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THE COURTS AND THE 1980 CENSUS CHALLENGES: TAILORING RIGHTS TO FIT REMEDIES

On December 22, 1980, a federal judge in New York City found that the Census Bureau's troubles in counting poor people and minorities had caused at least 750,000 to 900,000 people to be missed when the Bureau counted the state for the 1980 census.¹ The New York ruling came two months after a similar suit had prompted a federal judge in Detroit to order sweeping adjustments in the final census totals for the nation's black and Hispanic populations.² By the early months of 1981, these two suits had been joined by nearly fifty others, and the Supreme Court had been invited to face questions arising out of five of these cases.³

The 1980 census challenges involved issues that have assumed tremendous importance in the last two decades. Society's approach to the allocation of resources and political power depends fundamentally upon the census. The concerns that government benefits and political clout be distributed equitably throughout the nation have shaped the bold doctrines of the reapportion-

1. *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded*, 653 F.2d 732 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3352 (U.S. Oct. 20, 1981)(No. 81-752).

2. *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3404 (U.S. Nov. 6, 1981)(No. 81-867).

3. A listing of 49 census challenges appears in *Carey v. Klutznick*, 653 F.2d 732, 735 n.10 (2d Cir. 1981). Of these, a suit challenging inclusion of illegal aliens in the census had been appealed to the Supreme Court. *Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge court), *appeal dismissed*, 447 U.S. 918 (1980), *aff'd per curiam*, No. 80-1246 (D.C. Cir. Nov. 6, 1980), *cert. denied*, 101 S. Ct. 1697 (1981) [hereinafter cited as *FAIR v. Klutznick*]. In addition, the New York and Detroit suits reached the Supreme Court after the trial courts had enjoined release of certain census figures pending the adjustment of undercounts. *Klutznick v. Young*, No. A-533 (U.S., stay granted Dec. 24, 1980), *Klutznick v. Carey*, 449 U.S. 1068 (stay granted 1980). Finally, in 1981 the Court granted certiorari in two cases involving the release of census data. *Shapiro v. Klutznick*, No. 80-2638 (D.N.J. Aug. 29, 1980), *aff'd mem.*, 636 F.2d 1210 (3d Cir.), *stay granted*, 101 S.Ct. 779 (1980), *cert. granted sub nom. Baldrige [sic] v. Shapiro*, 101 S. Ct. 2015 (1981); *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980), *rev'd*, 644 F.2d 844 (10th Cir.), *cert. granted sub nom. McNichols v. Baldrige [sic]*, 101 S. Ct. 3079 (1981).

ment cases and the wide-ranging congressional decisions to appropriate federal funds through population-based formulas.

Considering the importance of the public values threatened by census undercounts, it is not surprising that the courts first hearing the merits of the undercount suits generally ruled in the challengers' favor. Even so, by the fall of 1981 not one census statistic had been changed, nor had any major suit remotely approached a successful conclusion. This turnabout resulted from unceasing Census Bureau opposition, and a series of appellate court rulings that appeared to eliminate any chances the plaintiffs might have had for success.

At first, these appellate rulings are puzzling; their stated rationales are simply too unconvincing. As the problems involved in remedying census undercounts become more apparent, however, an ironic explanation arises for the appellate court rulings. The courts faced the possibility that no method of undercount adjustment could ultimately be defended, either in statistical theory or in constitutional doctrine. Given this situation, it seems a plausible hypothesis that the courts rejected the census challenges simply because they could find no viable remedy for the grievances presented.

This Note thus presents a vivid illustration of how the recognition of legal rights sometimes may depend wholly upon the efficacy of awarding relief. Parts I and II survey the 1980 census challenges and explore whether the 1980 litigants presented sound grievances. Part III argues that the 1980 census challengers may have failed because the reviewing courts could envision no feasible remedies for their injuries, and not because the challengers presented flawed legal and constitutional arguments. Finally, part IV criticizes the courts for dismissing the census challenges without confronting or acknowledging the gravity of the constitutional injuries threatened by census undercounts.

I. SURVEY OF THE CENSUS CHALLENGES

Undercounts have been customary from the very beginning of the census. In the nation's first census in 1790, a large undercount was suspected,⁴ and by 1970 the number of uncounted had

4. Special Committee on Empirical Data in Legal Decision Making, *The Undercount of the Census*, 36 REC. ASS'N BAR CITY N.Y. 23-24 (1981) [hereinafter cited as N.Y. BAR REPORT].

reached 4.5 million.⁵ As the April 1, 1980, census date approached, even the Census Bureau acknowledged that it would likely miss many people,⁶ prompting both houses of Congress to begin hearings on the causes and effects of the possible undercount.⁷

In these hearings, many observers anticipated that state and local officials would "challenge the Census in a thousand reasonable and unreasonable ways"⁸ in order to safeguard government funding. To forestall these challenges, the Bureau was advised to adjust the final 1980 figures to incorporate its own estimates of uncounted people.⁹ The Bureau, however, refused to take a position on the issue — an approach that seemed vindicated when the first of the 1980 challenges, seeking to exclude illegal aliens from the census, was dismissed for lack of standing.¹⁰ Indeed, no challenge to the agency had survived and gone to trial in previous years.¹¹ But in the summer of 1980, plaintiffs attacking cen-

5. Although the official 1970 undercount estimate was originally 5.3 million, the Bureau adjusted this estimate downward on the basis of data gained in the 1980 census. Compare 45 Fed. Reg. 82,872, 82,880-82 (1980) [hereinafter cited as *Federal Register Statement*], with BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REP., SERIES P-23, NO. 65, DEVELOPMENTAL ESTIMATES OF THE COVERAGE OF THE POPULATION OF STATES IN THE 1970 CENSUS: DEMOGRAPHIC ANALYSIS 12 (1977) [hereinafter cited as 1977 CENSUS REPORT].

6. See note 102 and accompanying text *infra*.

7. E.g., 1980 Decennial Census: Hearings Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 Senate Hearings]; *The Census Undercount Problem: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Governmental Operations*, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 House Hearings].

8. 1979 Senate Hearings, *supra* note 7, at 349 (statement of Nathan Keyfitz).

9. See, e.g., *id.* at 352-56; *id.* at 268-71 (remarks of Harold Goldstein).

10. FAIR v. Klutznick, *supra* note 3. This Note uses the term "illegal aliens," following the nearly universal practice of courts, commentators, and newspapers in discussing the census cases. The term is not intended to be pejorative; many aliens entered the United States illegally, but have now resided long enough to secure legal status, if they had the education and confidence in public authorities to obtain necessary documents.

11. The only previously reported decision holding against the Census Bureau was *City of Camden v. Plotkin*, 466 F. Supp. 44 (D.N.J. 1978), in which plaintiffs survived a motion to dismiss but did not go to trial. Other earlier challenges were rejected because either the Bureau was found to have sufficiently reasonable administrative policies, e.g., *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971); *Confederacion de la Raza Unida v. Brown*, 345 F. Supp. 909 (N.D. Cal. 1972); *United States v. Little*, 321 F. Supp. 388 (D. Del. 1971); *Prieto v. Stans*, 321 F. Supp. 420 (N.D. Cal. 1970); *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066 (D.D.C. 1970); *Quon v. Stans*, 309 F. Supp. 604 (N.D. Cal. 1970); *City of East Chicago v. Stans*, No. 70H156 (N.D. Ind. Oct. 21, 1970), or the alleged injuries were deemed too speculative, e.g., *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972); *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds*, 360 F.2d 505 (D.C. Cir. 1966). See generally Note, *Numbers that Count: The Law and Policy of Population Statistics Used in Formula Grant Allocation Programs*, 48 GEO. WASH. L. REV. 229, 245 (1980) (concluding

sus undercounts in Detroit, and later in New York, surprised the agency by surviving motions to dismiss,¹² and suddenly the courts were flooded with challenges patterned after these two suits.

A. *The Detroit Case: Young v. Klutznick*

The seeds of the Detroit case were sown in November 1979, when a Wayne State University law professor, Robert Sedler, argued before a congressional committee that failure to adjust for census undercounts would abridge the Constitution.¹³ Sedler noted that the Supreme Court's reapportionment cases clearly required congressional districting to be based strictly on population. Because the constitutional function of the census was to produce an accurate basis for apportioning legislators,¹⁴ he reasoned, it followed that any known inaccuracies would be constitutionally impermissible.

Sedler's theory applied particularly well to cities like Detroit, where members of large minority populations have tended historically to be uncounted more often than members of white populations.¹⁵ Because of these disproportionate undercounts, congressional districts with large minority populations are likely to contain many more people than districts with fewer minority residents. These imbalances thus tend to dilute the voting rights of the minority groups and consequently would seem to be for-

with approval, prior to the 1980 census suits, that the Bureau appeared "well insulated from legal attacks on its exercise of discretion in gathering and reporting data").

12. *Young v. Klutznick*, No. 80-71330 (E.D. Mich., motion to dismiss denied May 29, 1980); *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y.), *aff'd*, 637 F.2d 834 (2d Cir. 1980).

13. *Oversight Hearings on the 1980 Census, Part XIII: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 26-36 (1979) (testimony of Robert A. Sedler).

14. The Constitution as originally enacted provided:

Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. CONST. art. I, § 2, cl. 3. The fourteenth amendment repealed the initial sentence by providing: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2.

15. For example, the Bureau has estimated that it missed 6.9% of the nation's minority populations in the 1970 census, as opposed to 1.9% of the nation's white residents. 1977 CENSUS REPORT, *supra* note 5, at 97-98.

bidden by the Supreme Court's reapportionment decisions.¹⁶

Hoping to use this theory to force the Census Bureau to include undercount estimates in its final 1980 figures, plaintiffs filed suit in *Young v. Klutznick*,¹⁷ alleging that failure to adjust would cause voting rights injuries and the city's loss of federal funds. Unexpectedly, they survived the Bureau's motion to dismiss and went on to a sweeping trial victory on their voting rights claim.¹⁸ Judge Horace Gilmore declared it "to be the right of every person within the United States of America on April 1, 1980, to be counted in the census."¹⁹ Thus, he enjoined the

16. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

The claim that undercounts could dilute voting rights had been made previously in *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066 (D.D.C. 1970), but was effective only in establishing that plaintiffs had alleged a sufficient injury to support standing. When the court turned to consideration of whether plaintiffs had made a showing of irreparable harm adequate to obtain relief, it inexplicably ignored the troublesome problem of voting rights injuries and denied plaintiffs' motion for a preliminary injunction. Thereafter, some observers have perceived this sort of alleged injury as insignificant. See, e.g., Note, *supra* note 11, at 245 ("The weight of any given individual's vote surely will not be diminished by more than a trivial fraction as a result of underenumeration.").

17. *Young v. Klutznick*, No. 80-71330 (E.D. Mich., motion to dismiss denied May 29, 1980), 497 F. Supp. 1318 (E.D. Mich. 1980), *stay granted*, No. A-533 (U.S. Dec. 24, 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3404 (U.S. Nov. 6, 1981) (No. 81-867).

18. The plaintiffs' loss-of-funding claim had been previously disposed of in the pre-trial order denying the motion to dismiss. The court's analysis of this claim comprised one sentence in the closing discussion, and appeared to rely on the reasoning in *FAIR v. Klutznick*, *supra* note 3. *Young v. Klutznick*, No. 80-71330, slip op. at 17, (E.D. Mich. May 29, 1980). *But see* note 85 *infra*.

19. 497 F. Supp. at 1319. Judge Gilmore's declaration of a "right to be counted," however, was unnecessary — the plaintiffs had only sought to establish their rights to be counted in the same proportion as other groups. Such a claim, which might be called a "right to be counted equally," would be cognizable as a method of ensuring that one's vote was accorded equal weight. See *Reynolds v. Sims*, 377 U.S. 533, 576 (1964) (the equal protection clause guarantees the right of each voter to "have his vote weighted equally with those of all other citizens").

Indeed, it appears that there is no independent "right to be counted." See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) (acknowledging that requiring apportionment according to parity of "census people" may be misleading, because it is the injury to voters that the cases are intended to address). See also *Confederacion de la Raza Unida v. Brown*, 345 F. Supp. 909, 910 (N.D. Cal. 1972) ("Plaintiffs do not contend, and correctly so, that they have an absolute right to be counted"); *Quon v. Stans*, 309 F. Supp. 604, 606 (N.D. Cal. 1970); Note, *supra* note 11, at 236 n.59, 242 (1980).

Despite this authority, however, Judge Gilmore's declaration of a "right to be counted" deserves further mention. In situations other than voting rights cases, it might well be appropriate to recognize a "right to be counted" but not a "right to be counted equally." For example, children and convicted felons have no right to have their votes counted equally, because they cannot vote. But it may be that they could assert a right to be counted. Otherwise, federal funds would be allocated without reference to their needs, and legislators would be apportioned to districts without reference either to where they

Bureau from releasing its unadjusted population figures and

lived or to whether they had special interests that needed to be represented in the government.

Concerns such as these have led some to suggest something akin to a "right to be counted." A three-judge federal district court panel, for example, recently argued that a suit to exclude illegal aliens from the census probably would have been unsuccessful if the court had proceeded to the merits. While the court certainly understood that illegal aliens could not vote and therefore would have no rights "to be counted equally," nonetheless it found recognition among the drafters of both article I and the fourteenth amendment "that the 'non-voting classes' have a vital interest in the conduct of Government." "According to James Madison, the apportionment was to be 'founded on the aggregate number of inhabitants' of each state. . . . The Framers must have been aware that this choice of words would include women, bound servants, convicts, [and] the insane. . . ." *FAIR v. Klutznick*, *supra* note 3, at 576.

Nor was it implausible, as argued in *FAIR v. Klutznick*, that nonvoting groups might have a right to be counted because of their "vital interest" in the conduct of government. The Supreme Court has recognized that groups with special interests may legitimately try to influence legislative districting to protect their interests. See *United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977) (declaring it "permissible for a state, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts . . . in which they will be in the majority.") Indeed, in one special case the Court has even allowed groups to complain when their interests were imperiled by redistricting. See *Mahan v. Howell*, 410 U.S. 315 (1973) (affirming the rejection of a reapportionment plan that, among other infirmities, "discriminated" against one subgroup, military personnel, by diluting the strength of their votes).

But while the Court has allowed legislatures to consider the special interests of groups in devising apportionment plans, the Court has explicitly refrained from allowing groups to require that their interests be considered in shaping apportionment plans. Consequently, the Supreme Court has recently examined whether members of the polity can sue to insure that their interests are represented, and declared unambiguously that there is no right to be represented. *City of Mobile v. Bolden*, 446 U.S. 55, 75-80 (1980) (electoral system not unconstitutional if it provides for multimember districts that dilute the voting power of racial minorities). The danger the Court obviously seeks to avoid is having different groups come before the courts to argue that they are not being represented adequately in the political process. Those arguments would have to be given weight if the Court decided to view legislatures as representative bodies of special interests. But if that were to happen, it would surely prove impossible to sort out which groups existed as discrete units and deserved representation, and how individuals would be categorized among those groups.

Thus, the Court has accepted a theory that depicts legislatures as simply neutral delegations of the populace at large. Under this theory, citizens have no abstract rights to be represented, but merely rights as voters to have equal access for pressing their diverse interests. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964) ("It would defeat the principle solemnly embodied in the Great Compromise — equal representation in the House for equal numbers of people — . . . to give some voters a greater voice in choosing a representative than others.") (emphasis added).

The Court's resolution, however, of this fundamental issue in democratic theory may soon be challenged. As the *FAIR v. Klutznick* court appeared to recognize, the illegal alien influx may force the courts once again to face the distinction between a right to be counted and a right to be counted equally. Consider, for example, two hypothetical congressional districts in Texas, each having 500,000 inhabitants. District X has 150,000 registered voters and 200,000 illegal aliens. District Y has 300,000 registered voters and no illegal aliens. Could the registered voters of district Y claim that their votes are being diluted (by half) by the inclusion of illegal aliens in the census? See *Oversight Hearings*

ordered it to adjust its final figures "at the national, state, and sub-state level" to include uncounted segments of black and Hispanic populations. The agency was directed to use methods that would remain in the Bureau's discretion "so long as they are statistically defensible."²⁰

Following the trial, however, the Census Bureau protested that no "statistically defensible" methods existed for adjusting the population totals.²¹ Meanwhile, the Government filed an appeal with the Sixth Circuit and obtained a stay of Judge Gilmore's injunction from Justice Stewart.²² In June 1981, months after the Bureau's final totals had been released for congressional and state legislative reapportionment,²³ the Sixth Circuit reversed Judge Gilmore's order with a distressingly formalistic ruling.²⁴ Writing for a divided panel, Circuit Judge Merritt held that the plaintiffs lacked standing to sue because their alleged injury could not be traced to actions by the Bureau. Alternatively, the court held, the challenge was not ripe for adjudication because the Michigan legislature had not yet used the inaccurate census figures for reapportionment.

B. *The New York Case: Carey v. Klutznick*

Shortly after the Detroit case survived the Bureau's motion to dismiss,²⁵ a similar challenge was brought in New York against the Bureau, drawing on the underlying arguments advanced in *Young* but expanding their scope. In *Carey v. Klutznick*,²⁶ as in

on the 1980 Census, Part IV: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 6-20 (1979)(statement of State Sen. H. L. Richardson, noting that because of high numbers of illegal aliens in some California senatorial districts, but not others, 194,213 people in 1978 voted in one Los Angeles-area district, while only 73,998 voted in an adjoining district).

20. 497 F. Supp. at 1338-39.

21. Report of the United States Bureau of the Census in Response to the Judgment of the Court Entered September 30, 1980, at 3-4, filed October 27, 1980, and Second Report of the United States Bureau of the Census in Response to the Judgment of the Court Entered September 30, 1980, at 3-4, filed November 13, 1980, *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980).

22. *Klutznick v. Young*, No. A-533 (U.S., stay granted Dec. 24, 1980).

23. The deadlines for reporting the Census results were Jan. 1, 1981, for national results, and April 1, 1981, for results on approximately 39,000 sub-state areas. 13 U.S.C. §§ 141 (b), (c) (1976).

24. *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981); see notes 49-58 and accompanying text *infra*.

25. The Michigan court denied the Bureau's motion to dismiss on May 29, 1980. On August 8, 1980, the New York suit was filed.

26. 508 F. Supp. 404, and 508 F. Supp. 416 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 834 (2d

Young, the plaintiffs claimed that federal funds would be lost and congressional districting unconstitutionally imbalanced because of disproportionate undercounts. In addition, however, the *Carey* plaintiffs argued that so many poor people, blacks, Hispanics, and aliens would be uncounted that the state would lose at least one representative in Congress and one vote in the Electoral College. This considerably broadened the constitutional base for the *Carey* challenge by suggesting further violations of articles I²⁷ and II,²⁸ in addition to the article I theory developed in *Young*.

Because the *Carey* challenge required a demonstration that the undercount was sufficiently large to cost the state a representative, plaintiffs sought through discovery to obtain certain census records that Bureau officials acknowledged were "basic" for identifying census errors.²⁹ Despite a trial court order,³⁰ the Bureau insisted that the information sought was confidential under the Census Act and therefore privileged.³¹ After threaten-

Cir. 1980); 508 F. Supp. 420 (S.D.N.Y.), *stay granted*, 449 U.S. 1068 (1980), *rev'd and remanded*, 653 F.2d 732 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3352 (U.S. Oct. 20, 1981) (No. 81-752).

27. The Supreme Court ruled in *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." This ruling was grounded in article I of the Constitution, which provides that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . ." U.S. CONST. art. I, § 2, cl. 3.

Article I clearly requires that apportionment *among* states be based on actual population, as the New York plaintiffs argued in their suit. The Detroit claim, that voting strength *within* states cannot be diluted either, is consistent with *Wesberry*, *see notes* 71-77 and accompanying text *infra*, but not so obviously derived from article I. *See Wesberry v. Sanders*, 376 U.S. at 20 (Harlan, J., dissenting).

28. Article II of the Constitution provides that "Each state shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ." U.S. CONST. art. II, § 1, cl. 2. If New York is in fact "entitled" to an additional representative, the operation of the Electoral College using unadjusted figures is arguably unconstitutional.

29. In *Carey*, plaintiffs sought address registers and vacant housing lists to determine whether the Bureau had correctly included all people in given areas. The significance of this discovery request was underscored when the associate director of the Census Bureau "testified that the address register 'is the basic document controlling' the entire census process." Brief of Amici Curiae, *The State of New York, The City of New York, Governor Hugh L. Carey, Mayor Edward I. Koch, et al.* at 12, *Baldrige [sic] v. Shapiro, cert. granted*, 101 S. Ct. 2015 (1981); *McNichols v. Baldrige [sic], cert. granted*, 101 S. Ct. 3079 (1981) (cases consolidated by the Court for purposes of oral argument, August 28, 1981) [hereinafter cited as *Amici Brief*].

30. For a history of the Census Bureau's refusal to turn over the information covered by discovery order, *see id.* at 4-5. *See also Carey v. Klutznick*, 508 F. Supp. at 432.

31. The statute provides:

Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title —

ing to invoke contempt sanctions, federal District Judge Henry Werker finally entered an order precluding the Bureau from making any arguments at trial that the plaintiffs would have been able to challenge had they received the withheld documents.

Meanwhile, the Government once more had moved to dismiss the suit, as it had in *Young*, and again the trial court had denied the motion.³² This time, however, the Government took a direct appeal of the denial to the Second Circuit. In early December 1980, the Second Circuit unanimously upheld the trial court's findings of standing and justiciability.³³ A week later, District Judge Werker ruled for the plaintiffs at trial and enjoined the nationwide release of census figures until the Bureau had adjusted the population totals for New York City and New York State.³⁴

The Government succeeded again in obtaining a Supreme Court stay of the trial court injunction.³⁵ At the same time, the Bureau appealed once more to the Second Circuit. Six months later, a new panel of Second Circuit judges reversed and remanded for a new trial,³⁶ while suggesting that the judiciary should not be entertaining such cases at all.³⁷ In a perplexing

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence, or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. § 9(a) (1976). The Bureau argued that the statute extends confidentiality to "all information or data provided to the Census Bureau under the Act." *Carey v. Klutznick*, 653 F.2d 732, 740 (2d Cir. 1981) (Stewart, J., concurring).

32. *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980).

33. 637 F.2d 834 (2d Cir. 1980).

34. 508 F. Supp. at 433.

35. *Klutznick v. Carey*, 449 U.S. 1068 (stay granted 1980).

36. *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981).

37. The earlier Second Circuit panel had clearly taken the position that the judiciary should not be passive in this setting, as the later panel acknowledged. *Id.* at 737. Nonetheless, the later panel accompanied that acknowledgment with a citation, *id.*, to a report by a New York bar association committee, *see* note 4 *supra*, that had recommended judicial restraint. The unmistakable implication is that the later panel was simply reversing the earlier court's judgment.

opinion,³⁸ Circuit Judge Van Graafeiland ruled that the trial court should have included, as indispensable parties, other states who might be affected if New York were awarded another congressional representative. No other state had ever asked to intervene in the suit, however, nor was it clear what role such states might play upon retrial of the case.³⁹ As an alternative ground for its decision, the appellate panel held that Judge Werker's contempt sanction had been too broad, and that some of the documents he had ordered released were in fact privileged under the Census Act.⁴⁰

38. The court proposed four alternatives to the lower court's handling of the case, including (1) giving notice of the suit to other states, with any state "which felt that its interests were imperiled" being granted permission to intervene, (2) seeking multidistrict or coordinated proceedings, (3) staying the effect of its own decision pending review, and (4) substituting Bureau and congressional review for that of the court. 653 F.2d at 737-38.

These alternatives are puzzling for several reasons. First, Congress and the Bureau both had been aware of the undercount problem for years, but neither had acted directly to protect the plaintiffs' rights — and there was no reason to think either would. Second, all states surely had gained notice of the suit through the national news, but no state had sought to intervene. Third, the plaintiffs had sought to prove — and, according to the district court, had succeeded in proving — that the national undercount was disproportionately worse in New York. While that does not completely undercut the desirability of multidistrict litigation, as a practical matter the proceedings in Maryland to date, *see* note 40 *infra*, have not borne fruit, and should not be relied upon to redress legitimate grievances. Finally, the stay suggested by the Second Circuit had in fact been granted.

39. Moreover, "[t]he district court order provided that any appropriate relief should be formulated by the Census Bureau in a manner that safeguards the absent interested parties." 653 F.2d at 746 (Stewart, J., concurring).

40. The court's holding on the question of compelled disclosure focused on an issue already before the Supreme Court through two additional cases in which the Bureau, maintaining its broad resistance to the census challenges, had rebuffed challengers seeking census records for their undercount suits. In *Baldrige v. Shapiro*, both the New Jersey federal district court and the Third Circuit had rejected the Bureau's argument that address lists used in delivering census forms were exempt under the Freedom of Information Act ("FOIA"). *Shapiro v. Klutznick*, No. 80-2638 (D.N.J. Aug. 29, 1980), *aff'd mem.*, 636 F.2d 1210 (3d Cir.), *stay granted*, 101 S. Ct. 779 (1980), *cert. granted sub nom. Baldrige [sic] v. Shapiro*, 101 S. Ct. 2015 (1981). In *McNichols v. Baldrige*, plaintiffs were thwarted in their efforts to obtain vacant housing lists from the Census Bureau through discovery. *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980), *rev'd*, 644 F.2d 844 (10th Cir.), *cert. granted sub nom. McNichols v. Baldrige [sic]*, 101 S. Ct. 3079 (1981). The Tenth Circuit accepted the Bureau's argument that the Census Act made such information confidential and immune from discovery. 644 F.2d 844 (10th Cir. 1981). Writing for unanimous court, Circuit Judge McKay interpreted both the history of the Census Act and the broad language of its confidentiality provisions as indicating clear congressional intent to make census information immune from discovery. "The government has promised its citizens that census information will be kept confidential," Judge McKay declared. "In these times when confidence in the government's resolve to keep its promises to its citizens is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises."

The *Shapiro* and *McNichols* cases represented the fourth and fifth census-related suits to reach the Supreme Court, when added to the Detroit and New York cases and

Thus, by the fall of 1981, the census challenges had been completely ineffective in preventing the use of unadjusted census totals for reapportionment or government funding. Ironically, no court had ruled against the underlying constitutional theories of the census challenges. But in every case, nonetheless, the Bureau or the courts had produced a procedural or statutory bar to full relief.

II. THE LEGAL ISSUES RAISED IN THE CENSUS CHALLENGES

Aside from resisting discovery of census information, the Bureau countered the 1980 undercount suits by arguing that the suits were neither justiciable nor meritorious. The claims of non-justiciability were phrased somewhat differently from case to case, but in general the Bureau argued that (1) the plaintiffs lacked standing, (2) the challenges were not ripe for adjudication, and (3) the Bureau's actions were either entirely immune from judicial review, or subject to review only where arbitrary, capricious, or contrary to law. Next, in arguing against the merits of the suits, the Bureau directly contested the claims that the Constitution required an accurate census for either congressional or state legislative redistricting. Moreover, the Bureau denied that it was obligated to produce an accurate census for government funding purposes. When all of these objections are examined closely, their weaknesses make it strikingly clear that the Bureau's successes must have been produced by more than their arguments alone.

A. *Justiciability of the Census Challenges*

1. *Standing*— The Bureau's argument that the census chal-

the early case that had sought exclusion of illegal aliens from the census. In addition, literally dozens of other suits had swamped the federal courts in the wake of the initial Detroit rulings. See *Carey v. Klutznick*, 653 F.2d at 735 n.10. An undercount suit had been brought in Philadelphia, for example, and had survived a motion to dismiss by the Bureau which was virtually identical to the unsuccessful motions in *Young and Carey, City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued*, No. 80-2785 (3d Cir. April 24, 1981), despite the trial court's emphatically negative first impression expressed while denying a motion for a preliminary injunction. *City of Philadelphia v. Klutznick*, 503 F. Supp. 659, 661 (E.D. Pa. 1980). The Philadelphia suit was derailed, however, when the Bureau moved to have it and eight other undercount suits consolidated by the Judicial Panel on Multidistrict Litigation, which transferred the cases to Maryland where they promptly became stalled in discovery. *In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J.P.M.D.L. 1981).

lengers lacked standing drew upon the Supreme Court's two principal requirements for recognizing standing: that a possibility exist of "a 'distinct and palpable injur[y],' to the plaintiffs," and that there be "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct."⁴¹ The Bureau argued first that both the vote dilution and funding loss claims were too speculative to meet the "distinct and palpable" standard. Second, the Bureau contended that no "fairly traceable" connection could be drawn between the agency's actions in compiling the census, and any injuries that might arise when legislatures misallocated funds or misapportioned representatives.

In regard to the first standing requirement, the census challengers had little difficulty showing a "distinct and palpable injury." Though the effects of undercounts on government funding may be unclear,⁴² there is little doubt that voting strength can be diluted substantially by disproportionate undercounts. In the *Young* litigation, for example, it was predicted that in the 1980 census the Bureau was again likely to miss a significantly higher percentage of blacks than whites. Clearly this would be more harmful to Detroit, a city estimated to be sixty-percent black,

41. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 74 (1978) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41 (1976). These two requirements fulfill the condition that "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152 (1970). In addition, for there to be standing to challenge administrative action under § 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), it is necessary that "the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The Bureau generally did not challenge whether the voting rights or rights-to-government-funding claims satisfied this condition.

42. Federal funds are distributed in a variety of ways, including by population, by per capita income, by school-age population, and by number of unemployed. The Census Bureau analyzed the effects of undercount adjustments on funding in 1977 and concluded: "Correction of the population figures by the coverage estimates developed in this study makes little difference in the funds allocated to most states, but for some states the change in funds would be substantial." 1977 CENSUS REPORT, *supra* note 5, at 106.

Interestingly, the Bureau added that there likely would be as many states — if not more — that lost funds as gained them through the corrections. *Id.* In fact, the Bureau's study ironically suggests that both Michigan and New York, as well as other Northeastern states, would lose money if undercount adjustments were made. *Id.* at 111-12. *But see* note 87 *infra*. For example, some federal programs distribute funds on the basis of recent loss of population, so that one researcher has argued that undercount adjustments actually could decrease funding for a city like Trenton, N.J. *See* Blum, *Census and Sensibilities*, *NEW REPUBLIC*, Feb. 14, 1981, at 15. *See also* *Cities Reportedly Overstate Effect of '80 Census on Aid*, *N.Y. Times*, Oct. 3, 1980, at 12, col. 1; notes 85-88 and accompanying text *infra*.

than other areas of Michigan.⁴³ Similarly, in the *Carey* litigation trial evidence established that the Bureau's mismanagement of the census process in New York had possibly cost the state a congressional representative. That result too would clearly constitute a cognizable injury to voting rights — even if New York were the only state suffering such injury.

The second standing requirement, that a “fairly traceable” causal connection exist between the plaintiffs' injuries and the Bureau's actions, proved to be the more difficult hurdle for the 1980 challengers. This requirement serves two broad functions: it allows courts to dismiss claims against parties who should not be held responsible for the plaintiff's injuries, and it ensures “that the exercise of the Court's remedial powers would redress the claimed injuries.”⁴⁴ Unfortunately, the Bureau focused its

43. Brief for Appellee, *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981).

44. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). The requirement applies to three separate situations where courts may decline to recognize standing. The first is when the complained-of conduct simply cannot be said to have produced the alleged injury. *See, e.g.*, *Wimpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980) (use of federal funds by campaign committee of incumbent President not responsible for rival candidate's failure to gain support). The second is when the courts could consider one party responsible for the indirect effects of its actions, but that is not considered fair. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs denied standing because their inability to secure inexpensive housing was due far more to the economics of the housing market than to the town's zoning practices).

The third and final situation in which courts may deny standing is when courts recognize that even if one party “caused” the complained-of injury, ordering a change in the conduct may not succeed in preventing the injury. *See, e.g.*, *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980) (even if air-travel agreement implemented by Secretary of State was invalid because it required Senate ratification, no showing that court invalidation would enable plaintiffs to obtain more amenable terms than those of the current agreement).

Determining whether a case falls within one of the first two situations is often notoriously difficult, *see* note 46 *infra*, for it will often be an inscrutable question whether a particular act may be said even indirectly to have “caused” injury. The third situation presents a wholly different issue, because even if the court orders the challenged conduct changed, the injury will not necessarily be relieved. To avoid these situations, courts can turn to the Supreme Court's requirement that there be a “substantial likelihood” that the relief requested will redress the injury claimed, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. at 74, although cases rejecting standing on this basis are surprisingly uncommon.

While no Supreme Court case has yet rejected standing because the requested relief will be pointless, several lower court cases have denied standing on this basis. *See, e.g.*, *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514 (1st Cir. 1979); *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (en banc). Other courts faced with such standing issues should follow the lead of these cases and simply acknowledge that they lack the power to bring about relief, rather than engaging in Herculean efforts to rationalize, using article III, their refusal to hear the merits. “As with many other areas of justiciability concern, in short, it would be better to forgo resort to article III and supposed limits on judicial power in favor of direct attention to the substantive and

defense on the first function, arguing that it should not be held responsible for "causing" the alleged funding and vote-dilution injuries. Instead, at least by early spring 1981, the Bureau should have argued that no "substantial likelihood" remained that the relief requested would redress the injury claimed.⁴⁵

The Bureau's argument that it did not "cause" the alleged injuries was intrinsically flawed, for such a defense depends entirely on how "cause" is defined.⁴⁶ Defining "cause" sometimes will be uncontroversial, because the connection between the acts and the injuries is fairly direct (or alternatively, entirely non-existent). For example, if the Bureau fails to count 750,000 to 900,000 people in New York State, it is beyond question that the agency will directly "cause" the state to lose a representative in Congress.⁴⁷

But on other occasions, a legal finding of causation is not so straightforward, requiring a court to wrestle with how far it will go in tying together actions and injuries. For example, in *Young* the plaintiffs argued that it was the census undercounts that would "cause" Detroit residents to lose voting strength, even though the Michigan legislature ultimately was responsible for deciding what population data to use in apportionment. Similarly, plaintiffs in both *Young* and *Carey* argued that the Bureau would "cause" the loss of government funds, although Congress has ultimate responsibility for allocating federal monies. In either case, the real decision the courts had to make was whether

remedial problems raised by the particular case." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 112 (Cum. Supp. 1980); see note 45 *infra*.

45. The Sixth Circuit, however, explicitly rejected this basis for its decision. 652 F.2d at 625 n.8. But while the Sixth Circuit's basis for denying standing was extremely questionable, see note 54 *infra*, direct attention to the remedial problems could have led to a more defensible decision not to award relief, on grounds of impracticality. See pts. III B, III C *infra*.

46. See generally J. VINING, LEGAL IDENTITY 139-44 (1978) (arguing that use of concepts such as foreseeability in standing discussions are conclusory in that they are "governed by the determinants of the decision to hold the defendant responsible"; moreover, "any attempts to distinguish between causal chains as such . . . may be expected to fail, for the ways in which outcomes are brought about in the human world are still mysterious"). For criticism of the causation doctrines adopted by the *Young* court, see note 54 *infra*.

47. The Bureau originally argued that New York could not establish any injury because plaintiffs historically have been unable to prove that the complex formula used for apportioning representatives among states was functioning improperly. See *FAIR v. Klutznick*, *supra* note 3; *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972); *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds*, 360 F.2d 505 (D.C. Cir. 1966). For a thorough explanation of the formula, see Schmeckebier, *The Method of Equal Proportions*, 17 L. & CONTEMP. PROBS. 302 (1952). In fact, however, the challengers in *Carey* appear to have established that enough people were missed to make the loss of a representative quite possible.

they would choose to connect up the Bureau's actions and the plaintiffs' injuries.⁴⁸

In their rulings, therefore, the courts could not contend plausibly that the Bureau's actions were unconnected with the plaintiffs' injuries, because Congress and virtually all states indeed do use census figures for apportionment and fund allocation. Instead, the courts could decide only that the Bureau's role was too indirect — as the Sixth Circuit ultimately held.⁴⁹ But as dissenting Sixth Circuit Judge Keith argued, such a view of causation was disingenuous, given the realities of the apportionment process, as well as excessively restrictive in view of traditional legal doctrines.⁵⁰

48. The courts should have been particularly receptive to the census challenges, not just because of the realities of apportionment itself, *see* notes 52-53 and accompanying text *infra*, or the general state of legal doctrine concerning causation, *see* note 54 *infra*, but also for three reasons rooted in the defendant's posture as a public agency and the particular subject matter of the suits.

First, because the defendant was a government agency, the remedies sought were different from those generally at issue in private litigation. Holding a defendant liable or blameworthy in private litigation means that the defendant will be required to give up assets or position. By contrast, in the census cases the plaintiffs sought only to prevent future errors in funding and apportionment, not to prejudice the defendant's interests or to "restructure the past." J. VINING, *supra* note 46, at 142. Thus, the courts had less reason to be concerned about being unfair in granting the requested relief.

Second, because the census challenges relied on allegations that relatively clear constitutional doctrines were being violated, they resembled many suits against public agencies that involve challenges framed around independent texts such as statutes or the Constitution. These independent texts represent pronouncements about wrongdoing developed by legislatures or the people as a whole, and not just the judiciary. Because the courts thus have independent support for their determinations, in cases like the census challenges the courts need not be as wary of manipulating the entire fault-finding process as they might be in common law tort cases, for example. Consequently, the courts can be less reticent in finding a defendant to be an "indirect cause" than they might be where they are ruling not only on whether a link existed to the wrong, but also whether a "wrong" even occurred in the first place. *Id.* at 142.

Finally, because the census cases involved efforts to protect uncontested constitutional values, the courts should have been especially willing to adjudicate the merits of the cases. Professor Fiss has suggested this argument in his analogous discussion of the judiciary's role in overseeing governmental bureaucracies. There he criticizes restrictive judicial policies like the adoption of the "tailoring principle — the insistence that the remedy must fit the violation." That principle, Fiss contends, suggests "that the relationship between remedy and violation is deductive or formal," which "gives us an impoverished notion of remedy." Instead, he argues, courts dealing with governmental agencies should assume as their responsibility "not to eliminate a 'violation' in the sense implied by the tailoring principle, but rather to remove the threat posed by the organization to the constitutional values." Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46-48 (1979).

49. Specifically, the court declined to hold the Bureau responsible because "[a]n independent third party, the Michigan legislature, would play a necessary role in determining the effects of the census upon plaintiffs." *Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981).

50. 652 F.2d at 627, 629 (Keith, J., dissenting). Judge Keith came to the *Young* chal-

First, the Sixth Circuit was disingenuous when it dismissed the contention that the Bureau had "caused" a dilution of voting strength. The court concluded that "having found no legal compulsion that the state act in a certain way, we may not predict what decisions the state legislature will, in fact, make."⁵¹ Yet not only do nearly all states use census data for legislative and congressional apportionment,⁵² but a number of them — including Michigan — are *required* to do so by their state constitutions.⁵³ Even more important, assuming that any states would have the resources to set up their own census operations, it seems extremely unlikely that many would want to adopt figures other than those released by the Bureau. Disputes about which numbers to use would only become another area for controversy in the ferocious battles that already accompany reapportionment.

Second, as Judge Keith contended at length, the Sixth Circuit's restrictive view of standing was not compelled by recent Supreme Court decisions. In fact, the court's analysis contrasted sharply with theories of causation generally applied in such legal contexts as torts, for example.⁵⁴

lenge well aware of the realities of the Michigan legislature's reapportionment procedures. In 1972, following the nation's last census, then-District Judge Keith was forced to choose a congressional districting plan for the state, after the Michigan legislature proved unable — despite court prodding and time extensions — to agree on its own arrangement. *Dunnell v. Austin*, 344 F. Supp. 210 (E.D. Mich. 1972).

51. 652 F.2d at 625.

52. The district court in *Young* declared that "[a]ll of the 50 states are required to use census data for the purpose of congressional districting," 497 F. Supp. at 1325. While this statement is not accurate, *see* note 70 *infra*, nonetheless, most states do use census data for congressional and legislative districting, and generally there is a legal presumption in favor of the authority of census figures — at least for reapportioning congressional districts.

53. Both Michigan and New York have constitutional provisions requiring that federal census data be used for state legislative apportionment. MICH. CONST. art. 4, §§ 2, 3; N.Y. CONST. art. III, § 4.

54. 652 F.2d at 629-33 (Keith, J., dissenting). The Sixth Circuit reasoned that the Michigan legislature was an "intervening actor," so that the Bureau was not an appropriate defendant. *Id.* at 625. The majority relied on *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), in which the Supreme Court had said that "the 'case or controversy' limitation of art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42.

The Sixth Circuit's approach had earlier been adopted in *Borough of Bethel Park v. Stans*, 449 F.2d 575, 582 n.4 (3d Cir. 1971), and *FAIR v. Klutznick*, *supra* note 3, at 570 n.11. *See also* Note, *Democracy and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 859 (1981).

But *Simon* is distinguishable from *Young*, as Judge Keith pointed out. 652 F.2d at 633 (Keith, J., dissenting). *See also* *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 671

2. *Ripeness*— Three trial courts and the Second Circuit⁵⁵ rejected the Bureau's argument that the undercount cases were not ripe for adjudication in 1980, but in *Young v. Klutznick* the Sixth Circuit found ripeness to be an alternative ground for dismissing the Detroit suit. The Sixth Circuit reasoned that "the Michigan state legislature has not yet expressed its reaction to the census enumeration," and that "heightened public sensitivity to the problems of census undercounts makes past reliance on census figures an uncertain predictor of future legislative action."⁵⁶

The Sixth Circuit's argument hardly seems plausible; as discussed above, there is every reason to expect that Michigan will use unadjusted census data for apportionment.⁵⁷ Every state in the nation now uses census figures for congressional apportionment, and no evidence in *Young* suggested that the Michigan legislature has either the interest or the resources to develop alternative population figures. Therefore, rather than rely on a ripeness argument that was demonstrably unrealistic, the Sixth Circuit should have recognized the obvious inapplicability of the

(E.D. Pa. 1980). In *Simon*, the Supreme Court denied standing to plaintiffs who argued that reductions in free hospital services to poor people had been caused by an Internal Revenue Service decision to loosen its interpretation of a statutory provision about tax-exempt status. The Court said that it was "purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 43. In *Young*, on the other hand, the Bureau's role in producing the challengers' injury was far more than "purely speculative." Rather, it was clear that the plaintiffs' alleged injury could not occur "but for" the causal effect of the Bureau's undercounting. See *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980), *aff'g* 508 F. Supp. 404 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 671 (E.D. Pa. 1980); *City of Camden v. Plotkin*, 466 F. Supp. 44, 47-51 (D.N.J. 1978). See also *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (applying an exceedingly relaxed causation standard: plaintiffs had standing because if they were successful in challenging the constitutionality of the Price-Anderson Act, which allows nuclear power plants to limit their liability, a disputed plant might not be built and the plaintiffs' injuries might not occur); *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975) ("The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing."); *United States v. SCRAP*, 412 U.S. 669, 688 (1973) (standing is not to be denied simply because there may be an "attenuated line of causation to the eventual injury").

Finally, see *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* 93 (1978) ("The causation requirement is thus highly manipulable [and] poses a serious risk that, in the guise of causality analysis, federal courts will engage in an unprincipled effort to screen from their dockets claims which they substantively disfavor.").

55. *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), *aff'g* 508 F. Supp. 404 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Young v. Klutznick*, No. 80-71330 (E.D. Mich., motion to dismiss denied May 29, 1980).

56. 652 F.2d at 626.

57. See notes 52-53 and accompanying text *supra*.

two concerns that underlie the Supreme Court's ripeness doctrine. The Bureau's public declaration that it would not adjust for undercounts meant that the courts could not have been "entangling themselves in abstract disagreements over administrative policies" by entertaining the census challenges. Moreover, with the census already compiled and released in ostensibly final form, there was no need "to protect the agency from judicial interference until an administrative decision ha[d] been formalized and its effects felt in a concrete way."⁵⁸ Indeed, the timing of the census challenges seems to have been particularly appropriate. Given the levels of judicial review encountered by the challenges, and given the time lags that were anticipated for developing adequate relief, the Sixth Circuit's rationale is especially unconvincing.

3. *Reviewability of agency actions*— The final major justiciability argument advanced by the Bureau was that its management of the 1980 census was immune from judicial review, or at most subject to reversal only if the agency had acted in a way that was arbitrary, capricious, or otherwise contrary to law. The courts rejected the former claim of absolute immunity out-of-hand, with the district court in *Carey*, for example, noting that without convincing evidence of congressional intent it would not infer restrictions on judicial review of agency actions.⁵⁹

A more troublesome issue arose with the Bureau's latter claim that judicial review under the Administrative Procedure Act ("APA") permitted reversal only where the agency's actions had been arbitrary or contrary to law.⁶⁰ This standard had not prevented the trial court in *Young* from concluding that the Bureau's decision not to adjust for undercounts violated the Constitution and was therefore contrary to law.⁶¹ Nor had the standard prevented the trial court in *Carey* from finding the Bureau's management of the New York census process to be sufficiently flawed that adjustments in the count were required.⁶²

58. The cited concerns are drawn from the Supreme Court's classic discussion of the ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.") (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

59. 508 F. Supp. at 413.

60. Section 706 provides that a reviewing court may "hold unlawful and set aside . . . agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976).

61. 497 F. Supp. at 1335-36.

62. 508 F. Supp. at 429-31. The census is conducted in essentially two stages. First,

But a problem did develop when the Bureau sought to insulate its determination — arguably well within its field of expertise and beyond the competence of the courts — that “statistically defensible” adjustments were “infeasible.”

Though deference to the determinations of expert agencies often is necessary,⁶³ to have deferred automatically to the Bureau on whether relief was “infeasible” obviously would have stalemated the census challenges. Ultimately, both the *Young*

the Bureau mails out questionnaires that must be completed and returned. Second, workers disperse throughout communities to clarify or obtain information where forms were filled out improperly or never returned. Errors that could produce an undercount may arise at both stages.

Problems in the first stage limited the successfulness of the mail-out, mail-back technique in New York, and drew heavy criticism from the *Carey* court. These included: (1) failure to distribute forms in languages other than English (though there are twenty languages spoken by 10,000 or more people in New York City, *1979 House Hearings, supra* note 7, at 11); (2) inadequate advertising to minority audiences; (3) use of commercial mailing lists that included only fragmentary coverage of low-income areas; and (4) poor mail delivery. As a result of these factors, while the “overall mail return rate for New York City was 72 percent[, i]n parts of the city the return rate was considerably lower, decreasing to only 48 percent in Bedford-Stuyvesant.” 508 F. Supp. at 425. Moreover, most of these factors had been anticipated well before the census, to little avail. See *1979 Senate Hearings, supra* note 7, at 211-12; *1979 House Hearings, supra* note 7, at 4.

Another set of factors acted to produce an undercount at the second stage of conducting the census, when census workers actually went out to gather information. These factors included administrative policies such as paying workers on a piece-rate system, instead of an hourly wage, a practice found directly responsible for “the high turnover rate among enumerators as well as . . . [the] falsification of questionnaires,” 508 F. Supp. at 431, that occurred when workers would invent answers for assigned census forms rather than verify information directly in distant or unsafe neighborhoods.

Finally, aside from these administrative factors, both the *Young* and *Carey* trial courts noted a number of characteristics that made counting black and Hispanic areas more difficult. These factors included “greater antagonism or resistance to the government,” increased numbers of people who are harder to locate and count, and “lower income leading to . . . lawful or unlawful conversion of housing units to accommodate increased numbers of people.” *Young v. Klutznick*, 497 F. Supp. at 1327-28. See also the colloquy between Senator John Glenn of Ohio and Mayor Marion Barry, Jr., of Washington, D.C.:

SENATOR GLENN: The people in the minority areas are the ones that are most affected by the revenue funds that come out of this thing. It has to be important to impress on them that every single person get counted. If they don't, they are hurting themselves

MAYOR BARRY: Mr. Chairman, I don't know how we can do it . . . most of the people who are uncounted are also the ones you mentioned need the help the most. Their philosophy or feeling is one of survival on a day-to-day basis. They don't worry about what comes through the mail or filling out forms and understanding it. They just throw it in the trash can or use it for paper to start a fire

1979 Senate Hearings, supra note 7, at 224-25.

63. See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 283-84 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (“Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”).

and *Carey* trial courts chose to override the Bureau's judgment, and each court ordered the agency to develop adjustment remedies despite the Bureau's reservations. This approach seems reasonable, especially because the agency had reached its determination only after it was enmeshed in litigation, when its motives may well have been mixed.⁶⁴ Nonetheless, the orders to develop adjustments failed to solve the ultimate problem: what to do if the Bureau's judgment of infeasibility had been sound.⁶⁵

B. *The Merits of the Challengers' Arguments*

1. *Dilution of voting rights*— Although in reality the undercount suits were brought largely to safeguard government funding, in the courtrooms the plaintiffs focused principally on the weakening of voting rights caused by undercounts. This was the argument that distinguished the 1980 challenges from previ-

64. The argument had been raised previously in *City of Newark v. Blumenthal*, 457 F. Supp. 30, 34 (D.D.C. 1978), that defensible undercount adjustments were not feasible. See Note, *supra* note 11, at 251-52 nn.182-84. But the point was not argued seriously in the initial 1980 challenges. In fact, throughout the undercount challenges, the Bureau's policymakers — who were admittedly under intense political pressures — acted in a way that regrettably invites skepticism about their motives in finding adjustments to be statistically infeasible. The background for the agency's conclusion is worth recalling.

Well before the actual census, the Bureau had been aware of the likelihood of challenges to census undercounts, given Congress' 1972 decision to distribute revenue-sharing funds according to population. See *1979 House Hearings, supra* note 7, at 16 (statement of Census Bureau Acting Dir. Robert L. Hagan); *id.* at 18 (remarks of Census Bureau Assoc. Dir. Daniel B. Levine). Nonetheless, despite widespread recommendations from expert observers, see note 9 *supra*, the Bureau tentatively decided not to adjust its figures. At least two reasons have been cited for this decision. First, the Bureau was concerned about losing its credibility as an apolitical agency if it adjusted figures. See *1979 Senate Hearings, supra* note 7, at 365-67 (statement of Bryant Robey). Second, the Bureau wanted to ensure that people would take seriously their responsibility of responding to the census. See *1979 House Hearings, supra* note 7, at 26 (remarks of Census Bureau Assoc. Dir. Daniel B. Levine).

Having adopted this policy, the Bureau met the first of the 1980 undercount challenges with a demonstrably implausible argument that the Constitution forbade adjustments. See notes 89-90 and accompanying text *infra*. Once the agency began losing in the courts, it adopted a defiant posture toward releasing court-ordered discovery evidence. See note 40 *supra*. See also *Census Director Defends Refusal to Release Data*, N.Y. Times, Nov. 1, 1980, at 27, col. 6. Additionally, the agency generally showed poor faith in performing and reporting on mandated remedial studies that undercut its position. See, e.g., Letter from *Carey* attorney Robert S. Rifkind to District Judge Werker (Jan. 27, 1981) (on file with the *Journal of Law Reform*). As a final step, before adopting the position that "statistically defensible" adjustments were infeasible, the Bureau announced to the public that there in fact had been no "measured undercount." This characterization was misleading, however, as the Bureau had reason to know. See notes 103-04 and accompanying text *infra*.

65. See pt. III *infra*.

ous suits;⁶⁶ unlike the claims made in earlier years, and unlike the funding question, the vote-dilution argument was firmly rooted in the Constitution, making the 1980 challenges far more difficult to dismiss.

The vote-dilution argument actually comprised three different claims that varied markedly in force. The first was that a large undercount would affect voters in different *states* differently; the second was that undercounts would affect voters in different *congressional districts* within a state differently; and the third was that voters in different state *legislative districts* would be affected differently.

The first claim was advanced in New York, where plaintiffs argued that the immense undercount would cost the state a congressional representative. This argument, which implied a complete denial of the right to vote, drew support from the literal language of article I and suggested a clear violation of the Electoral College arrangement.⁶⁷

The second claim was advanced in *Young*, where it was argued that congressional districting within Michigan would be impermissibly skewed by disproportionate undercounting of minority areas. This claim, although ultimately faithful to the spirit of the Supreme Court's reapportionment cases, was vulnerable for a host of reasons. In particular, the Constitution imposes no explicit requirement upon the states that they apportion congressional representatives among districts.⁶⁸ Similarly, the Constitution does not obligate the Census Bureau to compile intrastate data, or to make it available for districting purposes.⁶⁹ And finally, even if states do apportion their representatives, and even if the Bureau does compile intrastate data, the states are

66. See notes 4-7, 11 and accompanying text *supra*. See generally Note, *supra* note 54.

67. See notes 27-28 *supra*.

68. Until 1842 there was no requirement — constitutional or statutory — that states distribute their representatives among districts. Most states elected representatives from the state as a whole. See Celler, *Congressional Apportionment — Past, Present, and Future*, 17 L. & CONTEMP. PROBS. 268, 272-75 (1952). Districting is now a federal statutory requirement, 2 U.S.C. § 2 (1976), but the Supreme Court has found it not to be required by the Constitution. *Wood v. Broom*, 287 U.S. 1 (1933); *accord*, *Norton v. Campbell*, 359 F.2d 608 (10th Cir. 1966), *cert. denied*, 385 U.S. 839 (1967). Especially in recent years, however, the Supreme Court often has discouraged the use of multimember districts. Nonetheless, the Court has often commented that multimember districts are not prohibited by the Constitution. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 65-66 (1980), and cases cited therein.

69. The sub-state population figures that states use to apportion their representatives are compiled by the Census Bureau only because of *statutory* requirement, 13 U.S.C. § 141(c)(1977), not constitutional mandate.

not required by the Constitution to use that intrastate data in drawing up their districting plans.⁷⁰ Given these factors, it would seem hard to argue that the Bureau has a constitutional obligation to adjust the data for undercounts when it does supply intrastate data to the states.

Though that argument may be flawed in its logic, it is convincing in the context of Supreme Court decisions. In *Wesberry v. Sanders*⁷¹ and succeeding congressional reapportionment cases,⁷² the Supreme Court mandated that states must "make a good-faith effort to achieve precise mathematical equality"⁷³ in the size of voting districts when promulgating congressional districting plans. In a 1973 case,⁷⁴ for example, the Supreme Court rejected a congressional districting plan in Texas that involved average deviations of less than one percent between districts,⁷⁵ substituting in its place a plan in which districts only varied in size from 466,930 to 466,234 people.⁷⁶ Once the Census Bureau is

70. Contrary to the district court's finding in *Young* that census data must be used for districting plans, 497 F. Supp. at 1333, the Supreme Court has suggested that the Constitution might tolerate apportionment based, for example, on totals of eligible voters. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-35 (1969) ("There may be a question whether distribution of Congressional seats except according to total population can ever be permissible under Art. I, § 2. But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable . . ."). See also *Mahan v. Howell*, 410 U.S. 315 (1973); *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971); *Shalvoy v. Curran*, 393 F.2d 55 (2d Cir. 1968); *Dixon v. Hassler*, 412 F. Supp. 1036 (W.D. Tenn. 1976), *aff'd sub nom. Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976); *Exon v. Tiemann*, 279 F. Supp. 603 (D. Neb. 1967); *Meeks v. Avery*, 251 F. Supp. 245 (D. Kan. 1966). In each of these cases, the courts authorized or mandated use of non-census population data for reapportionment. Generally, however, the courts have presumed that census figures are the most suitable. See, e.g., *Dixon v. Hassler*, 412 F. Supp. at 1040 ("we believe that the standard to be applied is that the decennial census figures will be controlling unless there is 'clear, cogent and convincing evidence' that they are no longer valid and that other figures are valid").

71. 376 U.S. 1 (1964).

72. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973).

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

74. *White v. Weiser*, 412 U.S. 783 (1973).

75. The districts in the rejected plan ranged from 477,856 to 458,581 people, with an average deviation of 3,421 people (or 0.745%).

76. See also *Dunnell v. Austin*, 344 F. Supp. 210 (E.D. Mich. 1972), discussed in note 50 *supra*, in which a Michigan district court adopted a plan apportioning that state's 19 congressional districts so precisely that no district varied by more than 8 people from the "ideal district size" of 467,543.

The astounding mathematical precision mandated in these apportionment cases is paradoxical given the acknowledged census undercounts. If Detroit was actually undercounted by 67,000 people in 1970, as the *Young* plaintiffs estimated, Brief for Plaintiffs-Appellees at 3, 652 F.2d 617 (6th Cir. 1981), it may be wondered why the *Dunnell* court should have strained to ensure that Michigan's districts be precisely equal. The Supreme Court has recognized this paradox. See *Gaffney v. Cummings*, 412 U.S. 735, 745-46 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 539 (1969) (Fortas, J., concurring); *Wells v.*

considered as a matter of law to be causing reapportionment inaccuracies, as the Bureau unquestionably is doing as a matter of fact, then it makes sense to recognize the Bureau's constitutional duty to correct these inaccuracies.⁷⁷

The third and final claim based on voting-rights dilution arose in connection with state legislative districts. As in the case of congressional districts, the Detroit and New York plaintiffs argued that unadjusted census figures must be corrected if they produce impermissible deviations in district sizes. This argument is even more vulnerable than the congressional districting argument, because the Supreme Court has expressly allowed states to use non-population-based data, including lists of eligible voters, for apportionment of legislative districts.⁷⁸ In addition, the Court has been more tolerant of any resulting deviations when legislative rather than congressional districts are involved.⁷⁹

Rockefeller, 394 U.S. 542, 555 (1969) (White, J., concurring) ("Today's decisions . . . require precise adherence to admittedly inexact census figures.").

An even greater irony of the undercount suits is presented by the prospect that relief will not be awarded in those cases simply because it is administratively infeasible. This is ironic because the rights that are being asserted in those suits — which stem from the premise that mathematical precision in apportionment is mandatory — originated because mathematical rigidity promised to provide an easily administrable solution to a political problem that seemed impossibly complicated. See, e.g., Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 210 (1964) ("by its exclusive focus on bare numbers, the Court may have transformed one of the most intricate, fascinating, and elusive problems of democracy into a simple exercise of applying elementary arithmetic to census data").

77. See notes 46-48 and accompanying text *supra*.

78. See *Burns v. Richardson*, 384 U.S. 73, 91-92 (1966).

The Court has left open the question whether non-population-based data can be used for congressional districting. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-35 (1969). The distinction between the standards applied to congressional districting plans and those applied to state legislative plans stems from the difference between the constitutional provisions used to justify judicial supervision in these two areas. The Supreme Court built its "one person-one vote" doctrines for congressional apportionment upon the language of article I of the Constitution. See note 27 *supra*. Because that provision refers only to distribution for the House of Representatives, the Court turned to the equal protection clause when it developed similar equal districting doctrines for state and local districting plans. In *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), the Court interpreted the equal protection clause to require that state apportionment statutes not have unequal effects on the voting rights of citizens.

79. At first, it was unclear whether the Supreme Court would apply the same standard of precise mathematical equality to legislative districting as it was requiring with congressional districting. But in 1973, with several justices from the earlier voting rights cases off the bench, the Supreme Court ruled that population disparities of as much as 16.4% would be tolerated if justified by legitimate state policy considerations. See *Mahan v. Howell*, 410 U.S. 315 (1973). These considerations included allowing the representation of political subdivisions as legislative units, maintaining compact and contiguous districts, and preserving natural or historical boundary lines. See *Swann v. Adams*, 385

Even with regard to legislative apportionment, however, there remains a strong argument for requiring census adjustments if they are possible. Given that virtually all states use census data for apportionment, once again the real issue is whether the Bureau should be considered responsible in legal terms for the inaccuracies it produces in fact. If so, the deviations that result often may be large enough to exceed even the Supreme Court's relaxed standards for legislative districts.⁸⁰

2. *Loss of government funds*— The role of undercounts in depriving areas of government funds was largely ignored once the census cases reached the courtrooms.⁸¹ Both the district court in *Young*⁸² and the District of Columbia panel in the illegal aliens case⁸³ adopted a restrictive view of causation by ruling that the plaintiffs could seek relief on their funding claims only from Congress or state legislatures.⁸⁴ The New York courts, on the other hand, again took a more realistic stance, recognizing that Census Bureau figures often were responsible for significant funding losses.⁸⁵ While the effect of an undercount on funding

U.S. 440, 444 (1967).

Later that year, the Court declared that even districting plans that contained unexplained 9.9% deviations were permissible, because those deviations were "relatively minor." *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

80. For example, if the undercount in New York City was in fact as high as 517,000 to 650,000 people, *Carey v. Klutznick*, 508 F. Supp. at 428, then because that undercount would have occurred with disproportionate strength in certain racial and socioeconomic neighborhoods, any legislative districting in New York City based on census figures might well involve disparities of at least the 9.9% "de minimus" deviations sanctioned in *White v. Regester*, 412 U.S. 755 (1973), and *Gaffney v. Cummings*, 412 U.S. 735 (1973). *Cf. City's Population Loss Is Put at One Million; 13.8% Drop Since '70*, N.Y. Times, Sept. 26, 1980, at 1, col. 2 (preliminary census figures show New York City's population at 6,808,370 people). *But see Note, supra* note 65, at 861 ("It would be surprising if any plaintiffs were able to show that an undercount violated these more relaxed standards.")

Moreover, it is conceivable that no deviations rooted in correctable undercounts should be tolerated. The Court has specifically noted that it will not accept any deviations that reflect "any taint of arbitrariness or discrimination." *Roman v. Sincoc*, 377 U.S. 695, 710 (1964), *quoted in Swann v. Adams*, 385 U.S. 440, at 444 (1967). Failure to correct census figures suggests the arbitrary and indefensible dilution of voting rights — especially those belonging to poor people and minorities — about which the Court has often been particularly concerned.

81. There is no discussion of this issue, for example, in the New York trial opinion, even though the Second Circuit explicitly affirmed as a valid cause of action plaintiffs' claims that they would lose funding. *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980).

82. *Young v. Klutznick*, No. 71330 (E.D. Mich., motion to dismiss denied May 29, 1980); *see note 18 supra*.

83. *FAIR v. Klutznick, supra* note 3, at 569 n.9.

84. "While Congress may well be distributing federal monies on the basis of undifferentiated population figures, that is its choice. . . . Congress may choose any method of allocation it prefers, subject only to the constraints of the rational relationship test." *Id.*

85. *See notes 46 & 54 supra*. If the Bureau's mismanagement and undercount policies

may vary from year to year and area to area,⁸⁶ the Second Circuit noted that undercounts of the New York area can easily produce multimillion dollar losses.⁸⁷ This result is especially unfortunate because many of these funding programs have been designed to benefit the very groups who tend to be missed.⁸⁸ Thus, both in constitutional theory and in political reality the arguments for census adjustments seem strongly persuasive.

III. THE PROBLEM OF REMEDY IN THE CENSUS SUITS

In the initial census skirmishes, the one issue that virtually never surfaced was whether "statistically defensible" undercount adjustments were even possible. The issue was overlooked because the Bureau devoted most of its efforts toward arguing that the Constitution actually barred census adjustments.⁸⁹ That

produced a misallocation of funds, that should have provided a sufficient causal link to support standing. See *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), *aff'g* 508 F. Supp. 404 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *City of Camden v. Plotkin*, 466 F. Supp. 44 (D.N.J. 1978).

One commentator has contended that "there is no [convincing] argument that congressional intent is being violated by a failure to prepare or use adjusted data" because "Congress has recognized the undercounting problem but, with one exception, has not ordered the use or production of adjusted statistics." Note, *supra* note 65, at 863. That inference, if true, would seriously weaken the funding claim by suggesting that the census challengers may have no cognizable right to greater funding. *But see* 13 U.S.C. §§ 141(e), 181(a), 183(a) (1976) (authorizing or requiring development of updated population data during the intervals between censuses for use, among other purposes, in distributing government benefits). See *generally* Note, *supra* note 11 (describing the considerable congressional concern expressed over the last decade with the problem of undercounts).

86. See note 42 *supra*.

87. *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980). In 1979, Queens Borough President Donald R. Manes testified before a congressional committee that in the previous year, for example, New York City had lost \$32 million alone from the four major federal funding programs because of failure to include 750,000 illegal aliens in area population totals. 1979 *House Hearings*, *supra* note 7, at 28. *But see* note 42 *supra*.

88. Census statistics now provide the basis for distributing federal funds under more than one hundred programs. See SUBCOMM. ON CENSUS AND POPULATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 95TH CONG., 2D SESS., THE USE OF POPULATION DATA IN FEDERAL ASSISTANCE PROGRAMS (Comm. Print 1978).

89. The constitutional provision authorizing the census is found in article I: "The actual Enumeration shall be made within three Years after the first Meeting . . . and within every subsequent Term of ten Years. . . ." U.S. CONST. art. I, § 2, cl. 3. The Bureau argued that, in requiring an "actual Enumeration," the Constitution prohibited statistical adjustments. But both the *Young* and *Carey* courts, after reviewing debates from the Constitutional Convention of 1789, as well as the Supreme Court's opinions in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), concluded that the Constitution required accuracy in the census data, not any particular method.

claim was patently untenable, however, because the Bureau itself had adjusted the 1970 census to add 4.9 million of the 10.2 million it estimated were uncounted.⁹⁰

The Bureau's arguments during the early census battles may have reflected undue confidence;⁹¹ in any event, the agency clearly seemed unprepared for the Detroit trial opinion enjoining release of final figures until national adjustments had been made. Within weeks, the agency began arguing seriously in post-trial reports⁹² and in testimony at the New York trial that such adjustments were infeasible. But the trial courts, perhaps skeptical about the Bureau's motives in making this argument,⁹³ continued to order it to develop adjustment plans whose precise features were left to the agency's discretion. While the courts' skepticism may have been understandable, their orders did not solve the dilemma of what relief they should give if the Bureau was right. Ultimately, this seems to have been the case; apparently there were no "statistically defensible" adjustment techniques.

A. *Standard Adjustment Methods*⁹⁴

The following sections evaluate the three principal adjustment methods the Bureau could have used. Each method has its strengths, but all have daunting weaknesses. The paradoxical outcome for the census challengers may well have been that although their rights were acknowledged at trial, ultimately no remedy was available to vindicate those rights.

90. See *Young v. Klutznick*, 497 F. Supp. at 1329. While the Bureau decided not to adjust its final figures to include 5.3 million people that it estimated were uncounted, the agency nevertheless had "imputed" the existence of certain groups of people, including some "when the Bureau did not have hard evidence . . . that they even existed in the quantity imputed." Given these imputations in 1970, the district court in *Young* found it "astonishing" that the Bureau would argue in 1980 that such adjustments were unconstitutional. *Id.*

The Bureau currently estimates that it only missed 4.5 million people in 1970 — not including the 4.9 million it missed but "imputed." *Federal Register Statement*, *supra* note 5.

91. See note 11 and accompanying text *supra*.

92. See note 21 and accompanying text *supra*. See also *Census Bureau Seeks to Appeal Court Decision Invalidating 1980 Census*, N.Y. Times, Oct. 4, 1980, at 6, col. 1 ("Mr. Barabba [the head of the Census Bureau] said that it was important to appeal promptly because the judge in the Detroit case, Horace W. Gilmore, 'has, in essence, changed the rules of the ballgame.'").

93. See note 64 *supra*.

94. This section relies extensively on *N.Y. Bar Report*, *supra* note 4; 1977 CENSUS REPORT, *supra* note 5; and *Federal Register Statement*, *supra* note 5.

1. *Demographic records*— Under the “simple synthetic method,” the Census Bureau first estimates separate cross-sections of the nation’s population, using demographic data such as birth, death, immigration, and Medicare records. After the census has been taken, the Bureau then compares the estimates derived from these demographic sources with the actual headcounts and adjusts the final figures accordingly. If estimates indicate that the Bureau undercounted blacks by seven percent, for example, the final figures for blacks can be adjusted upwardly by that amount. By “synthesizing” the estimates with the raw data, the Bureau can quickly produce adjusted totals of greater accuracy than either the estimates or the actual headcount.

The synthetic method, although speedy, presents two major problems. First, its estimates may not be accurate for making precise adjustments in legislative or congressional districts. It may have been true, for example, that in 1980, as in 1970, nearly thirteen percent of black males nationwide between twenty-five and thirty-four years of age were uncounted.⁹⁵ But that information has only limited usefulness, because it seems likely that the undercount of black men varied markedly between the inner city of Detroit and its well-to-do suburb of Southfield.⁹⁶

Second, the synthetic method is only as accurate as the demographic records used to make the initial estimates. Thus, the Bureau may *overestimate* the population — when, for example, it uses records that include the same people twice under variant spellings of their names. In addition, the Bureau may be left with *flatly inconsistent estimates* — because, for instance, Hispanics may list themselves in demographic data as “white” or “of other races” at different times.⁹⁷ And most important, the Bureau may *underestimate* the population—when it not only lacks demographic records on illegal aliens, for example, but also never counts them, and thus never knows they were missed.

2. *Matching population lists*— Instead of using demographic data, the Bureau alternatively can match the names on census lists with those on other contemporaneous lists — from Medicare, Internal Revenue Service, or welfare files, for example — and develop estimates about the extent to which different

95. 1977 CENSUS REPORT, *supra* note 5, at 43.

96. See Note, *supra* note 11, at 251-52 nn.183-84 (doubts about the validity of the synthetic method are “appropriate,” especially when local adjustments are sought).

97 N.Y. BAR REPORT, *supra* note 4, at 28 (“Pretests for the 1980 census showed that as many as 40 percent of the respondents of Hispanic origin characterized themselves as ‘other races,’ while in the demographic data Hispanics are characterized as ‘whites.’”).

groups in the population were missed. This method is more precise than the synthetic method because it involves matching actual names. Thus, the inconsistency problems of the synthetic method that arise in counting Hispanics, for instance, would be largely remedied. Furthermore, this approach enables lists to be corrected when people have been included in the wrong areas or made up by census workers.⁹⁸

Matching studies, however, do not provide a perfect solution to the undercount adjustment problem. Such studies require massive lists of names if precise local estimates are to be made. They are thus very time-consuming, because they require adjusters to work name-by-name and investigate discrepancies "in the field." Furthermore, matching studies rarely count illegal aliens, unless the aliens have signed up for social services. Finally, because these studies require the extensive use of detailed individual information, they generate considerable anxiety and litigation over the secrecy of census files.⁹⁹

3. *Composite statistical techniques*— In addition to straightforward use of demographic data or matching lists to make adjustments, the Bureau has also designed a host of approaches that combine these simpler methods to produce increasingly sophisticated estimates. For example, one composite technique involves adjusting demographic estimates of men of certain ages by match study ratios based on estimates of the undercounting of women. The latter estimates are considered more reliable than estimates of the undercounting of men. Other composite techniques are used to produce improved estimates of Hispanic populations, for example, or the more precise adjustments that statistical regression analysis can provide.

The two greatest problems of composite techniques are that they are predictably more time-consuming than the simpler methods, and they are not markedly more effective in estimating illegal aliens. These latter problems lie at the heart of the ulti-

98. See note 62 *supra*.

99. See note 40 *supra*. The confidentiality concerns were expressed poignantly during an exchange between Senator John Glenn and Reverend Riddick, chairman of an advisory committee on the black population for the Census Bureau:

SENATOR GLENN: [W]e were told the Census Bureau has a problem because some people don't want to be counted. Why don't they want to be counted? It is to their benefit to be counted.

REVEREND RIDDICK: [S]pying on people's lives and everything like that is a very real part of the existence they have and so they are very intimidated by the census.

Many people have the image of the census as Big Brother, you know, made manifest. . . .

1979 Senate Hearings, *supra* note 7, at 250.

mate impossibility of granting relief in the undercount cases.

B. The Delay Required in Making Adjustments

Not surprisingly, the most accurate and detailed undercount adjustments take the most time. For example, the Census Bureau has already released preliminary national estimates of the undercount of blacks, Hispanics, and people from other racial backgrounds. But the most reliable, most detailed state and local adjustments will not be available before 1984.¹⁰⁰

This timetable creates tremendously complex problems for courts trying to develop remedies. Simply in terms of reapportionment, and without trying to address loss-of-funding claims, there are the following dilemmas:

- Should courts require reapportionment only after several years, when the Bureau releases its best undercount estimates? Or should they act earlier, when the Bureau first releases its initial estimates based on less reliable statistics and methods?

- Should courts allow state reapportionment to proceed with figures that have not yet been adjusted, while requiring the use of any preliminary national corrections that are available (so that New York State, for example, might get an additional congressional representative)?

- Should courts have required reapportionment when the Bureau was scheduled to release its estimates for the largest cities and metropolitan areas in late 1981, and then require another reapportionment when the most detailed adjustments become available in 1983 or 1984?¹⁰¹

Faced with these bewildering riddles, it is understandable that the appellate courts in New York and Detroit declined to affirm the lower court rulings. The appellate courts simply were

100. Although national estimates of the undercount of blacks, Hispanics, and other races derived from demographic records and 1978 match studies were released in February, 1981, the most precise national estimates will not be available until mid-1983. Preliminary undercount estimates for states, using a match study conducted at the time of the 1980 census, were to be available by the fall of 1981. Again, however, the best composite state estimates will not be available until late 1983 or early 1984. Finally, preliminary estimates for major cities and Standard Metropolitan Statistical Areas were to be available in the fall of 1981. The best estimates, however, involving experimental composite techniques and regression analysis, will not be available until 1984.

101. A final source of controversy is presented by the 1985 mid-decennial census, which Congress has authorized for the first time in the nation's history. See 13 U.S.C. § 141(d) (1976). While Congress has made clear that this census is not to be used for congressional reapportionment, *id.* § 141(e)(2), it has provided that funding may be adjusted in accordance with the new figures, *id.* § 141(e)(1).

stymied by the same dilemmas that had prevented either Congress or the executive branch from resolving the undercount problems themselves.

C. *The Illegal Alien Issues*

In the end, the greatest irony of the 1980 census challenges was that no official undercount occurred at all. In the Detroit trial in August 1980, Bureau Director Barabba testified that his agency estimated the nation's population at 227 million and had expected to count 222 million.¹⁰² But by December 1980, the Bureau had in fact counted 226 million people; after adjusting faulty assumptions about immigration in the 1970's, it announced there was no "measured undercount."¹⁰³

The Bureau's statements, however, were more than a little misleading.¹⁰⁴ There clearly was a significant undercount in the population of legal residents, as observers had expected. The complication was that the Bureau had compensated by counting several million illegal aliens. Because few of those aliens had been included in the Bureau's estimates, for few had birth, Medicare, or IRS records, a new panoply of adjustment problems arose. The counting of illegal aliens raised problems at the outset because the Bureau had virtually no way of knowing which illegal aliens had been counted or where they were — or for that matter, which illegal aliens had *not* been counted or where *they* were.¹⁰⁵ Furthermore, the inclusion of unanticipated

102. 497 F. Supp. at 1330.

103. *Census Bureau Bars Shift in '80 Figures/Director Says He Is Convinced the 226 Million Total Counted Is Close to Real Population*, N.Y. Times, Dec. 12, 1980, at 17, col. 1; *Federal Register Statement*, *supra* note 5 (statement of Bureau's decision not to adjust the undercount, published in the Dec. 16, 1980 Federal Register).

104. Though the Bureau was fully candid in its official statements, *see Federal Register Statement*, *supra* note 5, there is a strong suggestion that the Bureau knew it was being deceptive in adopting the artifice of a "measured undercount." *See Plaintiffs' Memorandum on the Tape Recordings of the October 16-17, 1980, Conference at the Bureau of the Census at 5-7, Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980). And to some extent, the Bureau was successful; among those fooled were the *New York Times* editorial staff. *See Clouds Over the Census*, N.Y. Times, Dec. 31, 1980, at 14, col. 1 ("This year, the estimate was 226 million and the actual count appears to be very close to just that figure; the undercount is likely to be small.")

Other observers were not misled — the *Carey* trial court, for example, referred dryly to the phrase "measured undercount" as "a term of recent vintage." 508 F. Supp. at 427. And some others were amused. *See, e.g., Blum, supra* note 42, at 15 ("Senator George Aiken secured his place in history by proposing that we end the Vietnam War by simply declaring victory and going home. The US Census Bureau, mired in a similar quagmire late last year, adopted the Aiken strategy. And it worked. . . .")

105. "No estimate of the size of the illegal alien population exists which is accepted

aliens created the related problem of not knowing whether the states involved in the undercount suits were actually the ones most affected by the national undercount. Some observers have suggested, for example, that the states most injured by the national undercount were not, with the exception of New York, the northeastern states, but rather the sunbelt states of Texas, Arizona, and California where most illegal aliens live.¹⁰⁶

Most important, the census process highlighted the problem of whether illegal aliens should be counted at all. This question was raised before one court in the last months before the 1980 census, but that court refused to recognize standing — perhaps because the question was so complex that the court thought it deserved greater attention.¹⁰⁷ The court explicitly noted that its disposition did not foreclose the raising of the question again, and the serious constitutional ramifications certainly suggest that the issue will be addressed in the future.¹⁰⁸

IV. PROBLEMS UNRESOLVED BY THE 1980 CENSUS CASES

Although the Bureau had not focused in the Detroit or New York trials on the staggering complexities of the illegal alien issues, their appearance must have been the final blow to any prospects the census challengers had. With the emergence of these problems, the chances of obtaining any coherent relief — already diminished by the uncertainties of knowing which adjustments to make — dropped to zero.

At the same time, these complexities of framing a remedy put the appellate courts in a difficult position. Despite the agency's failure to raise the defense of infeasibility earlier in the proceedings, the courts could hardly have required the Bureau to go through the motions of adjusting the census. Given this situa-

as accurate or based on hard data." *FAIR v. Klutznick*, *supra* note 3, at 567 n.6. Though estimates of the nation's illegal alien population extend as high as 8 to 12 million, *1979 House Hearings*, *supra* note 7, at 22-23, the Bureau's best estimate is 3.5 to 5 million. *FAIR v. Klutznick*, *supra* note 3, at 567 n.6. The New York City Planning Commission has estimated that city's illegal alien population to be at minimum 750,000, though the Bureau disputes that figure. See *1979 House Hearings*, *supra* note 7, at 23, 27-28.

106. Blum, *supra* note 42, at 15-16 ("The people who should be complaining most haven't raised the slightest objection to the 1980 Census. They are the mayors of cities like Austin, Texas, and Tucson, Arizona, where illegal aliens flowed during the last decade without attracting the Census Bureau's notice.").

107. *FAIR v. Klutznick*, *supra* note 3, at 577.

108. See, e.g., note 19 *supra*, exploring the distinction between a right to have one's vote count, which illegal aliens do not have, and a right to be represented or to be counted, which illegal aliens may have.

tion, the courts should have acknowledged openly that the cases had changed since their inception and now defied relief. Unfortunately, the courts seem to have chosen a different approach. After each wrestling with the trial court opinions for a half a year or more,¹⁰⁹ the Sixth and Second Circuits dismissed the suits on grounds that seem remarkably disingenuous.

At least two important benefits would have resulted from the former, more candid resolution of the undercount cases. First, the courts could have avoided manipulating the law of their jurisdictions in a way that encourages cynicism today, while tying the hands of courts tomorrow who may be determined to restrain their decisions within intelligible precedent. The Sixth Circuit's decision on standing grounds was especially unfortunate, for example, and can only befoul an already murky doctrinal area.

Had the appellate rulings been based on impracticality grounds, a second advantage would have been that the courts could have taken the opportunity to address the public values at stake in the census cases.¹¹⁰ If one principal role of the judiciary, particularly in public law cases, is to give meaning to constitutional values,¹¹¹ then the courts missed an important opportunity to fulfill their responsibilities. They should have pointed out that undercounts not only directly threaten rights to participate in the democratic decisionmaking process, but also frustrate a societal goal of redistributing resources to the nation's minority and underprivileged residents.¹¹² In declining to affirm

109. Despite the considerable time pressures created by the reapportionment process, it took nearly seven months for the Second Circuit to rule in *Carey*, and nearly nine months for the Sixth Circuit to rule in *Young*. Interestingly, the appellate rulings came within days of each other. See *Court Overturns Census Decision in New York Suit*, N.Y. Times, June 13, 1981, at 27, col. 1; *Appeals Court Upsets Order to Raise Census Total*, N.Y. Times, June 16, 1981, at 16, col. 1.

110. The Sixth Circuit was candid about its approach. See *Young v. Klutznick*, 652 F.2d 617, 625 n.8 (6th Cir. 1981) ("Obviously there are many unjust conditions and occurrences, natural and man-made, which federal courts do not have the strength, wisdom or power to remedy in a timely manner. When there is no realistic remedy available, there is no point in deciding the merits.").

111. See Fiss, *supra* note 48, at 9 ("The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals."). See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972).

112. See J.H. ELY, *DEMOCRACY AND DISTRUST* (1980). The voting rights injuries complained of in the census challenges raise concerns that are "what judicial review ought preeminently to be about." *Id.* at 117. On one hand, the challenges were well-rooted in specific clauses of the Constitution's text. See notes 27-28 and accompanying text *supra*.

these values, the courts instead sent the message that those values — at least in this context — perhaps are not so important after all.¹¹³

Yet while the 1980 census may have receded into history, the challenges heard in 1980 are likely to surface again as the nation's first mid-decennial census approaches in 1985.¹¹⁴ The creation of a mid-decennial census only underscores the nation's increasing concern that its resources and political power be distributed equally. Given these awesome tasks, it is hard to justify failure to make every reasonable effort toward developing population figures that are as complete as possible.

Unfortunately, the 1980 undercount challenges made clear that the Census Bureau's management techniques bear watching with some concern. At the same time, however, it seems likely that wholly accurate headcounts will never be possible.¹¹⁵ Indeed, some have argued that the nation already wastes vast sums in its quixotic attempts to eliminate census undercounts.¹¹⁶ The suggestion that undercounts can be corrected seems to be a

In addition, the merits of the census suits are further underscored when one examines the Constitution's purposes. For even if, as Professor Ely contends, "judicial review under the Constitution's open-ended provisions" is bounded "by insisting that it can appropriately concern itself only with questions of participation [in the democratic process], and not with the substantive merits of the political choice under attack," *id.* at 181, nonetheless, "denial of the vote seems the quintessential stoppage" of the democratic process, *id.* at 117.

113. See Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220 (1978) ("as a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of judicial enforcement"). The census challenges powerfully illustrate Professor Sager's suggestion that where constitutional norms are not enforced for institutional reasons, as opposed to analytical difficulties, the "underenforced" norms should still be expressed and "understood to be legally valid to their full conceptual limits." *Id.* at 1221. Not only should the societal values raised in the census cases be championed generally for future constitutional adjudication, but the Bureau also should be made aware of the necessity that it make all possible efforts to reduce undercounts.

Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins. At a minimum, the obligation of public officials in this context, as in any other, is one of "best efforts" to avoid unconstitutional conduct.

Id. at 1227.

114. See note 101 *supra*.

115. See generally note 62 *supra*. For many, the census is intimidating or intrusive, see note 99 *supra*, and is likely to be resisted. For others, the census may simply be irrelevant, and unlikely to gain their cooperation. See, e.g., the exchange between Senator Glenn and Mayor Barry, *supra* note 62.

116. See 1979 House Hearings, *supra* note 7, at 2 (statement of Arnold P. Jones, Assoc. Dir., Gen. Gov. Div., GAO) ("Our [November] 1978 report shows that the Bureau plans to spend more than four times the \$222 million it spent for the 1970 census, without assurance that there will be an appreciable improvement in the data collected.").

false hope; at least with the present technology, reliable methods of adjusting for undercounts do not appear to exist.

Thus, Congress and the courts should be alert to the dangers of simplistic or intensely politicized "corrections." The integrity of the census process should not be at the mercy of which cities care or can afford to sue,¹¹⁷ which minorities are able to establish injury, or which federal judges have the courage — or the foolhardiness — to confront the census bureaucracy.

Even so, however, the methods used by Congress and the courts to protect the census process should be undisguised; the public values threatened by undercounts deserve to be addressed openly. That these values cannot always be defended in an unruly world may be unfortunate. But rather than tailoring the rights of the census challengers by judicial manipulation,¹¹⁸ or finding clever ways to change the subject when their concerns are raised, the courts will better protect societal values if they frankly acknowledge that the claims must go unvindicated because no relief can be granted.

CONCLUSION

Significant census undercounts, such as those occurring in 1980, threaten to undermine the nation's commitment to distribute political power and resources equally. But undercounts cannot be easily adjusted, and the 1980 suits to correct the census foundered on doubts that effective relief could be obtained. On one hand, these issues will diminish in coming years, as im-

117. See *New York Finding 'Pro Bono' Costly*, N.Y. Times, Dec. 3, 1981, at 20, col. 1 (midw. ed.) (describing \$384,245 bill for "out of pocket" expenses submitted to New York City in the *Carey* suit by its pro bono counsel, a Wall Street firm. "Had the firm actually charged the city for the hours its attorneys put in to date, it maintains, the bill would be \$1,865,132.").

118. Professor Fiss, discussing how courts may shape remedies in cases involving public bureaucracies so as to ensure that the relief can be implemented and enforced, writes:

The remedy is, as we saw, a vitally important part of the meaning of the public value, and even if the remedy were all that were affected, all that were compromised, there would be reason to be concerned. But the truth of the matter is that the stakes are likely to be higher — the distortion will be felt in the realm of rights, too. Just as it is reasonable to assume that a judge wishes to be efficacious, it is also reasonable to assume that no judge is anxious to proclaim his impotence. He will strive to lessen the gap between declaration and actualization. He will tailor the right to fit the remedies.

Fiss, *supra* note 48, at 54-55 (footnote omitted); cf. note 76 *supra* (discussing how the Supreme Court framed the definition of injury in the reapportionment cases around how easily remedies could be administered and future litigation minimized).

proving technology and methods of conducting the census provide more complete results. But the difficulties that surfaced in 1980 in counting certain populations, especially the dilemmas surrounding the counting of illegal aliens, likely will persist and demand more responsive court attention in the future.

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