s decision not to adjust the census but from the independent action of their state legislatures. Section II.B criticizes the Second Circuit’s ruling in *City of New York v. United States Department of Commerce* because it inappropriately found standing and ignored the important distinction in redistricting jurisprudence between analysis under Article I, Section 2 and analysis under the Equal Protection Clause.

A. *Standing under Lujan v. Defenders of Wildlife*

The Court’s recent articulation of the standing doctrine in *Lujan v. Defenders of Wildlife*⁷⁰ declares that:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and

66. 5 U.S.C. § 701 et. seq. (1994). Judge McLaughlin made clear that his rigid conception of his judicial role and the severe nature of the “arbitrary and capricious” standard animated his conclusion to uphold the Secretary’s decision not to adjust. See *NYC v. DOC III*, 822 F. Supp. at 929. See generally *infra* text accompanying notes 93-95.

67. *NYC v. DOC III*, 822 F. Supp. at 931.

68. 822 F. Supp. at 928.

69. See, e.g., *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114, 1123-24 (2d Cir. 1994), cert. granted, 116 S. Ct. 38 (1995); *City of Detroit v. Franklin*, 4 F.3d 1367, 1377 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994); *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411, 1411, 1413 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992); *NYC v. DOC III*, 822 F. Supp. at 916.

70. 504 U.S. 555 (1992).

particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."* Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."⁷¹

The absence of any of these elements strips a plaintiff of standing and prohibits Article III courts from taking any positive remedial action.⁷²

Plaintiffs who sue the Department of Commerce over its failure to adjust census data do not have standing because they fail to satisfy *Lujan's* second prong — the causation requirement. Plaintiffs in undercount litigation suffer injury because they live and vote in congressional districts with disproportionately large populations, which dilutes the voting power of individuals therein.⁷³ The *state* in which the district is located, however, bears the responsibility for this harm because each state constructs its own congressional election districts.⁷⁴ If the Federal Constitution required states to use census data, then the Department would be a direct cause of the plaintiff's injuries, and states' incomplete control over congressional redistricting would not affect litigation against the Depart-

71. 504 U.S. at 560-61 (citations omitted) (emphasis added).

72. See 504 U.S. at 561 (stating that these three requirements are "an indispensable part of the plaintiff's case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof").

73. Plaintiffs also have brought suit against the Secretary of Commerce alleging that his decision not to adjust the census has cost them population-linked federal funds. Although an adherence to *Lujan* also should create second-prong difficulties for these actions — given that Congress is not required to use official census figures in its distribution of funds — a few courts have found that municipalities and individuals have standing to challenge the Secretary's failure to correct for the differential undercount, based on a deprivation of federal funds. See *City of Detroit*, 4 F.3d at 1374 (holding that plaintiffs do not have standing to challenge the census undercount on a vote-dilution claim but that they do have standing to challenge the undercount on the basis of lost federal funds); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (ruling that plaintiffs had sufficient factual foundation for a challenge to the undercount on the basis of lost federal funds), *revd. on other grounds*, 653 F.2d 732 (2d Cir. 1981). *But see* *State of Texas v. Mosbacher*, 783 F. Supp. 308, 314 (S.D. Tex. 1992) (arguing that the state does not have standing to challenge the undercount in the absence of a direct loss of funds). The fact that courts have found standing based on a loss of federal funds does not suggest that plaintiffs successfully can challenge the decision not to adjust the census and actually obtain relief for either a vote-dilution injury or a lost-federal-funds injury. In fact, none of these actions has had any success because the statutes that govern the census do not create a justiciable right to accuracy. See, e.g., *City of Detroit*, 4 F.3d at 1376 (stating that "these enactments do not create justiciable rights"). These cases, therefore, suffer from the same problem that has plagued other efforts to force the Department of Commerce to adjust the census: plaintiffs fail to recognize that the administrator of the census only has a positive duty to assure a good-faith effort to achieve accuracy, and so his decisions are only reviewable under the "arbitrary and capricious" standard detailed in the APA. See generally *infra* text accompanying notes 93-95.

74. See, e.g., ME. REV. STAT. ANN. tit. 21A, § 1206 (West 1994); OKLA. STAT. ANN. tit. 14, § 5.2 (West 1994); TENN. CODE ANN. § 2-16-103 (1994).

ment of Commerce. State legislatures, however, are not required to use official census data when redistricting.⁷⁵ Absent such a constitutional mandate, a state's decision to use unadjusted census data — a decision wholly beyond the control of the Department of Commerce — constitutes the kind of "independent action of some third party not before the court," that falls outside the standing rule articulated by the *Lujan* Court.⁷⁶

A good example of this reasoning is found in *City of Detroit v. Franklin*, in which the Sixth Circuit recognized the separation between the census and congressional redistricting and consequently denied the plaintiffs standing to challenge the census on a complaint of unequal representation. The City of Detroit sued Secretary of Commerce Barbara Franklin in an attempt to force her to adjust the 1990 census.⁷⁷ Detroit complained that it had suffered injury from both underrepresentation with regard to other Michigan cities⁷⁸ and an insufficient share of federal funds distributed on the basis of population.⁷⁹ Affirming the district court's grant of summary judgment, the Sixth Circuit held that Detroit lacked standing on the representation prong of its complaint because Michigan's "decision (whether to use the [census] data or not) is an independent act breaking the chain of causation between the challenged actions of the Census Bureau . . . and the injury to the plaintiffs."⁸⁰ The decision in *City of Detroit* acknowledged that the state legislature and not the Secretary of Commerce has ultimate respon-

75. See *Burns v. Richardson*, 384 U.S. 73, 91, 92-97 (1966) (upholding an apportionment based on a registered-voter basis); see also *City of Detroit*, 4 F.3d at 1373 (noting that states are "not constitutionally compelled to use the Bureau's census data when redistricting"); *Assembly of State v. United States Dept. of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992) ("The states are not obligated to use official census data when drawing their state legislative districts or their congressional districts." (citations omitted)); *Garza v. County of Los Angeles*, 918 F.2d 763, 772-73 (9th Cir. 1990) (using updated, noncensus data to examine the influence of redistricting on Hispanics), *cert. denied*, 498 U.S. 1028 (1991); *Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981) (declaring that "[t]here is no reason to believe that states would not be free to adjust census figures for redistricting"), *cert. denied*, 455 U.S. 939 (1982); *Borough of Bethel Brook v. Stans*, 449 F.2d 575, 582 n.4 (3d Cir. 1971) (stating that states need not use the federal census for apportioning their legislatures). See generally *infra* section III.B.

76. *Lujan*, 504 U.S. at 561 (citations omitted).

77. See *City of Detroit*, 4 F.3d at 1369.

78. The plaintiffs argued that, in a redistricting based on the unadjusted 1990 census, Detroit encompassed 1,769 congressional districts, while a district mapping based on the DSE would have given Detroit 1,811 congressional districts. "Thus, the use of the unadjusted official population count to determine Congressional representation within . . . Michigan means that the residents of . . . Detroit have proportionately less representation in the House of Representatives than the residents of all or virtually all of the other cities and sub-units in Michigan." 4 F.3d at 1372 n.4.

79. The remedy for the deprivation of federal funds rests neither on the right to vote nor on the right to an equal apportionment. That deprivation and the legal issues that spring from it are, therefore, beyond the scope of this Note.

80. *City of Detroit*, 4 F.3d at 1373.

sibility for the composition of congressional election districts. Thus, plaintiffs seeking to combat equal representation related to the differential undercount must bring actions against the state legislatures directly responsible for the injury and not the administrators of the census.

B. *The Second Circuit and City of New York v. United States Department of Commerce*

In *City of New York v. United States Department of Commerce*, the Second Circuit took two unprecedented steps with regard to standing and redistricting jurisprudence. In its decision, the Second Circuit vacated Judge McLaughlin's judgment in the lower court decision⁸¹ and remanded the case for further proceedings. The court disagreed with Judge McLaughlin's use of the APA's "arbitrary and capricious" standard and ordered that he instead use a "more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity."⁸² Section II.B.1 criticizes the Second Circuit's failure to consider standing in light of *Lujan*. Section II.B.2 demonstrates that, even leaving aside the question of standing, the Second Circuit's opinion inappropriately grounds its analysis in the Equal Protection Clause and thus contravenes the established distinction within redistricting jurisprudence between congressional districts, subject to Article I, Section 2, and state and local districts, subject to the Equal Protection Clause.

1. *The Second Circuit's Erroneous Finding of Standing*

The Second Circuit's finding of standing rested on a single, imprecise assumption — the court wrote that "[i]naccuracies in the decennial census affect both the distribution of Representatives among states and the distribution of Representatives within most states, since states use the census figures in drawing district lines."⁸³ Based on this finding, the court imposed standards of exactitude which ordinarily apply to state governments in their redistricting efforts on the Secretary in his decision not to adjust the census.⁸⁴ This leap of logic imposes too much responsibility for the undercount on the Secretary. As noted in section II.A, the states have no obligation to use official census data in their redistricting efforts. The various state legislatures decide to use such data, and they are

81. See *City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993). See generally *supra* text accompanying notes 64-68.

82. *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114, 1131 (2d Cir. 1994), cert. granted, 116 S. Ct. 38 (1995).

83. 34 F.3d at 1128.

84. See 34 F.3d at 1125-29.

responsible for the consequences of that decision. Consequently, the Secretary's decision is not directly linked to vote dilution, and this disrupted causation properly triggers *Lujan* standing analysis.⁸⁵ The Second Circuit, therefore, erred when it assumed that the plaintiffs had standing to sue the Secretary because they did not satisfy *Lujan's* second prong on account of the intervening independent action of their state legislatures.

2. *The Limits of Equal Protection Analysis*

Even if the Supreme Court ignored *Lujan* and found that the plaintiffs had standing, the Second Circuit's use of equal protection analysis and application of strict scrutiny could not withstand close examination because the court confused two distinct doctrinal systems within redistricting jurisprudence. The court's opinion maintains that a "fundamental right to vote" has been violated and that equal protection analysis is therefore appropriate. In applying that analysis, the court asserted that because the vote dilution adversely affects suspect classes, the Secretary's decision not to adjust must "be supported by an official showing that that [decision] (a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective."⁸⁶

This reasoning ignores the Supreme Court's clear distinction between vote-dilution claims relating to *congressional* districts and those relating to *state* legislative districts. Population-equality standards for *congressional* districts spring solely from Article I, Section 2, while equality standards for *state* legislative districts grow only from the Equal Protection Clause.⁸⁷ This distinction has substantive consequences, for Article I's equality requirement is significantly more exacting than that of the Equal Protection Clause.⁸⁸ The Second Circuit's opinion does not recognize this fundamental bifurcation and applies equal protection analysis to a vote-dilution claim regarding congressional districts. Consequently, the decision's logical structure rests on a misconceived foundation.

Even if the Second Circuit applied equal protection analysis to congressional districts, a claim of undercount-related vote dilution would not violate a fundamental right because equal protection analysis permits a ten-percent de minimis population deviation for

85. See *supra* section II.A.

86. *NYC v. DOC IV*, 34 F.3d at 1131.

87. See *Gaffney v. Cummings*, 412 U.S. 735, 741-42 (1973) ("[T]here are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth Amendment and *Reynolds v. Sims* . . . and its progeny."); *Mahan v. Howell*, 410 U.S. 315, 322 (1973) ("The dichotomy between the two lines of cases has consistently been maintained.").

88. See *infra* text accompanying notes 89-92, 102-08.

election districts.⁸⁹ With a total undercount of 1.58%,⁹⁰ the average election district drawn from unadjusted census figures should deviate only 1.58% from an identically constructed district drawn from adjusted figures. At the extreme, a district composed entirely of the most severely undercounted demographic group — Hispanic males — would deviate approximately 5.51% from its population ideal.⁹¹ These deviations fall well below the constitutionally acceptable ten-percent *de minimis* standard, so the use of unadjusted figures in the construction of state and local election districts would not violate a fundamental right under the Equal Protection Clause and therefore would not trigger strict scrutiny.⁹²

Because the Secretary's decision not to adjust the census does not implicate a fundamental right or equal protection analysis, courts instead must apply the "arbitrary and capricious" standard of review established by the APA.⁹³ Under this rigid standard, plaintiffs cannot assail the Secretary's decision because it does not "abuse[] reason."⁹⁴ Although the vast majority of the evidence and advice counseled in favor of adjustment, the Secretary still had experts in his camp favoring unadjusted figures.⁹⁵ Given the existence of such experts, no court that respects its judicial role should overturn his decision as wholly violative of reason, and consequently undercount-related suits against the Secretary of Commerce should fail.

In sum, the Secretary's decision does not directly implicate a fundamental right or equal protection analysis, and, because the

89. See *White v. Regester*, 412 U.S. 755, 763 (1973) ("Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district . . . made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error."). Compare this 10% *de minimis* standard with the "as nearly as practicable" standard of exact equality required by the Supreme Court under Article I, Section 2. See *infra* text accompanying notes 102-08.

90. See 58 Fed. Reg. 69, 70 (1993).

91. See 58 Fed. Reg. at 71.

92. In the absence of a violation of a fundamental right under the Equal Protection Clause, the only form of equal protection analysis available based on the differential undercount is ordinary "disparate impact" analysis. In order to prevail against a government defendant on a disparate impact claim, a plaintiff must demonstrate that the government's action "reflect[ed] a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). Because the plaintiffs offered no evidence that racial animus motivated the Secretary's decision, they could not prevail in a disparate impact claim.

93. The Department of Commerce is an administrative agency and thus is subject to the APA. See, e.g., *Carey v. Klutznick*, 637 F.2d 834, 838-39 (2d Cir. 1980); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1105 (S.D.N.Y. 1987); *Borough of Bethel Park v. Stans*, 319 F. Supp. 971, 976-77 (W.D. Pa. 1970), *affid.*, 449 F.2d 575 (3d Cir. 1971).

94. *City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906, 929 (E.D.N.Y. 1993). For a detailed discussion about the strictness of the APA's standard, see 822 F. Supp. at 929.

95. See *supra* section I.C.

APA permits the Secretary to make unwise decisions regarding adjustment, plaintiffs cannot prevail in actions against the Department of Commerce. Given the foregoing errors, the Supreme Court should reverse *City of New York v. Department of Commerce* and authoritatively close the door on litigation against the Secretary over census adjustment. This eventuality would be, however, only a temporary setback for plaintiffs seeking to end undercount-related vote dilution because they have another, better alternative — suits against their state legislatures based on their legislature's use of unadjusted census data.

III. A REMEDY FOR THE PROBLEM OF THE DIFFERENTIAL UNDERCOUNT

This Part argues that plaintiffs who seek a remedy for representational inequality linked to the census undercount should sue their state governments because the Constitution requires those governments to create congressional districts of equal population, as measured by the best population data available. Section III.A examines the current state of apportionment jurisprudence and demonstrates that states have an affirmative duty to forge districts that are as nearly equal as practicable. Section III.B shows that, in creating those districts, states have a duty to use the best population data available and concludes that requiring states to redistrict with adjusted census data would result in substantially more equal representation for most of the population. Section III.C responds to potential criticisms of forcing states to use adjusted census figures in congressional redistricting.

A. *The Population-Equality Requirement in Congressional Redistricting*

In the 1960s, the Warren Court addressed the substantial population differences that existed among federal election districts. These gaping discrepancies resulted in widespread vote dilution such that the relative ballot power of many minority and urban citizens suffered in comparison to white, rural voters.⁹⁶ The judiciary's reapportionment revolution swept aside decades of practice and invalidated numerous state constitutional mechanisms for congressional redistricting.⁹⁷

96. See generally GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* (1966); ALFRED DE GRAZIA, *APPORTIONMENT AND REPRESENTATIVE GOVERNMENT* (1963); ROBERT G. DIXON, *DEMOCRATIC REPRESENTATION* (1969).

97. See, e.g., *White v. Weiser*, 412 U.S. 783 (1973) (holding that a Texas congressional-redistricting scheme with an average deviation from the ideal district of .745% and a maximum deviation of 2.43% was invalid since it did not achieve numeric equality); *Wells v.*

The first salvos of this revolution, *Baker v. Carr*⁹⁸ and *Wesberry v. Sanders*,⁹⁹ established the bedrock doctrines relating to congressional apportionments and required states to shape their congressional districts such that each district has an equal population, as nearly as practicable. *Baker* held that, with regard to state legislative districts, a claim of vote dilution by malapportionment presents a justiciable issue¹⁰⁰ and declared that individuals who have suffered vote dilution have standing to challenge their state's apportionment scheme.¹⁰¹ *Wesberry* extended *Baker's* finding of justiciability and declared that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."¹⁰²

Subsequent decisions demonstrated the Court's deepening commitment to strict equality and solidified the requirement that states adhere to that standard when constructing their congressional districts. In *Kirkpatrick v. Preisler*, the Court defined the "as nearly as practicable" standard for purposes of congressional elections, when it declared that a Missouri apportionment in which "the most populous district was 3.13% above the mathematical ideal, and the least populous was 2.84% below,"¹⁰³ violated the Constitution, since "the 'as nearly as practicable' standard requires that the State strive to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."¹⁰⁴ The standard for these justifications lays a heavy burden on the state, for the Court considers the "size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely."¹⁰⁵ Missouri offered no legitimate justification for its nearly six-percent deviation,

Rockefeller, 394 U.S. 542 (1969) (invalidating a New York redistricting scheme for congressional districts with a total deviation of 13.1%); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

98. 369 U.S. 186 (1962).

99. 376 U.S. 1 (1964).

100. See *Baker*, 369 U.S. at 198-204.

101. See 369 U.S. at 204-08. Furthermore, *Baker* established that a legislature's apportionment decisions do not fall under the protective umbrella of the "political question" doctrine. See 369 U.S. at 208-37.

102. *Wesberry*, 376 U.S. at 7-8 (footnote omitted). The *Wesberry* Court grounded its decision on Article I, Section 2 and not the Equal Protection Clause. It did not reach the argument that the Georgia apportionment violated the Equal Protection Clause. See 376 U.S. at 8 n.10.

103. *Kirkpatrick v. Preisler*, 394 U.S. 526, 528-29 (1969).

104. 394 U.S. at 530-31 (citation omitted).

105. *Karcher v. Daggett*, 462 U.S. 725, 741 (1983).

and therefore its redistricting scheme could not withstand judicial scrutiny.

More recently, the Court affirmed this emphasis on numeric exactitude in *Karcher v. Daggett*, when it voided a New Jersey redistricting scheme in which the difference between the smallest and largest districts amounted to “0.6984% of the average district.”¹⁰⁶ The Court found that this deviation, “although small, [was] not the result of a good-faith effort to achieve population equality.”¹⁰⁷ New Jersey offered a differential of one percent as a potential de minimis threshold, but the Court rejected this notion, arguing that “[a]s between two standards — equality or something less than equality — only the former reflects the aspirations of Art. I, § 2.”¹⁰⁸ In order to comport with constitutional dictates, therefore, states proactively must achieve near numeric perfection in their construction of congressional districts or else rigorously defend their decision to countenance inequality.

B. *The Data Requirements for Congressional Redistricting*

In order to achieve this constitutionally mandated population equality, state legislatures must construct their congressional districts from the “best population data available” — no matter what the source.¹⁰⁹ The Court first delineated its willingness to accept noncensus data in *Kirkpatrick*, when it grounded its evaluation of Missouri’s redistricting scheme on “the best population data available to the legislature in 1967, the 1960 United States census figures.”¹¹⁰ In the 1960s, in the absence of any additional evidence to the contrary, the Court concluded that 1960 census data best represented the actual population and therefore required their use. The *Karcher* Court reiterated the importance of this requirement when it averred that “[a]dopting any standard other than population equality, using the best census data available, would subtly erode the Constitution’s ideal of equal representation.”¹¹¹ In short, the Court used official census data to evaluate the comparative populations of congressional districts, not because they were used by the state, but because they were the best data available.

Although both the *Karcher* and *Kirkpatrick* Courts supported the use of census figures under the circumstances, each majority opinion recognized that better data potentially could present themselves and expressed an openness to the use of such data. Justice

106. 462 U.S. at 728.

107. 462 U.S. at 727.

108. 462 U.S. at 732.

109. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969).

110. 394 U.S. at 528.

111. *Karcher*, 462 U.S. at 731 (citing *Kirkpatrick*, 394 U.S. at 532).

Brennan, responding to Missouri's argument that its population discrepancies between districts sought to adjust for "projected population shifts," detailed the *Kirkpatrick* Court's willingness to countenance the use of alternate figures. Justice Brennan stated that where "shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. . . . Findings as to population trends[, however,] must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner."¹¹² The *Karcher* Court, too, contemplated the use of other figures in redistricting decisions, when it stated that decisions based on noncensus data "must be supported with a precision not achieved here."¹¹³ These matter-of-fact assertions indicate that the Court would not hesitate to support the use of alternative data, so long as that data achieved a high level of accuracy.

States, therefore, must use the best data available, and they have the flexibility to go beyond official census figures in their constitutionally required search for the best data. The Court has not yet required states actively to seek out the best data,¹¹⁴ but, if presented with a choice between two already extant data sets — census data and demonstrably better adjusted data — *Karcher* and *Kirkpatrick* clearly require the states to use the better data when forming congressional districts, unless the legislature can justify the decision not to use the superior figures.¹¹⁵

Although aggrieved plaintiffs cannot sue successfully the Department of Commerce to force census adjustment because they lack standing to bring such suits,¹¹⁶ plaintiffs in states where the accuracy of the adjusted census demonstrably surpasses the unadjusted census¹¹⁷ can find a remedy for the differential undercount by bringing actions directly against their state governments. In these jurisdictions, congressional districts, if drawn on the basis of official census figures, unavoidably contain population discrepancies when measured by the standard of the "best population data available" — the adjusted census. For example, the 1990 DSE shows that if a state constructs a primarily African-American congressional district, then that district is likely to be significantly larger than a primarily white district, thus diluting the voting power

112. *Kirkpatrick*, 394 U.S. at 535.

113. *Karcher*, 462 U.S. at 738 (citing *Kirkpatrick*, 394 U.S. at 535).

114. See *infra* text accompanying notes 138-39.

115. See *Senate of California v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) ("If the State knows that the census data is underrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process." (citation omitted)).

116. See *supra* Part II.

117. The total-error model indicates that the DSE is more accurate than the unadjusted census for at least 33 states. See *supra* text accompanying note 57.

of African Americans.¹¹⁸ Because legislators can foresee these discrepancies, redistricting based on official census data violates “the ‘as nearly as practicable’ standard,” which requires a “good-faith effort to achieve precise mathematical equality.”¹¹⁹ In the absence of such a good-faith effort, the state independently must “justify each variance.”¹²⁰ Given the availability of superiorly adjusted figures and the minimal cost incurred by states in their use,¹²¹ states that choose to use the unadjusted census will not be able to satisfy this justification requirement. Courts must require these states to use adjusted figures for congressional redistricting in order to ensure compliance with the strict dictates of Article I, Section 2, as interpreted by the *Wesberry-Kirkpatrick-Karcher* line of cases. By following this path, the judiciary will fulfill the promise of the American constitutional system by ensuring equal representation and freedom from vote dilution.¹²²

C. Potential Criticisms

If undercounted groups adopt this Note’s recommendations, plaintiffs will call upon states to defend vigorously their decisions to use unadjusted census figures in congressional redistricting. This litigation strategy undoubtedly will receive some criticism. Section

118. See generally *supra* section I.B.

119. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

120. 394 U.S. at 530-31; see also *Karcher v. Daggett*, 462 U.S. 725, 741 (1983) (requiring justification).

121. See *infra* text accompanying notes 138-39.

122. This Note’s logic also may assist plaintiffs who sue to correct the interstate apportionment of congressional representatives. Under 2 U.S.C. § 2a (1994), the Secretary of Commerce must deliver his final census figures to the President, who applies a mathematical formula to determine congressional apportionment and gives the result to Congress. The Court has ruled that the President has advisory power with regard to these figures and that he can order the Secretary of Commerce to revise his findings and conclusions. See *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). Although apportionment among the states cannot achieve the ideal of one person, one vote because of the indivisibility of seats and the Article I, Section 2 requirement that each state be allotted at least one representative, the Supreme Court has speculated:

As we interpreted the constitutional command that Representatives be chosen “by the People of the several States” to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States “according to their respective Numbers” would also embody the same principle of equality.

United States Dept. of Commerce v. Montana, 503 U.S. 442, 461 (1992). Given this dictum, perhaps the Court would look favorably upon a challenge that demonstrated that the unadjusted census figures used in the apportionment of the House of Representatives and ratified by the President did not represent best the actual population and the actual distribution of people among the states. Such a challenge would try to force the President to reject the unadjusted figures offered by the Secretary and to demand the most accurate numbers possible.

If the 1990 census had been adjusted for the federal apportionment to correct the differential undercount, Arizona and California each would have gained one seat at the expense of Wisconsin and Pennsylvania. See 56 Fed. Reg. 33,582, 33,601 (1991).

III.C.1 responds to the objection that states should not use adjusted figures in redistricting because experts have failed to demonstrate conclusively the DSE's superiority on the block level. Section III.C.2 counters critics who maintain that it makes little sense to attempt to correct the undercount problem on a state-by-state basis, rather than on the national level. Finally, section III.C.3 addresses the concern that, if the Department of Commerce refuses to release adjusted data, the Freedom of Information Act might prove insufficient to force the disclosure of adjusted block data.

1. *The Relevance of Inconclusive Substate Findings*

Some critics may argue that states should not use adjusted data in their redistricting — a process that necessarily involves numerous, complex decisions based on block-level data — because statisticians cannot prove the superiority of the adjusted census figures on the block level. These opponents would maintain that, given the uncertainty about the quality of adjustment, prudence dictates an adherence to the unadjusted enumeration and that a decision to use post-facto statistical adjustments would undermine the integrity of both the census and the redistricting process.

This position mistakenly presumes that an alternative data set must be definitively better on *all* levels to supplant the actual enumeration. The Constitution requires that states use the best data available.¹²³ The DSE is clearly a better data set on the national and state level.¹²⁴ Furthermore, there is no persuasive evidence to suggest that the unadjusted census is more accurate on substate levels. If the census were demonstrably better on the substate level and the DSE demonstrably better on the state and national level, then there might be compelling arguments in favor of the status quo, but this is not the case. Redistricting is a substate process and so this ambiguity is unfortunate, but, ultimately, states must choose between data that are demonstrably better on several levels and data that are demonstrably better on no level. Article I, Section 2's requirement of population equality demands that states select the data set *more likely* to approximate best the true population — the adjusted census.¹²⁵

2. *The Consequences of a State-by-State Approach*

Other critics might question further the wisdom of approaching the problem of undercount-based vote dilution on a *state-by-state*

123. See *supra* section III.A.

124. See *supra* sections I.C.1, I.C.2.

125. Recall the spirit and substance of the Court's admonition that "[a]s between two standards — equality or something less than equality — only the former reflects the aspirations of Art. I, § 2." *Karcher v. Daggett*, 462 U.S. 725, 732 (1983).

basis. They might argue that this piecemeal strategy is a peculiar remedy to a national problem and will create a bizarre situation where some states redistrict with adjusted figures, while their neighbors redistrict with official figures.

Although undercount-based vote dilution affects people throughout the nation, it remains a state problem because of state legislatures' plenary power over the redistricting process. In the absence of federal legislation requiring the Secretary of Commerce to produce an accurate census, a national approach cannot work on account of the decentralized operation of the several state legislatures.¹²⁶ Undercounted groups, therefore, must bring actions against their particular state legislature in an effort to force it to use the best data available.

Aesthetics aside, there are simply no negative consequences arising from a patchwork use of adjusted figures. No state's redistricting depends on the redistricting policy of its neighbors — each state acts independently. Therefore, a state's use of a particular data set would never influence another state's practice, and so one state's use of adjusted data would not affect its neighboring states. One might find an imbalance when one state's voters become free from vote dilution while another state's population continues to suffer from undercounting, but surely the solution to that "inequality" is to extend the benefits of the adjusted count, not to maintain a system that systematically harms minorities and renters in all states.¹²⁷ In short, the Constitution requires equality. If plaintiffs prove that the DSE's estimate of the true population in a given state is more accurate than the official census's estimate, then that state must use the DSE because the people have a right to election districts based on the best population data available.

3. *The Ability of Plaintiffs To Recover Block Data Under the Freedom of Information Act*

A skeptic additionally might argue that, while states must use the "best population data available" in congressional redistricting, they do not have ready access to adjusted census data and that requiring them to obtain or create these data would burden unduly them. If the Department of Commerce has adjusted statistically the enumeration and agrees to turn over block-level data to the states, then this objection collapses. In response to the Florida legislature's request that the Secretary turn over adjusted data for redistricting purposes, however, the Eleventh Circuit ruled that the Department can refuse to turn over such data, on the grounds that

126. See *supra* section II.A.

127. See *supra* note 125.

the information falls under Exemption 5 of the Freedom of Information Act (FOIA),¹²⁸ known as the "deliberative process privilege."¹²⁹ On the other hand, courts in two other circuits have ruled to the contrary, arguing that release of block-level data would trigger neither element of Exemption 5.¹³⁰

The Supreme Court has construed the "deliberative process privilege" to protect documents that are both "predecisional" and "deliberative."¹³¹ "Predecisional" information is information that has been "prepared in order to assist an agency decisionmaker in arriving at his decision,"¹³² whereas "deliberative" information reflects the "decision making processes of government agencies" and generally includes "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."¹³³ Furthermore, because FOIA seeks to expedite the disclosure of government documents, the Court has interpreted its exemptions narrowly.¹³⁴

The narrow exception to FOIA defined by the Supreme Court should not apply to block-level data. Actual adjusted census data do not constitute "predecisional" information because the integrity of the statistical formulae, not the actual data themselves, allegedly affected the Secretary's decision.¹³⁵ If the Secretary's protestations that he did not consider which states and groups specifically would gain voting power are true,¹³⁶ then the actual figures had nothing to do with his decision not to adjust the official numbers. Consequently, the data fail to qualify as "predecisional." Nor do the adjusted figures constitute "deliberative" information because they themselves do not constitute an agency's or individual's recommen-

128. 5 U.S.C. § 552 et seq. (1994).

129. See *Florida House of Representatives v. United States Dept. of Commerce*, 961 F.2d 941, 950 (11th Cir.), cert. dismissed, 113 S. Ct. 446 (1992).

130. See *Assembly of State v. United States Dept. of Commerce*, 968 F.2d 916, 921-23 (9th Cir. 1992); *City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906, 930-31 (E.D.N.Y. 1993).

131. See *Renegotiation Bd. v. Grumman Aircraft Engg. Corp.*, 421 U.S. 168, 186 (1975).

132. 421 U.S. at 184.

133. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citations omitted).

134. See *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).

135. See *Assembly of State v. United States Dept. of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992).

136. Secretary Mosbacher stated:

What is unsettling, however, is that the choice of the adjustment method selected by Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance. I am confident that political considerations played no role in the Census Bureau's choice of an adjustment model for the 1990 census. I am deeply concerned, however, that adjustment would open the door to political tampering with the census in the future. The outcome of the enumeration process cannot be directly affected in such a way.

56 Fed. Reg. 33,582, 33,583 (1991).

dation but rather are the products of an alternative population enumeration process.¹³⁷

Even if the courts rule that the Department of Commerce does not have to release adjusted data to the states, plaintiffs still may prevail. The *Wesberry-Kirkpatrick-Karcher* line of cases require that states use the “best population data available” for the construction of congressional districts. The meaning of this standard, in large part, turns on the definition of “available,” which can mean both “capable of being used” or “accessible.”¹³⁸ If the Department of Commerce agrees to release or must release adjusted data, then under either definition, individual states must use these data if courts find that they best represent the population. Even if the Department withholds an adjusted census, however, courts still may require states to conduct *their own* statistical adjustment under the second meaning of “available,” given the existence of a demonstrably superior methodology. Although ordinarily courts may hesitate to dictate state policy, they ought to interpret broadly the commands of the *Wesberry-Kirkpatrick-Karcher* line of cases and extend this positive duty to the states because the right at stake — equal representation in Congress, guaranteed by Article I, Section 2 — is so central to the integrity of the republic.¹³⁹

Critics also might contend that, even when presented with extant contending data sets, courts will find it difficult to evaluate the alternatives.¹⁴⁰ The accuracy of adjusted figures for each state undoubtedly will be the subject of intensive, complex litigation, and, until the Supreme Court endorses a specific methodology, the results and character of that litigation will vary because of the difficulties caused by diverse statistical procedures and the absence of a scientific united front.¹⁴¹ Article I, Section 2 and the principles ex-

137. The Supreme Court established that a “flexible, common-sense approach” requires a determination of where information falls on the spectrum between the “purely factual” and “law, policy, or opinion.” *EPA v. Mink*, 410 U.S. 73, 91 (1973). Furthermore, Congress sought, through Exemption 5, to relieve agencies from the specter of operating “in a fishbowl” — an environment that would chill the free exchange of ideas and thus damage the quality of the decisionmaking process. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The data *themselves* do not reveal any information about the processes that went into the Secretary’s decisionmaking and therefore cannot fall under the “deliberative-process” exemption.

138. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 128 (2d ed. 1983).

139. States may object that a positive duty to adjust for the differential undercount would place upon them a significant financial and institutional burden. This may be so, but the people’s interest in equal representation far outweighs the state’s interest in parsimony.

140. *See, e.g., Tucker v. United States Dept. of Commerce*, 958 F.2d 1411, 1419 (7th Cir.) (“The dispositive consideration in this case is that, though even the fine points of statistical methodology can have real consequences, a case about statistical methodology is a case whose gears fail to mesh with any judicially enforceable federal rights.”), *cert. denied*, 113 S. Ct. 407 (1992).

141. *See generally supra* section I.C.

pounded in *Wesberry*, *Kirkpatrick*, and *Karcher* demand, however, that courts rigorously evaluate the relative strength of competing figures and actively apply those findings in the redistricting context.

CONCLUSION

Should the Supreme Court reverse the Second Circuit's decision in *City of New York v. United States Department of Commerce*,¹⁴² it would bring to an end current efforts to ameliorate the census undercount by suing federal officials. If this result proves to be the death knell for challenges to the differential undercount, America's constitutional structure will have proven unable to fulfill its promise of "one person, one vote." Ultimately, therefore, someone must take responsibility for the differential undercount. This responsibility properly rests with the state governments, for they independently make the redistricting decisions that translate the Census Bureau's faulty enumeration into a palpable marginalization of underrepresented peoples. Plaintiffs who suffer from undercount related vote dilution, therefore, should challenge their state's delineation of congressional districts when their legislature uses unadjusted census figures. Such litigation would end our long, shameful history of race- and class-based oppression by means of unequal representation and would ensure that each member of the polity would have an equal opportunity to participate in our representative democracy — America's great experiment.

142. 34 F.3d 1114 (2d Cir. 1994), *cert. granted*, 116 S. Ct. 38 (1995).