Distortion in the Census: America's Oldest Gerrymander?

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I. INTRODUCTION

In 1962, the Supreme Court entered the political thicket of redistricting to vindicate the principle of equal representation.[1] And in 1964, the Court established the bedrock principle that redistricting must be done "on a population basis."[2] This requirement—often dubbed the

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1. Baker v. Carr, 369 U.S. 186, 187–88 (1962).

2. Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) ("While it may not be possible to draw

"one person, one vote" principle—has shaped our politics ever since. It cabined some of the most egregious gerrymandering of the moment but also shifted much of modern gerrymandering to strategic line-drawing rather than simple malapportionment.

Nevertheless, this basic rule of American democracy is, of course, only as good as the underlying population data it relies on. Nearly all states rely on decennial Census Bureau total population data to redistrict.[3] But what happens when that data is not only imperfect (an inevitability) but also persistently biased in its imperfections?

In fact, the census, and accompanying apportionment, has consistently undercounted and distorted representation of minority communities throughout its history.[4] Indeed, the Founders enshrined in our Constitution that an enslaved person would count as "three fifths" of a person for purposes of apportionment.[5] This "compromise" not only dehumanized enslaved persons but also allowed the Southern states to accrue the benefits of additional representation based on a silenced and subjugated population of enslaved persons that the free Southern residents certainly did not meaningfully represent.

Section 2 of the Fourteenth Amendment explicitly repealed the three-fifths compromise. Nonetheless, the distortion of minority communities' representation has persisted in different forms. Decade after decade, the census disproportionately undercounts minority communities. This bias in the results is termed the "differential undercount."[6] Moreover, the census also miscounts incarcerated individuals in their

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congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

3. Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016).

4. *See infra* Parts III, VI. Throughout this Essay, the authors refer to minority voters and minority communities. By this terminology, we mean to refer to people and communities of color in the United States. While people of color are not always "minorities" in their local communities—indeed, they are often not—the legal doctrine often refers to minority voters and minority communities. Therefore, we repeat that terminology here for ease of reading.

5. U.S. CONST. art. 1, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV.

6. *See Coverage Measurement: Definitions*, U.S. CENSUS BUREAU, https://www.census.gov/coverage_measurement/definitions/ (last updated Mar. 26, 2012).

prison cells rather than their home communities.[7] This practice also disproportionately impacts minority representation. Despite these representational harms, there has been little to no remedy for that undercounting and miscounting in the redistricting context.

As the 2020 Census approaches, it threatens to both repeat the mistakes of the past and exacerbate them. Despite near unanimous opposition in the public comments, the Census Bureau has chosen to continue miscounting incarcerated individuals in their jail cells rather than in their home communities in 2020.[8] It is woefully underprepared to adequately count historically hard-to-count populations.[9] And the Secretary of Commerce has elected to add a citizenship question to the 2020 Census form despite overwhelming evidence that it will exacerbate undercounts in immigrant communities.[10] Much of the litigation and legal analysis on these matters is outside the right-to-vote and redistricting context—for example, claims under the Enumeration Clause[11] or the Administrative Procedures Act[12]—but the equal representation principle looms large over all of them.

This Essay aims to frame matters of systemic census data discrimination as another form of gerrymandering. It will place some of the current issues facing the 2020 Census in the context of the fundamental right to vote and to equal representation; discuss the pressing threats to those rights raised by the 2020 Census; and argue that the legal and redistricting community should no longer treat decennial census data as inviolate and neutral in the face of compelling evidence suggesting otherwise.

II. THE CENSUS COUNT IS A VOTING RIGHTS ISSUE

Our Essay stems from an often unarticulated premise: the census count is a voting rights issue. Professor Pam Karlan has developed

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7. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5528 (Mar. 12, 2018) (to be codified at 15 C.F.R. ch. 1).

8. *Id.* at 5527 ("Of the 77,887 comments pertaining to prisoners, 77,863 suggested that prisoners should be counted at their home or pre-incarceration address."). *See infra* text accompanying note 60.

9. *See infra* Part VI.

10. *See infra* Part V.

11. U.S. CONST. art. I, § 2.

12. 5 U.S.C. § 552(a) (2012).

a framework for discussing the distinct but interconnected public interests that voting rights collectively serve: voting as participation, voting as aggregation, and voting as governance.[13] Voting as participation is exactly as it sounds: it is about "the right to cast a ballot that is counted."[14] While the census count does not affect whether an individual can cast a ballot in any given election, the right to vote is about more than simply casting a ballot. Voting rights also hinge on how individual votes are aggregated and counted to determine the winners and losers of elections and how much representation communities receive in their governing bodies. Census data and its impact on apportionment impacts both voting as aggregation and voting as governance.

A. Voting as Aggregation

While the census does not interact with voting as participation, it does interact with voting as aggregation. As Professor Karlan explains, the primary function of voting "is to combine individual preferences to reach some collective decision, such as the selection of representatives. Voting therefore involves aggregation, and each voter has an interest in the adoption of aggregation rules that enable her to elect the candidate of her choice."[15] How does a differential census undercount impact voting as aggregation? Undercounts of minority communities can lead to overpopulated districts with large minority populations. In at least some places, a proper count of the population could result in two districts where the minority community is able to elect a candidate of choice, but as a result of the differential undercount, only one district can be drawn. In other words, the differential undercount may limit minority communities' ability to aggregate their votes to elect candidates of choice by packing minority communities into artificially overpopulated districts. The resulting vote dilution is exacerbated by prison gerrymandering, discussed *infra*, in which disproportionately minority prison populations *are counted* but are counted in the *wrong place*, thereby allowing for the creation of *underpopulated* and predominantly white prison districts.[16]

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13. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993).

14. *Id.* at 1709.

15. *Id.* at 1712–13.

16. *See infra* Part VI.

But perhaps the most important way that the census differential undercount impacts voting as aggregation is in its intersection with Voting Rights Act[17] enforcement. As Professor Nate Persily has explained, the differential undercount can have important voting rights consequences for minority communities because of "legal requirements that allow certain claims to lie only when the minority can show it is or could be a majority in a single-member district."[18]

The Supreme Court held in *Thornburg v. Gingles* that a minority group can only challenge an at-large election scheme or otherwise dilutive redistricting plan under the Voting Rights Act if it can first establish three elements: (1) a "sufficiently large and geographically compact" minority population to constitute a majority in a single-member district; (2) cohesive voting patterns among the minority community; and (3) a cohesive majority voting bloc that blocks the election of minority candidates of choice.[19] Professor Persily notes that the "admittedly obsessive adherence to numeric requirements" for the first element can make even minor differential undercounts consequential if they cause the minority group to fall below the 50% plus one threshold for a single-member district.[20] And the matter has only worsened since 2001 when Professor Persily wrote on this topic. In 2009, the Supreme Court confirmed the courts' "obsessive adherence to numeric requirements"[21] by holding that voters can only succeed in Voting Rights Act

17. 52 U.S.C. §§ 10301–14 (2012 & Supp. 2015).

18. Nathaniel Persily, *The Right to Be Counted*, 53 STAN. L. REV. 1077, 1109 (2001) (reviewing PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000)). A single-member district is an electoral district that elects a single member to a legislative body. For example, U.S. Congressional Districts are single-member districts where voters from a distinct geographical area (the district) elect a single member to the U.S. House. In an at-large scheme, on the other hand, multiple members of a legislative body may be elected by the entire electorate. Many local elections use at-large systems. For example, a city council may be made up of multiple councilmembers, each of whom are elected by the entire city. Under the Voting Rights Act, a single-member districting system may be imposed as a remedy when minority voters are denied the opportunity to elect candidates of choice under an at-large system.

19. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

20. Persily, *supra* note 18, at 1110. The 50% plus one threshold simply refers to a minority citizen voting age population that is sufficiently numerous to constitute a one-person majority of the population in the geographical district. *See id.* at 1109.

21. *Id.* at 1110.

claims if they can prove their group constitutes at least 50% plus one of a proposed single-member district.[22] It is insufficient for minority voters to show that they can create a coalition of minority and white voters to elect their candidate of choice. In other words, the Court held that minority voters cannot invoke the Voting Rights Act to create "crossover" districts. In so doing, the Supreme Court has put minority voters to strict proof regarding their numerosity to gain representation under the Voting Rights Act even though available data is known to systematically undercount these communities.[23] These are the types of heads-I-win, tails-you-lose options that minority voters now face when seeking to vindicate their voting as aggregation rights.

B. Voting as Governance

The census differential undercount also impacts voting as governance. Professor Karlan explains that voting as governance is about a voter's "degree of both . . . direct and . . . virtual representation."[24] Professor Karlan explains that the one-person, one-vote principle is essentially about voting as governance:

> [T]he real injury in [the one-person, one-vote case] was that once the elected representative arrived in the legislature, her constituents' effective voting power in the legislature would be unfairly minimized because their representative could be outvoted by representatives of smaller groups of constituents. Put somewhat differently, [the purpose of the one-person, one-vote principle was] to protect the governance rights of the majority, which was unable to elect a legislature whose overall composition reflected its preferences.[25]

Here, the census differential undercount's impact is most obvious. If certain communities are systematically undercounted while other communities are overcounted, the result is widespread one-person, one-

22. Bartlett v. Strickland*,* 556 U.S. 1, 6 (2009) (Kennedy, J., plurality opinion).

23. *See id.* at 14–17 (holding that crossover districts do not meet the first *Gingles* prong); *see also infra* Part III.

24. Karlan, *supra* note 13, at 1717.

25. *Id.*

vote violations. And these are not random one-person, one-vote violations but ones that consistently target the same "hard-to-count" communities across the country.[26] In 2016, the Supreme Court held that "ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."[27] If minority groups are systemically undercounted, the result is less equitable "direct and . . . virtual representation"[28] for those communities.

III. THE SYSTEMIC DIFFERENTIAL UNDERCOUNT

In the last section, we discussed how voting rights would be affected if minority groups are systemically undercounted[29] by the census. They are. This Essay need not belabor the point because the existence of a persistent differential undercount for historically disenfranchised communities is uncontroverted.

The census itself identifies the following populations as "hard-to-count" and at risk of being undercounted: "young children, people of color, rural residents, & low-income households" as well as "'linguistically isolated' households; frequent movers; foreign born residents; households below the poverty line; large (i.e. overcrowded) households; low educational attainment households; & single-parent headed households."[30] In 2010, the Census Bureau estimated that it overcounted the non-Hispanic, white population by 0.8% but undercounted the Black population by 2.1% and the Hispanic population by 1.5%.[31] The Census Bureau also estimated that the 2010 Census undercounted Native Americans living on reservations by 4.9%.[32] Thus, the *differential* undercount (the difference between the minority undercount and the white overcount) was 2.9% for Blacks, 2.3% for Latinos,

26. *See What is "HTC?,"* HARD TO COUNT 2020, https://www.censushardtocountmaps2020.us (last visited May 8, 2019) [hereinafter HARD TO COUNT 2020].

27. Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016).

28. Karlan, *supra* note 13, at 1717.

29. *See supra* Part II.

30. HARD TO COUNT 2020, *supra* note 26.

31. *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census*, U.S. CENSUS BUREAU (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html.

32. *Id.*

and 5.7% for Native Americans on reservations. In 2000, the figures were very similar.[33] And this pattern has been consistent decade after decade:

Table 1[34]

	1940	1950	1960	1970	1980	1990
Net Undercount	5.4	4.1	3.1	2.7	1.2	1.8
Black Undercount	8.4	7.5	6.6	6.5	4.5	5.7
Non-Black Undercount	5	3.8	2.7	2.2	0.8	1.3
Differential	3.4	3.7	3.9	4.3	3.7	4.4

The reasons for the persistent census undercount are not in themselves nefarious but rather reflect characteristics of minority communities that flow from a history of discrimination against racial minorities in this country.[35] The Census Bureau's Working Group on these "hard-to-count" populations expressly ties the differential undercount to discrimination's long-lasting impact:

> African Americans have a lengthy history of discrimination and unequal treatment in this country and this can lead to distrust of the government and hence apprehension about responding to federal questionnaires. Lower income African Americans in economically disadvantaged areas may be particularly vulnerable to an undercount. Enumerators may not always have the cultural sensitivity needed to gain the trust of these individuals and may themselves be fearful of low-income African American neighborhoods.[36]

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33. *See id.*

34. Eugene Ericksen, *Who Gets Missed in the Census? Evaluating the Census Net and Differential Undercounts*, U.S. CENSUS MONITORING BOARD (Dec. 28, 2000), http://govinfo.library.unt.edu/cmb/cmbp/issuebriefs/122800.diffundercount.asp.htm.

35. *See infra* note 37.

36. U.S. CENSUS BUREAU, NAT'L ADVISORY COMM. ON RACIAL, ETHNIC, AND OTHER POPULATIONS, ADMINISTRATIVE RECORDS, INTERNET, AND HARD TO COUNT POPULATION WORKING GROUP 8 (2016), https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf.

Importantly, this type of harmful interaction between a facially neutral policy and the entrenched impacts of historical discrimination is *precisely* the type of discriminatory result that § 2 of the Voting Rights Act prohibits when equal opportunity to vote is at stake.[37]

IV. CENSUS 2020: A FAILURE TO MITIGATE

While the Census Bureau may not be able to eliminate the barriers that make minority populations hard-to-count, they have a constitutional obligation to count *everyone* and do so in an equitable manner that does not distort political representation.[38] While the census is still a year away, the Bureau's approach to the 2020 Census has raised serious doubts about its preparedness to minimize the differential undercount.

In March 2019, the NAACP and Prince George's County of Maryland (a majority-Black county) sued the Census Bureau alleging an abdication of the Census Bureau's duty to mitigate the differential undercount through proper planning and funding.[39] The warning signs of a 2020 Census likely to exacerbate historical differential undercounts are evident. As the NAACP alleged in its lawsuit, the census has been severely underfunded, and that underfunding has directly impacted the Census Bureau's preparedness to reach hard-to-count populations.[40] Due to fiscal limitations, the Census Bureau has already canceled field tests and two of three "dress rehearsal" sites and delayed the

37. Section 2 of the Voting Rights Act guarantees all Americans an equal opportunity to participate in the electoral process free from racial discrimination. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 243–44 (5th Cir. 2016) (en banc) ("To prove that a law has a discriminatory effect under Section 2, Plaintiffs must show not only that the challenged law imposes a burden on minorities, but also that 'a certain electoral law, practice, or structure interacts with social and historical conditions *to cause* an inequality in the opportunities enjoyed by [B]lack and white voters to elect their preferred representatives.'") (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

38. *See* U.S. CONST. amend. XIV, § 2; Reynolds v. Sims, 377 U.S. 533, 571–75 (1964) (holding vote dilution in state and local redistricting to be unconstitutional).

39. NAACP v. Bureau of the Census, No. PWG-18-891, 2019 WL 355743, at *6–7 (D. Md. Jan. 29, 2019).

40. *See id.* at *19.

opening of six of its regional centers.[41] With respect to the differential undercount risk, the lawsuit alleges that the Census Bureau has "drastically cut two of the most important elements of pre-census procedures for reaching these [minority] populations: outreach efforts with partnership specialists, and field infrastructure to conduct non-response follow up."[42] These drastic cuts to programs specifically focused on mitigating the undercount of hard-to-count populations suggest that the 2020 Census is likely to exacerbate rather than mitigate the effects of the differential undercount.

V. CENSUS 2020: THE CITIZENSHIP QUESTION

In addition to the Census Bureau's obligation to count every person in the United States, it also has a duty not to aggravate existing undercounts. Yet current Commerce Secretary Wilbur Ross has fought strenuously to ensure that a citizenship question be added to the 2020 Census, despite the overwhelming evidence—including near unanimous consensus among stakeholders and his own staff—that asking census respondents about their citizenship would only magnify the Bureau's historic pattern of undercounting immigrant communities.[43]

It is no surprise that a citizenship question would have this effect. Since 1960, the Bureau has held the position that asking respondents about their citizenship status would only serve to exacerbate existing problems the census faces in counting minority groups, "particularly noncitizens and Hispanics . . . whose members would be less likely to participate in the census for fear that the data could be

41. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 7, NAACP v. Bureau of the Census, No. 8:18-cv-00891-PWG, 2018 WL 6046277 (D. Md. Aug. 13, 2018).

42. *Id.* While the district court held that some of the Plaintiffs' claims in the NAACP lawsuit were not yet ripe, it allowed the Plaintiffs to move forward toward trial on their underfunding claim. *NAACP*, 2019 WL 355743, at *1.

43. *See* New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d 502, 515 (S.D.N.Y. 2019) (describing efforts by Secretary Ross and his staff to build a case for the inclusion of the question, including by directing the DOJ to request the question be added for 2020); *see also id.* at 539 (collecting comments provided by stakeholders on the harms that would arise from adding a citizenship question to the 2020 Census and noting that "Commerce Department officials struggled to find anyone willing to express support for adding the question").

used against them or their loved ones."[44] In December 2017, John M. Abowd, the Census Bureau's Chief Scientist, concluded that asking every respondent about citizenship would "depress self-response rates, particularly among noncitizen households," "lower the rate of voluntary compliance," and would therefore "require expanded field operations."[45] As a result, not only would adding the citizenship question be "very costly," it would "harm[] the quality of the census count, and would use 'substantially less accurate citizenship status data than are available from administrative sources.'"[46] Thus, "the addition of a citizenship question to the 2020 [C]ensus will cause a significant net differential decline in self-response rates among noncitizen households," a "decline [that] will, if left uncured, translate into a net differential undercount" of noncitizens.[47]

This undercount would have a dramatic effect on representational rights, particularly on noncitizen and Hispanic communities, for whom the undercount would be the most severe.[48] Indeed, "the addition of a citizenship question will cause or is likely to cause several jurisdictions to lose seats in the next congressional apportionment and [] it will cause another set of jurisdictions to lose political representation in the next round of intrastate redistricting."[49] Specifically, adding a citizenship question would result in an undercount that would "certainly" result in California losing a seat in the next congressional reapportionment and would create a "substantial risk" that Texas, Arizona, Florida, New York, and Illinois would also suffer a loss of representation.[50] In addition, it would likely create an undercount sufficient to dilute the political power of jurisdictions in state redistricting schemes.[51]

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44. *Id.* at 515.

45. *Id.* at 532.

46. Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., Sec'y of Commerce (Jan. 19, 2018), https://apps.npr.org/documents/document.html?id=4500011-1-18-Cv-02921-Administrative-Record#document/p1289/a428453.

47. *U.S. Dep't of Commerce*, 351 F. Supp. 3d. at 578.

48. *Id.* at 678–79.

49. *Id.* at 594.

50. *Id.*

51. *Id.* at 595.

Despite this record, Secretary Ross has persisted in his efforts to ensure the citizenship question is added to the 2020 Census.[52] The Secretary's insistence on including the question raises serious concerns about his true intentions,[53] including the disturbing specter that he is intentionally undermining the accuracy of the 2020 Census for political reasons.[54] This term, the Supreme Court will decide whether Secretary Ross' decision violates the Administrative Procedures Act.[55]

VI. PRISON GERRYMANDERING: MASS INCARCERATION AND EQUALITY OF REPRESENTATION

Prison gerrymandering, or the practice of counting incarcerated persons as permanent residents of prisons for redistricting purposes, is a problem of *miscounting* a particular population, rather than *undercounting* a particular population. Nonetheless, prison gerrymandering, which is in essence a physical manifestation of mass incarceration, engenders substantial representational harms that disproportionately affect minority communities.

Every ten years, states must redraw district boundaries at the state and local level to ensure equality of population and thus equality of representation.[56] Most state and local redistricting authorities rely

52. *See, e.g.*, Petitioners' Response to Motion to Dismiss as Improvidently Granted, Dep't of Commerce v. S.D.N.Y., 2019 WL 292988, No. 18-557 (Jan. 22, 2019) (notifying the Court of forthcoming petition for certiorari).

53. *See, e.g.*, *U.S. Dep't of Commerce*, 351 F. Supp. 3d. at 662 (finding that "Secretary Ross failed to disclose his true rationale" in seeking to add the citizenship question to the census).

54. *See, e.g.*, Vann R. Newkirk II, *The Weaponized Census,* THE ATLANTIC (Mar. 28, 2018), https://www.theatlantic.com/politics/archive/2018/03/the-weaponized-census/556592/; The Editorial Board, *The Trump Administration Sabotages the Census*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/opinion/trump-census-2020-citizenship.html; The Editorial Board, *Wilbur Ross, Stop Rigging the Census*, WASH. POST: THE POST'S VIEW (Oct. 17, 2018), https://www.washingtonpost.com/opinions/wilbur-ross-stop-rigging-the-census/2018/10/17/2caa44ba-d21d-11e8-b2d2-f397227b43f0_story.html?utm_term=.7335b35fd3f2 (collectively raising the question of whether undermining census data is an intentional political act).

55. *See* U.S. Dep't of Commerce v. New York, 139 S. Ct. 953 (2019) (granting certiorari on Feb. 15, 2019).

56. *See* U.S. CONST. art. I, § 2; *id.* amend. XIV, § 2; Reynolds v. Sims, 377 U.S. 533, 571 (1964) (holding vote dilution in state and local redistricting to be unconstitutional).

on census data to draw political lines for everything from state legislative districts, to judicial districts, city-council districts, and school-board districts.[57] The goal is to create districts with nearly equal populations to ensure that each person has the same representational power as every other person in the political subdivision.[58] As such, the census must not only compile an accurate snapshot of population size but also population geography.[59] Yet, despite the fact that most states do not consider incarceration to effect a legal change on an individual's residence, the census counts prisoners as residents of the prison in which they are incarcerated rather than in their home communities.[60]

For almost two centuries, this practice was relatively harmless, in part because the prison population was so small.[61] In the latter half of the twentieth century, however, mass incarceration sent prison populations soaring.[62] As the prison population grew larger, prison gerrymandering began to undermine the equality of representation. Counting prisoners in prison districts rather than in their home communities artificially inflates the population of prison districts in relation to other state and local political districts.[63] As a result, voters in prison districts enjoy outsize political power at the expense of all other voters in the

57. *See* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 359 (2011); Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. PA. L. REV. 431, 433 (2003); *see also, e.g.*, LEAGUE OF WOMEN VOTERS OF CAL. EDUC. FUND, LOCAL REDISTRICTING IN CALIFORNIA, LEAGUE OF WOMEN VOTERS (Jan. 2011), http://www.redistrictingca.org/wp-content/uploads/2009/12/Local-Redistricting-with-LWVCEF-footer.pdf (describing redistricting for county, city, and school districts for "local governments that elect by district").

58. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1126 (2016) ("Equalizing total population . . . vindicates the principle of representational equality by 'ensur[ing] that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives.'").

59. *See, e.g.*, Proposed 2020 Census Residence Criteria and Residence Situations, 81 Fed. Reg. 42577 (proposed June 30, 2016) ("[I]t is crucial that the Census Bureau counts everyone in the right place.").

60. Ho, *supra* note 57, at 359, 366–67.

61. Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1243–46 (2012).

62. *Id.* at 1243.

63. *Id.* at 1243–46.

relevant political subdivision.[64] For example, after the 2000 Census, Lake County in Tennessee drew a district "where 88% of the [district's] population was not local residents, but incarcerated people" and therefore "every group of 3 residents in [the district had] as much say in county affairs as 25 residents in other districts."[65]

Compounding this inequality of representation is the fact that "many politicians admit that they do not view the prisoners inside the walls of their districts' prisons as constituents."[66] Indeed many prisoners are prohibited from voting due to criminal disenfranchisement or are required to vote in their home communities based on rules around legal residency.[67] Thus, these politicians—heavily dependent on prisons for political power yet unaccountable to the prisoners themselves—are often more likely to support state and local policies that sustain mass incarceration.[68] And because the political power of prisoners' home communities, and indeed every other non-prison district, is diluted relative to the political power of the prison district, it is harder for communities most affected by mass incarceration to obtain the political power necessary to redress its effects. The result is both a demographic and a representational disconnect between prisoners and the prison community, where prisoners' political interests are often directly at odds with the prison districts' representatives.

These effects are particularly troubling because of both prisons and prison communities' racial demographics. Mass incarceration disproportionately affects communities of color, and racial and ethnic minorities make up a disproportionate percentage of the prison population

64. *Id.* at 1243.

65. *Id.* at 1245.

66. John C. Drake, Note, *Locked Up and Counted Out: Bringing an End to Prison-based Gerrymandering*, 37 WASH. U. J.L. & POL'Y 237, 260 (2011).

67. *See* Ho, *supra* note 57, at 359, 366. This includes prisoners such as pretrial detainees and misdemeanants who often retain the right to vote while incarcerated but must vote in the district in which they legally reside, rather than the one in which they are incarcerated. *See id.* at 366.

68. *See, e.g.*, Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York*, PRISON POL'Y INITIATIVE, http://www.prisonpolicy.org/importing/importing.html (last updated May 20, 2002).

as compared with the population at large.[69] Yet most prisons are situated in rural districts with predominantly white populations.[70] As a result, prison gerrymandering allows white, rural districts to meet minimum population requirements by "padding" their population counts with prisoners of color—a practice that echoes the three-fifths compromise.[71]

The only way to eliminate the outsize power of prison districts while "vindicat[ing] the principle of representational equality" is to count prisoners, and to count them in their home community.[72] The alternative—removing prisoners from the count entirely—would go against the "history, precedent, and practice," of using total population numbers.[73] This means that districts are typically drawn based on a population that includes non-voting members, such as children and noncitizens, as well as those who are simply not registered to vote.[74] Eliminating prisoners from this calculus would therefore create an entirely unique population that exists wholly outside the representational scheme.

Despite substantial pressure on the Census Bureau to change its policy,[75] the 2020 Census will continue to count prisoners where they are incarcerated. While the Bureau has agreed to provide the data necessary for states and localities to count prisoners in their home communities should they so choose,[76] the vast majority of jurisdictions will

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69. *See* Ho, *supra* note 57, at 361–62.

70. *Id.*

71. Wagner, *supra* note 61, at 1243; Ho, *supra* note 57, at 362 (comparing prison gerrymandering to the three-fifths compromise and finding that "[t]here has only been one other instance in American history where disenfranchised, captive populations of people of color were used to artificially inflate political strength").

72. Evenwel v. Abbott, 136 S. Ct. 1120, 1126 (2016).

73. *Id.* at 1126.

74. *See id.* at 1128.

75. *See, e.g.*, The Campaign Legal Center, Comment to *Proposed 2020 Census Residence Rule and Residence Situations* (July 28, 2016) https://campaignlegal.org/sites/default/files/7.28.16%20CLC%20and%20VRI%20Comments%20on%20Proposed%202020%20Census%20Residence%20Rule.pdf.

76. After the 2010 Census, the Bureau made an effort to disaggregate prisoner data and provide it to state and local districting authorities who wanted to address the issue. Wagner, *supra* note 61, at 1248. As a result, some state legislatures have begun taking steps to eliminate prison gerrymandering. Maryland and New York began

likely continue to rely on imperfect data, and the harm to representational equality will remain unredressed.

VII. JUDICIAL DEFERENCE: THE COURTS' APPROACH TO CENSUS INACCURACIES

The census is the source of essential data for ensuring equality of representation both among the states and across state and local political jurisdictions. Yet, as this Essay has highlighted, even at its best the census is an imperfect tool for capturing an accurate measure of critical demographic information. And at worst, the census can be weaponized to perpetuate inequality and discrimination in political representation. Despite this, courts have consistently treated census data as presumptively valid and have resisted attempts to adjust the figures, even in the face of known flaws.

In a series of cases arising out of the 1990 Census, the Supreme Court adopted a highly deferential standard of review for cases challenging the Bureau's enumeration methodology.[77] Thus, "[i]n light of the Constitution's broad grant of authority to Congress" a decision by the Secretary of the Bureau regarding how to account for potential undercount "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population."[78] So long as there is disagreement among experts regarding how best to improve the accuracy of the census, a determination by the Secretary that a particular statistical adjustment to the census would not improve its accuracy may

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counting prisoners in their resident districts during the 2010 redistricting cycle, and Delaware and California will do so as of the 2020 cycle. *Id.* at 1249. In addition, over 200 localities have taken steps to address prison gerrymandering by counting prisoners in their home communities. *See Prison Gerrymandering Project: Solutions*, PRISON POL'Y INITIATIVE, http://www.prisonersofthecensus.org/solutions.html (last visited May 9, 2019).

77. *See* Wisconsin v. New York, 517 U.S. 1, 15 (1996) (citing Franklin v. Massachusetts, 505 U.S. 788 (1992), for the proposition that "the Constitution vests Congress with wide discretion over apportionment decisions and the conduct of the census"); U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 464 (1992) (finding that mathematical realities of apportionment entitles Congress's "good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' . . . [to] far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard").

78. *Wisconsin,* 517 U.S. at 20.

be found "reasonable" so long as it is "supported by the reasoning of some of his advisers."[79] As the Seventh Circuit explained, courts have largely treated differential undercounts as givens that are not redressable absent intentional discrimination: "We cannot provide a remedy for a census undercount, at least where the undercount is not the result of an effort to reduce some group's representation or funding but is merely an accident of the census-taking process."[80]

Of course, the intentional discrimination exception is narrow but important. Methodological decisions made with an intent to discriminate on the basis of a protected class are subject to heightened scrutiny.[81] And at least one court has held that "when the Census Bureau unreasonably compromises the distributive accuracy of the census, it may violate the Constitution."[82] In March 2019, a federal court in California held that the addition of the citizenship question to the 2020 Census violates the Enumeration Clause because it "will significantly impair the distributive accuracy of the census because it will uniquely and substantially impact specific demographic groups."[83] This type of attention to "*distributive* accuracy,"[84] or the differential undercount, may be crucial to vindicating the rights of minority voters in the future.

VIII. CONCLUSION

In this Essay we have explained the specific ways in which unadjusted census data can distort voting rights and political representation for minority communities. We have also posited that the census differential undercount is a result of historical discrimination and therefore may fit neatly within the Supreme Court's § 2 Voting Rights Act jurisprudence. Thus, while the Court has identified a deferential standard for the census count itself, it does not necessarily follow that the

79. *Id.* at 23.

80. Tucker v. U.S. Dep't of Commerce*,* 958 F.2d 1411, 1413 (7th Cir. 1992).

81. *See Wisconsin,* 517 U.S. at 18 n.8.

82. Kravitz v. U.S. Dep't of Commerce, 336 F. Supp. 3d. 545, 565 (D. Md. 2018).

83. California v. Ross, 358 F. Supp. 3d 965, 1048 (N.D. Cal. 2019). This constitutional question, alongside the Administrative Procedures Act issue, will likely be decided by the Supreme Court this term. *See* U.S. Dep't of Commerce v. New York, 139 S. Ct. 953 (2019) (granting certiorari on Feb. 15, 2019).

84. *Ross*, 358 F. Supp. 3d. at 1048 (emphasis added).

use of unadjusted census figures with a differential undercount is due the same deference under the Voting Rights Act and other voting rights protections. Civil-rights and voting-rights lawyers are currently engaged in the first round of legal battles surrounding the accuracy of the 2020 Census figures, seeking to ensure that the Bureau takes all reasonable steps to reduce rather than aggravate the differential undercount.

Once the 2020 results are in, the courts and advocates should seriously consider when census figures must be properly adjusted in redistricting to avoid a discriminatory result for minority communities. This may require the development of new jurisprudence under the Voting Rights Act that extends beyond the typical *Thornburg v. Gingles* case, which requires proof of the ability to create a new majority-minority district.[85] Where the underlying data is definitively skewed, there may no longer be a justification for such a strict limitation on the Voting Rights Act's guarantee of equal voting rights. Likewise, advocates may seek to build "one person, one vote" jurisprudence that rejects the assumption that population deviations below ten percent are constitutionally acceptable[86] when those deviations are systematically tilted against minorities.[87] If the 2020 Census undercounts and miscounts minorities at the same or higher levels as past censuses, both states in redistricting and the courts in adjudicating disputes will have much work to do to provide equality despite those baseline inequities.

85. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

86. *See* Brown v. Thompson, 462 U.S. 835, 842 (1983).

87. *See* Larios v. Cox, 300 F. Supp. 2d. 1320, 1340–41 (N.D. Ga. 2004) ("[T]he very fact that the Supreme Court has described the ten percent rule in terms of 'prima facie constitutional validity' unmistakably indicates that 10% is not a safe harbor.").