

**THE HISTORICAL ROOTS OF CONTENTIOUS LITIGATION OVER CENSUS
COUNTS IN THE LATE 20TH CENTURY***

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*Prepared for presentation at the Hawaii International Conference on the Social Sciences, Honolulu, Hawaii, June 17-19, 2004. The authors are grateful for comments by Tom Bryan.

19TH CENTURY ROOTS OF CONTENTIOUS LITIGATION OVER CENSUS COUNTS IN THE LATE 20TH CENTURY

Abstract

Although not originally intended as such, the US census has become a “Commons” in which private benefits are gained at the expense of public costs. The historical development of the census as a Commons first clearly emerged with the release of the 1970 census results, and since that time contentious litigation over census undercount error has become a standard part of the decennial census landscape. Political battles within the federal government have gone hand-in-hand with these litigation activities. They culminated with a Supreme Court decision on the legality of statistically adjusting census 2000 counts for estimated undercount error. As these battles raged, professional interest in providing methodological “fixes” for net census undercount error increased while public participation in the census generally declined. This paper examines the history behind these legal battles, the legislative acts, and judicial decisions that led to the 16th Amendment and the loss of the careful balance between public costs and private benefits crafted by the Founding Fathers in Article I of the Constitution. The paper identifies the role these 19th century actions played in making the census into a Commons, and setting the stage for modern day census litigation. We observe that as a Commons, the census is facing a potential collapse that can be prevented only by political action, not by methodological developments. If the census remains a Commons, tragedy is inexorable and nobody will be pleased with a national resource eroded by varying undercount estimates, littered with different adjustment methodologies, and stripped by numerous special interest groups.

Key words: Census, litigation, Commons, 16th Amendment

INTRODUCTION: THE CENSUS AS COMMONS

In the United States, we subordinate ourselves under rules, however imperfect, established by our constitution and laws in order to restrain the abuse of power and, thereby, enlarge liberty (Starr 1987: 57). In fact, the United States was explicitly established with the idea of checks and balances to restrain any single interest group from achieving hegemony and so limiting the possibility of an abuse of power. A governmental statistical program such as the Decennial Census helps to accomplish this purpose, and despite its imperfections, by so doing, serves to enlarge individual liberty (Anderson 1988, Cohen 1983). But today, we argue that our individual liberty is at risk because decisions on methods defining how to enumerate our population have become increasingly oriented to the demands of political, social, and economic interest groups (Prewitt 1987: 261-262).

This paper discusses the roots of these decisions by examining the more than 200 year history of federal legislation and Supreme Court holdings that led to highly contentious litigation over decennial census counts in the late 20th century. Using Hardin's (1968) metaphor of the "Commons," we argue that the decennial census is not only a looming tragedy, but an inexorable one as long as the census is characterized by an imbalance of interest group benefits over interest group costs.

In article I, section 2, the U.S. Constitution requires Congress to conduct an "actual Enumeration" of the population every ten years "in such Manner as they shall by Law direct." Accordingly, each decade since 1790, the United States has taken a count of its population; the decennial census. Congress delegated the authority to conduct the

decennial census to the Secretary of Commerce in the Census Act.¹ The Secretary, through the Census Bureau, has attempted to answer two important questions: how many people live in the United States and where are these people located? Answers to these questions are important because they determine how many representatives each state is allocated in the federal House of Representatives and to distribute billions of dollars in federal and state aid to counties, cities, Native American reservations and neighborhoods throughout the United States. In 2000, as in all censuses in the latter half of the 20th century, the method it used to obtain these answers was to mail census forms to every household in the nation. The Census Bureau then followed up by sending enumerators personally to visit households that did not respond. In spite of the Census Bureau's efforts, the methods it has employed have always failed to count a portion of the population. In 1980, the Bureau determined the census had failed to count 2.8 million people nationally (U.S. Census Bureau 1997). The national count was estimated to have fallen short by between 4.2 and 4.0 million people in 1990 (Anderson and Fienberg 2002). For 2000, there are as yet inconclusive results on the extent of the undercount, with estimates ranging from an undercount of 3.3 million to an overcount of 1.8 million (Anderson and Fienberg 2002).

Some population groups like minorities, children, and renters have historically been undercounted - "omissions" - while others are known to have been overcounted - "erroneous enumerations" (Anderson and Fienberg 2002, Skerry 2000, U.S. Census Bureau 1997). "Gross census error" is defined as the sum of omissions and erroneous enumerations; while net census error (also known as net undercount error) is the

difference between omissions and erroneous enumerations (Anderson and Fienberg 2002). Net undercount error has come to be commonly known as the census undercount.

The census undercount is not a new issue (Anderson 1988, Choldin 1994, Edmonston 2001, Edmonston and Shultz 1995). Supreme Court Chief Justice Rehnquist, in *Wisconsin v. City of New York*², wrestling with the issue of whether the Census Act *required* the Secretary to statistically adjust for undercount, pointed out that Thomas Jefferson complained the very first census in 1790 contained a significant undercount. The Census Bureau has worked to rectify the undercount problem. To its credit, it initiated studies of census accuracy of its own accord and has attempted to use these studies to improve accuracy (Anderson et al. 2000, Choldin 1994, Martin Fay and Krejsa 2003, Skerry 2000). In 1990 and in 2000, for instance, the Census Bureau promoted awareness of the census and its importance, provided census forms in the Spanish language and offered a toll free number for those who had questions about the forms (Martin Fay and Krejsa 2003).

In 1991, Congress addressed the undercount problem by passing the Decennial Census Improvement Act³ which directed the Secretary to contract with the National Academy of Sciences to study methods for obtaining the most accurate population count possible. The Supreme Court discussed the results of the study in *Department of Commerce v. U.S. House*⁴ noting that “[t]wo of the three panels established by the Academy concluded that differential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement; a statistical sampling procedure that adjusts census results to account for undercount in the initial enumeration.” Based on the Academy’s report, the Census Bureau announced a plan for

the 2000 census that would use statistical sampling to supplement the data obtained through traditional census methods.

The Republican-controlled Congress, however, did not really want the undercount mitigated; just studied. Closely following the announcement of the Census Bureau's statistical sampling plan, Congress passed a bill to prohibit sampling or statistical adjustment in figuring population for purposes of the apportionment of representatives. President Clinton, a Democrat, vetoed the bill with this message to the House:

Without sampling, the cost of the decennial census will increase as its accuracy, especially with regard to minorities and groups that are traditionally undercounted, decreases substantially. The National Academy of Sciences and other experts have recommended the use of statistical sampling for the 2000 decennial census. The Department of Justice, under the Carter and Bush Administrations and during my Administration has issued three opinions regarding the constitutionality and legality of sampling in the decennial census. All three opinions concluded that the Constitution and relevant statutes permit the use of sampling in the decennial census. Federal courts that have addressed the issue have held that the Constitution and federal statutes allow sampling.⁵

The crux of the partisan conflict was to be found in the "political advantage" area: Republicans, fearing a relative loss of seats in Congress, were largely against statistical sampling and adjustment because it would increase the number of those who tend to be represented by the Democratic party, the so-called "hard to enumerate", like minorities, children and renters (Hodges 1996). Not surprisingly, Democrats, hoping to gain seats in the House of Representatives, were largely in favor of statistical sampling and adjustment.

Undaunted, Congress passed another bill, which President Clinton signed, directing the Secretary to provide a "comprehensive and detailed plan outlining . . . proposed methodologies for conducting the 2000 Decennial Census and available

methods to conduct an actual enumeration of the population, including an explanation of the statistical methodologies that may be used.”⁶ The statute permits any person aggrieved by the Secretary’s planned use of statistical sampling methods in the 2000 decennial census to bring a legal action heard by a three-judge district court. Appeals were to be made directly to the United States Supreme Court.

Within a year, the aggrieved U.S. House of Representatives sued the Secretary, seeking a declaration that the use of statistical sampling violated the Census Act and article I of the Constitution. The three-judge district court held that the Census Act prohibited the use of statistical sampling to determine population for the apportionment of representatives and permanently enjoined the Secretary from using it for such purposes.⁷ The Secretary appealed to the Supreme Court.

The Supreme Court in *Department of Commerce v. U.S. House*⁸ upheld the district court’s ruling, finding that the Census Act prohibits the use of statistical sampling to determine the population for congressional apportionment. The provisions at issue in the Census Act were sections 141(a) and 195. Justice O’Connor delivered the opinion of the Court. Section 141(a), she noted, authorizes the Secretary to “take a decennial census. . . in such form and content as he may determine, including the use of sampling procedures”.⁹ However, the use of sampling procedures was limited by section 195 which provides that “except for the determination of population for purposes of appointment. . . the Secretary shall, if he considers it feasible, authorize the use of . . . statistical . . . sampling in carrying out the provisions of this title.” The Court, finding the use of statistical sampling for congressional apportionment violated the Census Act,

did not reach the issue as to whether or not such methods violated article I of the Constitution.

The Republicans and Democrats were not the only interest groups battling over census methods and adjustments (Anderson and Fienberg 1997, Choldin 1994). However, the focus of the other interest groups is less on apportionment and more on the distribution of federal and state aid; particularly federal block grants (Anderson and Fienberg 1997, Murray 1992). It is not a minor issue. The appropriated federal block grants for Native American housing in 2003 totaled \$649 million with an additional \$4,937 million for community development.¹⁰ It is easy to see why more than 100 Indian tribes, complaining of undercount, challenged the 2000 census results and conducted their own head counts (Kramer 2003). The tribes pointed out that the 2000 census counted 3,334 people at Warm Springs, Oregon, of which 3,018 were Indians. According to tribal registries however, 3,220 tribal members live on the reservation, suggesting that the 2000 census missed 504 Warm Springs tribal members, for an error undercount rate of 14 percent. (Kramer 2003). “We’re being shorted on funding,” they said. “The numbers [the Census Bureau] have are totally inaccurate. We’re doing our census to get the money we’re owed” (Kramer 2003). This sentiment is not confined to residents of the Warm Springs Reservation (Census Monitoring Board 2001, Price Waterhouse Coopers 2001, U. S. Conference of Mayors, 1999). Clearly, the allocation of resources is an invitation to conflict. But there is an even more fundamental issue than the continuing struggle over resource allocation, one that is obvious, but overlooked. It is this underlying issue which is leading inexorably to the eventual destruction of a vital national resource – the census itself.

Following Hardin's (1968) classic argument in "Tragedy of the Commons," in regard to herdsmen who added livestock to gain individual benefits at the expense of the pastureland Commons, the fundamental issue underlying the turmoil over census 2000 is the simple fact that the census is being exploited by interest groups of all political persuasions. In Hardin's terms, it has become a Commons of private benefits at the expense of public cost. The solution to overgrazing the pastureland to the ruin of all herdsmen is to limit freedom in the Commons – to enclose it (Hardin 1968). Similarly, the census must also be “fenced in” so that the private benefits become balanced by private costs. Until this occurs, technical solutions to correct net undercount error and related problems will continue to be hampered by the groups interested in getting resources (Swanson 1998).

THE CENSUS WAS NOT INTENDED AS A COMMONS

The census was not intended as a Commons. It was intended as an Enclosure.¹¹ How the census came to enclose the public benefits and, thereby, preserve them for the benefit of all the nation's competing interests began in the American colonies in the 18th century. It began with democratic fundamentals; the balancing of public benefits with public cost.

Prior to the French and Indian War in 1754, Great Britain regulated trade in their American colonies but pretty much stayed out of colonial affairs (Johnson 1997: 91, 97, 103). Things changed substantially, however, as the colonial settlers began to push west into the Ohio Valley. The French built fortified outposts to protect their profitable fur trade against the encroachment and the Indians attacked to push the settlers out of their

hunting grounds (Johnson 1997: 125; Zinn 2003: 54, 87). From the colonists' point of view, something had to be done.

England at the time was already engaged in war against France on the European continent and India (Columbia Encyclopedia 2001). In 1756, the English brought the battle to North America. The Indians, disliking the settlers' disruption of their way of life, sided with the French. The French and Indian War began.

Along with the British victory over France in 1763 came substantially more British intrusion into colonial affairs. King George III and his prime minister, George Granville, were faced with the problem of how to pay the huge debt England had amassed to win the war. They felt the American colonies should help pay since they had been the war's primary beneficiaries (Johnson 1997: 132). Accordingly, the British parliament levied a series of taxes on sugar, glass, lead and paint and finally passed the Stamp Act in 1765 (Zinn 2003: 60-1, Johnson 1997: 139). The colonists objected and strongly (Zinn 2003: 64-65). It was not that they were opposed to paying their share of the cost of the war. They resented being subjected to taxes without any say in the matter. Representing the American colonies, Benjamin Franklin traveled to England to testify before the British House of Commons. "An internal tax is forced from the people without their consent, if not laid by their own representatives,"¹² he told them. When the British imposed a tax on tea in 1773 it was the last straw. "No taxation without representation" was the revolutionary cry (e.g., Otis 1763). If there was a public cost to pay, the colonists felt strongly they should have the benefit of representation. They signed the Declaration of Independence from Great Britain on July 4, 1776.

To wage the war of independence against Great Britain, the colonists set up a loose federation governed by the Articles of Confederation. The federation was deliberately organized as a decentralized form of government wherein the independent states retained most of their sovereignty with the exception of foreign diplomacy and defense (Johnson 1997:159). Each state had one vote in the Continental Congress regardless of population (Tax History Project 1995a). To ensure the states would not be subjected to the same abuse of power from their own federal legislature as they had endured under the British parliament, the Articles did not allow the Continental Congress to tax or impose tariffs. Therefore, in order to finance the Revolutionary War, the colonial wartime government depended on the individual states to voluntarily provide funding (Evans 1991). When this failed, the Continental Congress relied heavily on loans from the French and Dutch governments, as well as wealthy Americans. Finally, in desperation, it just printed money (Evans 1991). The result was runaway inflation. To make matters worse, when the war ended in 1782, the British pursued punitive trade policies against the victorious colonies by dumping goods on the American market (Evans 1991). The Continental Congress was powerless. It had no power to raise revenue by internal taxation and it had no power to impose external measures like protective tariffs. The economy of the fledging nation was in shambles. When one hundred farmers attacked a federal arsenal in Massachusetts to protest the foreclosures on their farms, the Continental Congress was too weak to respond (Zinn 1997: 91-93). It was clear the federation would not survive much longer under the present system. State representation in the Continental Congress without a corresponding contribution to the federal coffers simply was not working (Johnson 1997:183).

A Constitutional Convention was called in 1787 to address the problem. The framers were divided on the appropriate power and responsibilities of the central government (Johnson 1997:184). They were particularly concerned with how to control the federal congress. The Federalists' view, with proponents like Alexander Hamilton, was that a much stronger central government was necessary (Johnson 1997: 180-186). They saw the current government under the Articles of Confederation as too weak and ineffective. The anti-Federalists felt that changes to the Articles would infringe on the rights of the individual states and their citizens (Johnson 1997:187).

The convention delegates also wrestled with the issue of how to balance the power between the small states like New Jersey and the large states like Virginia (Johnson 1997:188). The smaller states wanted equal representation in the federal congress with the large states. On the other hand, the system where each state received one vote under the Articles was not fair to the more heavily populated states. States like Virginia, by virtue of their larger size, should have more say in the running of the federal government.

The delegates solved both problems by creating a bicameral congress (Johnson 1997: 188). By dividing the legislature into two houses, the power of the legislature would be used against itself. One house would check the excesses of the other and thus, the federal congress would be kept in check. The bicameral legislature also resolved the problem of how to determine each state's representation. Each state would have two Senators in the Senate regardless of size while the number of representatives each state would have in the House of Representatives would be based on the state's population (Johnson 1997: 188).

The convention delegates were not yet finished defining congressional power, however. They needed a way to fund the federal government with the most immediate problem being how to repay the Revolutionary War debt. But there was opposition to granting too broad a taxation power to the federal congress at the expense of state rights (Evans 1991). James Madison in the *The Federalist* addressed this concern:

Now, to the existence of the states, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the colonies; and when the colonies became states, both before and after the formation of the confederation, it was exercised by the new governments. Under the articles of confederation the government of the United States was limited in the exercise of this power to requisitions upon the states, while the whole power of . . . taxes, was acknowledged to belong exclusively to the states, without any other limitation than that of noninterference with certain treaties made by congress.¹³

Alexander Hamilton's response was that most of the federal government's revenue would come from external sources like tariffs rather than internal sources like taxes and so the national taxing power would not supersede that of the states (Rossiter, 2003: 195). Except for tariffs", he argued, "as to all other taxes, the authority of the States remain[ed] undiminished" (Rossiter 2003).

Ultimately, the convention delegates agreed to give Congress the power to tax and levy tariffs. Article I, section 8 of the U.S. Constitution provides:

"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises."

However, there was still one important conflict to resolve; how to balance the power between the North and the South. The northern states wanted to classify slaves as property rather than part of a state's population to prevent the slave states from having

too much influence in the federal congress (Zinn 2003: 98, Johnson 1997: 188, Tax History Project 1995a). The southern states were worried the North may try to tax slavery out of existence altogether unless the South had strong representation in the House (Tax History Project 1995a). The delegate from New York, Gouverneur Morris, proposed a compromise. He suggested that taxation be in proportion to representation (Tax History Project 1995a). Thus, if the South counted slaves as population and, thereby, increased its representation in the House, at the same time, its share in the cost of running the federal government would likewise increase. To get both the North and South onboard, however, the delegates modified Morris' proposal in two ways: slaves would only count as 3/5ths of a person, thereby lessening the number of Southern representatives in the House and, in return, only "direct" taxes would be in proportion to representation (Tax History Project 1995a). What Mr. Morris meant by "direct" taxes was not clear. Some of the states considered "direct" taxes to be those levied on land or personal property as opposed to "indirect" taxes levied on imports, exports or consumption (Tax History Project 1995a). On the other hand, some of the states defined "direct" and "indirect" taxes differently. Mr. King, one of the delegates, asked what was the precise meaning of *direct* taxation? James Madison noted "no one answered."¹⁴ In spite of the lack of a clear definition of a "direct" tax or perhaps precisely because there was not one, the compromise was accepted by both the northern and southern delegates. The lack of a clear definition, however, was going to cause problems soon.

The Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*, more than a century later summed up the delegates' solution:

Thus was accomplished one of the great compromises of the constitution, resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves, and to remove the objection that, in adjusting a system of representation between the states, regard should be had to relative wealth, since those who were to be most heavily taxed ought to have a proportionate influence in the government.¹⁵

Thus, the language in article I, section 2 was settled:

“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union according to their respective Numbers.”

If population was to be the determining factor for the number of representatives a state was allocated in the House of Representatives as well as the state’s share of the cost in running the federal government, how was a state’s population to be determined?

The delegates debated how to resolve this problem and settled on the idea of a census:

Amendments were proposed by Mr. Ellsworth and Mr. Wilson to the effect that the rule of contribution by direct taxation should be according to the number of white inhabitants and three-fifths of every other description, and that, in order to ascertain the alterations in the direct taxation which might be required from time to time, a census should be taken.¹⁶

Thus, article I, section 2 of the Constitution provides for a decennial census:

“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.”

Thus, article I, section 2 was carefully crafted to resolve several problems: how to keep federal power in balance with the power of the states as a whole; how to balance the power among the large and small states; and finally, how to balance the power between the nation’s different regions. Article I also balanced the benefits and costs of larger populations with regards to each state’s citizens; a larger congressional delegation also

meant having to provide more federal tax dollars. In effect, this balance prevented the census from being a Commons. Instead, the census enclosed public benefits by protecting them from abuse by one interest over another. This was a conscious decision by the framers of the Constitution. As Madison (Starr 1983: 18) wrote in *The Federalist*:

It is of great importance that the States should feel as little bias as possible, to swell or reduce the amount of their numbers. Were their share or representation alone to governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have the opposite interests, which will control and balance each other, and produce the requisite impartiality.

THE EMERGENCE OF THE CENSUS AS A COMMONS

As the 19th century dawned, the first signs of contentious litigation over Article I began. In 1796, the United States Supreme Court in *Hylton v. U. S.*¹⁷ was asked to define a “direct” tax. Congress had imposed a tax on carriages but had not apportioned it among the states, instead applying it according to the rule of uniformity found in article I, section 8 of the Constitution:

“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.”

Hylton argued that a tax on carriages was a tax on personal property and, therefore, a “direct” tax which must be apportioned among the states. The Supreme Court disagreed finding the tax was on the “use” of the carriage rather than the carriage itself and therefore an “excise” tax which did not need to be apportioned.

It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example: Suppose two States, equal in census, to pay \$80,000 dollars each, by a tax on

carriages of 8 dollars on every carriage; and in one State there are 100 carriages, and in the other 1000. The owners of carriages in one State, would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage 8 dollars, but B in the other state, would pay for his carriage, 80 dollars.¹⁸

The Court, in effect, implied that that no tax should be classified as “direct” which could not be conveniently apportioned:

A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable.¹⁹

Thus, within seven years of the ratification of the U.S. Constitution, the link between cost and representation suffered a direct hit. After *Hylton* only those direct taxes that could be conveniently apportioned by Congress had to be apportioned among the states. The walls of the Census Enclosure were breached.

Early in the 19th century, the United States became entangled in another dispute between the English and the French. Napoleon, advancing across the European continent, attempted to conquer the British by starving them with a blockade of their sea trade (Johnson 1997:259). The British retaliated by attacking U.S. trade ships en route to France. After attempts to negotiate a peaceful solution failed, President Madison declared war on Great Britain (Tax History Project 1995a). The War of 1812 disrupted America’s trade with Europe and as a result, revenue collection from tariffs dropped by 50% (Tax History Project 1995a). To supplement the lost revenue, Congress passed a series of internal tax measures: (1) a “direct” tax of \$3 million; and (2) a tax of \$6 million levied on the value of all lands, lots of ground with their improvements and dwelling houses.²⁰ These taxes; one a tax on real estate, were apportioned among the states.

The Census Enclosure experienced a near-breach about this time, further weakening the link between representation and cost. In 1815, Secretary of the Treasury, Alexander Dallas, considered an income tax to raise more money for the war (Tax History Project 1995a). Dallas considered that such a tax would be an “indirect tax” and, therefore, would not require apportionment. The House of Representatives referred a resolution in this regard to the House Ways and Means Committee to inquire into the “expediency of laying a ‘duty’ on all salaried public service officers and on the professional income of lawyers, solicitors and counselors, and on the legal proceedings of courts of justice.”²¹ In December 1814, the House Ways and Means Committee ordered the report to “lie on the table,”²² but not because the tax might, in fact, be a “direct” tax which would require apportionment. The tax was referred to a “duty” and the House determined such an “indirect” tax would violate the constitutional requirement of uniformity:

The selection of a particular class of the community, which already pays, in common with others, a tax on property and consumption, and imposing on it an income tax, from which every other class is exempted, would be a departure from that system of equal and exact justice, which ought to form the basis of legislation in a free country.²³

Thus, the inconvenience of apportioning direct taxes could be avoided by defining taxes as “indirect” right from the start.

Following the War of 1812, Congress relied solely on tariffs as its source of revenue until the 1860s (Tax History Project 1995b). Tariffs did not have to be apportioned and thus were much easier for the federal government to collect. However, tariffs resulted in an unfair burden to the southern region of the United States and soon

became the battleground for sectional and partisan differences. The Tariff of 1828 revealed just how serious the differences were.

The War of 1812 cut off American trade with Europe and in doing so forced the United States to increase its own manufacturing capabilities. When the war ended, the fledging manufacturing industry in the North pressed Congress for high protective tariffs on imports (Johnson 1997: 346). Congress responded with the Tariff of 1828. Called the “Tariff of Abominations” by the South, it benefited the North by increasing the price on imported goods by 50 percent (Tax History Project 1995b). The rural South, on the other hand, had to import the manufactured goods it did not produce, and so paid higher prices on these items than the North (Tax History Project 1995b). The Congressional coffers were being funded by Southern consumers while the Northern manufacturers reaped profits.

Congress was able to pass the Tariff of 1828 over Southern objections because the South was losing Congressional seats. In 1810, Southern states comprised 47 percent of the population, but by 1820 they comprised only 45 percent. As a result, congressional reapportionment based on the 1820 Census resulted in seats going to the North and West, where support for the protective tariff was strong (Tax History Project 1995b).

With the passage of the Tariff of 1828, the South realized it might be unable to stop Congress from enacting tax laws which could threaten the continuation of slavery.²⁴ John Calhoun argued in his *Carolina Exposition and Protest* that the Southern states had the right to nullify federal laws they believed were unconstitutional (Tax History Project 1995b). It was not a totally novel idea. James Madison and Thomas Jefferson had presented the same argument in *The Virginia and Kentucky Resolves of 1798*. They had

argued that the states had the right to judge the constitutionality of federal laws and to declare acts of Congress void---null if the laws did not serve to benefit all interests (Tax History Project 1995b). South Carolina, leading the Southern protest, held a special Nullification Convention. The state declared the Tariff of Abominations unconstitutional and prohibited the collection of customs duties within the state (Johnson 1997: 241).

President Andrew Jackson, whose majority constituency was in the South, faced a difficult political problem. He negotiated the Compromise Tariff of 1833 which reduced protective tariffs and temporarily appeased South Carolina. However, he also added a “Force Bill,” which provided that the president could use arms to collect tariffs as needed (Johnson 1997: 347). Funding the federal government through tariffs was proving as challenging as apportioning taxes among the states.

In spite of their inherent unfairness, tariffs continued to be the main source of federal revenues until 1861. The conflict between the North and the South worsened and finally turned into the American Civil War (1860-1865). To obtain the revenue to fund the war, Congress passed a tax measure of twenty million dollars in 1861, to be levied wholly on real estate and apportioned among the states.²⁵ It was a complete failure. Most of the states did not even bother to collect the tax from their citizens; instead they printed money or borrowed to cover their apportioned amount (Tax History Project 1995c). Not surprisingly, Congress, trying to raise revenue other than primarily through inequitable tariffs, realized apportioned taxes were not only *inconvenient* to apportion, they were difficult to collect. Apportioning taxes on the basis of population was perhaps best to be avoided. The Census Enclosure, built to maintain a sustainable relationship between representation and cost, was fast failing.

The Civil War was costing a great deal of money and more was needed. Tariffs and apportioned taxes were not the answer. Congress decided to try a third method of revenue collection---unapportioned income taxes. The Thirty-eighth Congress, under President Lincoln, enacted the nation's first income tax law in 1862.²⁶ It was a progressive tax. The rate started at 3% per annum on income in excess of \$600 - \$5000; increased to a rate of 7.5% on income in excess over \$5, 000 - \$10,000 and increased again to a rate of 5% for income in excess of \$10,000. Like today's income tax, it was not apportioned among the states. The 1862 statute also established the Office of Commissioner of Internal Revenue, with the power to assess and collect taxes and enforce the tax law through prosecution and property seizure. By 1866, revenue collection on the unapportioned income tax had reached \$310 million, the highest in the nation's 90-year history (Moody 2003). The income tax measure of 1862 was followed by several more.²⁷ None was apportioned among the states. The balance of power devised by the Founding Fathers in article 1, section 2 of the Constitution ended. The Census Enclosure was down. Congress, unfettered by the inconvenience of apportioning taxes or the political aggravation of inequitable tariffs experimented so as to make tax collection even easier. A flat tax was levied of 5% and lowered to 2.5% in 1870²⁸ The flat tax, however, like tariffs, gave an advantage to one interest group over another: the share that the wealthy paid for the cost of the federal government decreased while the share of the poor increased.

In 1872 the Census Enclosure was rebuilt: Congress allowed the Civil War income taxes to expire and replaced them once again with protective tariffs (Moody 2003, Tax History Project 1995d). These protective tariffs encouraged the rapid growth

of Northern industrialization. Business discovered the economies of scale, discovering that increasing the number of units decreased the cost per unit (Johnson 1997: 552). Manufacturers were able to sell their products cheaper as production costs decreased. Cheaper products resulted in more products being sold. The method was particularly hard on labor, however. It required employees to work on assembly lines like machines performing a single task over and over 12 to 14 hours per day (Meltzer and Bennett 2002: 113). Unrestrained by government regulation, Northern industry plunged on in pursuit of more and more profit. The big business moguls put their immense profits to use buying out the competition in order to control all aspects of production. Monopolies were created like that of John D. Rockefeller who by 1877 controlled 95 percent of the U.S. oil refineries (McDuffie Piggrem and Woodworth 1998: 106). The re-enclosure of the Census Commons created, in effect a “Commercial Commons” in which large businesses fed on small businesses and both fed on cheap labor.

Eventually, 10 percent of the population controlled 90% of the nation’s wealth (McDuffie Piggrem and Woodworth 1998: 106). Andrew Carnegie, the developer of the modern steel industry, justified the unequal distribution of wealth in his article, “The Gospel of Wealth,” arguing that in business, like nature, unrestricted competition allowed only the “fittest” to survive for the benefit of all (see Johnson 1997: 550-555) Not surprisingly he opposed government regulation of industry.

The manufacturers not only used workers like machines, they further cut labor costs with low wages. They hired newly arrived immigrants, women and children and paid as little as possible. Slums and tenements arose to house the growing poor (Johnson 1997: 578). The cities divided into residential sections segregated by ethnic group,

social class and race (McDuffie Piggrem and Woodworth 1998: 107). In the meantime, the rapid growth of industry was requiring lots of capital. Businessmen borrowed huge sums of money and when the businesses failed, the banks went down with them causing one major financial panic after another (Zinn 2003: 254-277). The poor suffered the most as money tightened and unemployment increased. Public resentment with the Commercial Commons boiled over as the disparity between the wealthy elite and the poor masses grew. In 1886, labor took to the streets in the bloody Haymarket Square Riot in Chicago (Zinn 2003: 265-277).

The federal government finally took steps to enclose the Commercial Commons by controlling the unrestrained monopolies and the consolidation of business power into the hands of a few. The Sherman Anti Trust Act (Sherman Act) was passed by Congress in 1890 (Zinn 2003: 259). It was soon challenged by those who wanted to maintain the Commercial Commons. The Supreme Court helped them. In 1895, a pro-business Supreme Court ruled that the Sherman Act did not apply to the E.C. Knight Company; a company which controlled 98 percent of the sugar refining plants in the United States.²⁹ Later in the same year, the Court held that the Sherman Act could be used against labor on the basis that strikes constituted an illegal “restraint of trade.”³⁰ Clearly, the regional differences which had fueled the Civil War were fading in the face of ever increasing class conflicts. The poor were shouldering an unequal proportion of the cost of the federal government without receiving a proportional share of the benefits.

Meanwhile, a constitutional challenge to the unapportioned income tax measures passed during the Civil War finally reached the Supreme Court in 1880. The case, *Springer v. U.S.*³¹ had wound its way through the courts since 1866 and was over

property seized by the federal government from the plaintiff, Springer, for non-payment of income taxes. Springer argued that the tax on his income, gains and profits was a “direct” tax and therefore, should have been apportioned among the states. However, the pro-business Supreme Court upheld the income tax acts as constitutional. Justice Swayne in *Springer* reviewed the constitutional debates looking for the Founding Fathers’ purpose in apportioning “direct” taxes among the states as well as a definition of a “direct” tax. The Justice noted that the delays and difficulties in procuring voluntary funding from the States under the Articles of Confederation had been one of the main reasons for the adoption of article I giving Congress the right to levy taxes. Justice Swayne also noted that it was Gouverneur Morris of New York who had submitted the proposition “that taxation shall be in proportion to representation” and it was also Morris who then revised his motion by inserting the word “direct” in front of taxation. Later the same month, Morris yet again changed his mind, stating ‘he hoped the committee would strike out the whole clause. . .’³² But the clause remained. The passage that linked the amount of “direct” tax a state paid to the number of representatives a state was allocated in the federal House via the Census was incorporated into the Constitution. As for what the Founding Fathers actually meant by a “direct” tax, the Court could find nothing helpful in the convention debates. The Court stated that even Alexander Hamilton was perplexed to its meaning:

What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none.³³

The Court concluded there was no definitive meaning of the term “direct” tax, and based its holding on how Congress had applied different kinds of taxes historically. The only taxes that had previously been apportioned among the states were those levied against real estate or personal property; while taxes applied to income, profits and gains had never been apportioned among the states. The Court ruled that the tax levied against Springer’s gains, profits and income was, therefore, an “indirect” tax--- a duty or excise, and, so it was not necessary it be apportioned.³⁴ Income taxes could now be lawfully levied against citizens directly by the federal government. The states’ power over their citizens was compromised. The careful balance of power among the states and the regions was also damaged. There was no longer any relationship between the number of representatives a state had in the federal congress and the amount a state paid into the federal coffers. The Census Enclosure was again breached.

Armed with the Supreme Court’s decision in *Springer*, Congress enacted another unapportioned income tax in 1894 as part of the Wilson-Gorman Tariff; a two percent tax on income over \$4,000. The income tax portion was not apportioned among the states. The measure was a tax on high incomes designed to relieve the victims of the Panic of 1893 by shifting some of the burden to the wealthy (Tax History Project 1995d). The 1893 Panic was one of the worse economic depressions the country had endured. After decades of incredible industrial growth, the uncontrolled speculation and business borrowing caused a financial collapse: 642 banks failed and 16,000 businesses closed (Sinn 2003:277). Nearly 20 percent of the work force was unemployed (McDuffie Piggrem and Woodworth 1998:118). However, the income tax measure was only moderately successful in redistributing wealth. The high protective tariff portion of the

law discouraged overseas trade which would have eased some of the effects of the depression (McDuffie Piggrem and Woodworth 1998:118). Congress had taxed the income of the wealthy on the one hand; but given it back to them, on the other, with the tariff. Big business was still being protected by Congress to the disadvantage of the poor.

A challenge to the constitutionality of the unapportioned income tax law of 1894 reached the Supreme Court in 1895, *Pollock v. Farmers' Loan & Trust Co.*³⁵ Charles Pollock, a citizen of the state of Massachusetts, on behalf all stockholders of the Farmers' Loan & Trust Company of New York, sued to stop the company from paying the two percent tax on its nets profits pursuant to the income tax measure of 1894. This suit was brought before a different Supreme Court than the one that had ruled 13 years earlier in *Springer*. Several of the nine justices, including the Chief Justice, had been replaced with new appointments.

In a 5 to 4 decision, the Court reversed its holding in *Springer*.³⁶ The Court held that levying a tax on the income and profits of the company's real and personal property, imposed a tax upon the property itself and, therefore, the tax was a 'direct' tax and unconstitutional for lack of apportionment among the states. The ruling was stunning. Congress must now apportion income taxes on property to the states. The relationship between cost and representation was reestablished. A state's population determined by the census would balance the competing interests. The Census Enclosure was again rebuilt. Congress, facing again the problems the unapportioned income tax hope to resolve, went back to the drawing board.

In spite of the reversal by the Court in *Pollock*, the Supreme Court of the 1890s remained largely pro-business. It was less concerned with preserving the relationship

between cost and representation, then with preserving the wealthy ruling elite (Zinn 2003: 260-261). Understandably, some interest groups were unhappy with the Supreme Court's decision. If tariffs were to be the primary method of collecting federal revenue, then the bulk of the cost of the federal government would be paid by ordinary Americans at the point of consumption; not the wealthy (Tax History Project 1995d). Pulitzer's *New York World* characterized the *Pollock* ruling as "another victory of greed over need" (Tax History Project 1995d). Farmers felt it was yet another example of the alliance of government and business against the farmer. The farmers, in particular, were aware that if Congress apportioned direct taxes, they would be no better off. The concentration of wealth was in New York and the New England states. Apportioning real estate taxes resulted in an unfair burden on the less populated and poorer states. For example, if Congress wanted to raise \$100,000 by levying a tax on real estate, under the *Pollock* decision, a tax on real estate was a direct tax must be apportioned among the states. Thus, if the census in Mississippi indicated a population of 1,000 people; the State of Mississippi would be responsible for 1% of the tax; or \$1,000(1,000 Mississippi citizens/\$100,000). However, if only 500 Mississippian farmers owned real estate; then each farmer would pay \$2.00 in tax (\$1000/500). At the other extreme, suppose the census indicates that the wealthier state of New York had a population of 5,000. New York State is, therefore, responsible for 5% of the tax or \$5,000 (5,000 New York citizens/\$100,000 tax) If there were 4, 000 New York citizens who owned real estate, then they each would pay only \$1.25 in tax. Thus, as this hypothetical example illustrates, the citizens of wealthier states would likely fare better if income taxes on property were apportioned among the states.

The farmers' plight was serious. Mechanization had caused an increase in agricultural production and the increase in supply had caused a drop in prices. Farmers in the Midwest and the South, locked into long-term debt with fixed payments, were in financial straits. Because there was no relief after the *Pollock* decision, the farmers proposed their own solution. To make their payments easier, they wanted to increase the money supply by increasing the coinage of silver (Zinn 2003:283). Since silver was mined in the West, the western miners supported the farmers. The labor movement shared common goals with the farmers. By 1892, the Populist Movement, as it became known, had spread into forty-three states with some two million members (Zinn 2003: 285). It was called "the most massive organizing drive by any citizen institution of nineteenth century America" (Zinn 2003: 285).

In addition to calling for the more liberal coinage of silver, the Populist Movement supported a graduated income tax. As Populists became increasingly more successful in local and state elections, by 1896, they were ready to make a bid for the White House (Zinn 2003: 294). Their candidate, William Jennings Bryan, ran against Republican William McKinley. But Bryan lost the election and as the economy improved, the Populist Movement faded. What did not fade, however, was the idea of social reform through the government. The idea was adopted by the Progressives, who ushered in an era which followed and lasted until 1920. They absorbed much of the Populist platform (Johnson 1997: 607, Meltzer and Bennett 2002: 121-122).

The Progressives, unlike the Populists, were characterized as much more urban and educated (Johnson 1997: 607-608). As a result, they started with more economic and political strength than the Populists. Because it was predominantly a middle class

movement, it did not exacerbate the class differences. Because many were from the North, it also deemphasized regional conflicts. In short, the Progressive Movement had political strength and popular appeal.

The Progressives gathered momentum through organizations like the National Woman Suffrage Association, the American Bar Association and the National Municipal League (Meltzer and Bennett 2002: 121-123). The educated intellectuals united into interest groups to spur government reform to alleviate the abuses by powerful industrialists and the misery of the poor. President Theodore Roosevelt, one of the most well-known Progressives, earned the nickname “the Trustbuster” by using the Sherman Act against the big monopolies like Standard Oil (Meltzer and Bennett 2002: 121-123). The two presidents that followed him, Taft and Wilson, continued to push through more government regulation, establishing the Federal Trade Commission, the Federal Reserve, and a constitutional amendment for the direct election of senators (Meltzer and Bennett 2002: 623-639). Many states passed their first minimum wage and hour laws.

When the Dingley tariff in 1897 raised protectionism to new heights, the Progressives took up the Populists’ cry for an unapportioned progressive income tax (McDuffie Piggrem and Woodworth 1998: 118). Tariffs, like apportioned property taxes, did nothing to redistribute the nation’s wealth, so the poor were receiving little in the way of benefits from the costs they were shouldering. The Democrats took up their cause. Between 1874 and 1893, they introduced nearly 70 income tax bills in Congress; blocked repeatedly by the Republicans (Tax History Project 1995d). In April 1909, Senator Joseph W. Bailey, a conservative Democrat from Texas, decided to try one more time. He introduced a progressive income tax bill, expecting it be opposed by the

Republicans as usual. However, in spite of the threat of the Supreme Court striking the bill down as unconstitutional as they had done in *Pollock*, liberal Republicans joined in support (Tax History Project 1995e). Certain that it would be either defeated in Congress or fail to be ratified by the requisite 3/4ths of the state legislatures, Republican President Taft and Senate Finance Committee Chairman Nelson Aldrich (R-R.I), announced their intention to support an income tax, but only if it was an amendment to the Constitution (Tax History Project 1995e). Taft and Aldrich, however, were wrong in their assessment that the bill would go nowhere. The political rhetoric “soak the rich” with a progressive income tax rallied the people (Buenker 1981). The 16th Amendment was not only passed by Congress, but state after state ratified it. By 1913 it was adopted.

Short in wording but long in effect, the 16th Amendment simply states:

The Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

With the adoption of the 16th Amendment, the private benefits and costs were no longer enclosed. The stage was set for benefits to be private and costs to be public. The protection of the smaller states from the abuses of the larger states; the less populated and rural South from the abuse of the more populated and wealthier North ended, too. With the institution of an unapportioned federal income tax on the citizens of a given state, there was no longer a private cost to the citizen of a state having a larger share of the U.S. population: The census became a Commons.

The impact of the 16th Amendment was not immediate on the census. It served as a necessary, but not sufficient, condition for the Census Commons to be fully realized. The remaining conditions were put largely into place beginning with the 1960s when the

re-apportionment revolution occurred (Swanson and Stephan 2004) and the distribution of substantial amounts of federal funds became linked to census data (Anderson and Fienberg 2001, Choldin 1994, Mitroff Mason and Barabba 1983, Murray 1992). This meant that “populations” were linked to increased private benefits without the balance of accompanying private costs. Not surprisingly, interest groups began to form around these populations and the process of linking federal funds to census data accelerated (Anderson and Fienberg 2000, Choldin 1994, Mitroff Mason and Barabba 1983, Murray 1992). This development was not anticipated by the Progressives who had championed passage of the 16th Amendment and tended to see only the wealthy and the poor as special interest groups of note.³⁷

These new constellations of interest groups would be much broader and very different than those recognized and understood by the Progressives. They would include interest groups defined not only by socio-economic class and political parties, but by gender, race, ethnicity, and age - and combinations thereof (Mitroff Mason and Barabba 1983). To this list one could add interest groups forming around disability status, veteran status, educational attainment, immigrant status, and even citizenship, among many others (Anderson and Fienberg 2001, Anderson 1988, Mitroff Mason and Barabba 1983 Choldin 1994). As recognition of these benefits has spread, the Census Commons has become more and more exploited. Evidence of this increasing exploitation can be found in a wide range of publications, including Alonso and Starr (1987) Anderson (1988), Anderson and Fienberg (2001, 1997), Brunell (2001), Choldin, 1994; Edmonston and Schultze, (1996), Murray (1992), Prevost and McKibben (1988), Rousch (1996), Siegel (2002: 535-582), Skerry (2000), US Census Bureau 2001, 2003, and US GAO

(1999). As each herdsman attempted to add more of his animals to the pastureland Commons, so have interest groups attempted to add more of their “population” to the Census Commons in accordance with the attendant benefits expected from federal and other programs distributing resources in relation to these populations (Mitroff , Mason and Barabba, 1983, Skerry 2000).

Let us briefly review these developments, beginning with the controversial Census of 1920, the first to be taken since passage of the 16th Amendment. It revealed that states with rapidly growing urban populations would gain congressional seats while those without such areas would lose seats (Anderson 1988: 134). It also revealed that some of the rapid urban growth was due to immigration. These findings generated a great deal of consternation over the changing landscape of America and the shift of federal political power from rural to urban states. Although legal challenges were filed, the Supreme Court refused to hear them and the Congress was not re-apportioned until 1929 (Anderson 1988: 155-156).

The findings of the 1920 census, coupled with the lack of a well planned question on employment in the 1930 census, led to a change in ideas and methods for the 1940 census. Among other methodological improvements, 1940 saw the introduction of sampling into the decennial census and the first analytic evaluation of census results. The 1950 Census, the last to be done completely door-to-door, confirmed work done in the evaluation of the 1940 census that indicated an undercount of males, the urban poor, and minorities (Anderson 1988: 202). With the advent of the “mail-out-mail-back” enumeration process, the 1960 Census was also the first in which special attempts were made to reduce the differential undercount problem first empirically identified in 1940

and confirmed in 1950 (Anderson 1988: 202). Significantly by the early 1960s, census data were being used in a number of new federal programs using formulas involving population as a basis for distributing federal funds to states and local governments (Anderson 1988, Murray 1992, Prevost and McKibben 1988).

The 1960s also marked the start of the “reapportionment revolution” (Swanson and Stephan 2004: 785). In the 40 years since the Supreme Court had refused to rule on the cases involving the 1920 census, federal courts had followed this lead by refusing to rule on apportionment cases – until 1962. In a landmark case, the Supreme Court ruled in 1962 (*Baker v. Carr*) that the Tennessee legislature had to be re-apportioned (Anderson, 1988: 209).

Fueled by the proliferation of federal programs distributing benefits using decennial census data and the knowledge that federal courts were now willing to consider apportionment cases, several lawsuits were filed against the Census Bureau following the 1970 census. Importantly, these suits relied upon knowledge of differential undercounts from 1940 to 1960 and although they were dismissed, the Census as a Commons was now becoming evident. It came as no surprise that with the arrival of 1980 census data came a flood of lawsuits (Anderson 1988, Anderson and Fienberg 2001). This was followed by more in 1990 (Anderson and Fienberg 2001, Pack 1996) and yet more again in 2000 (Anderson and Fienberg 2001, Wejnert 2003). These lawsuits overwhelmingly are based on grounds that the census had undercounted some population (Anderson 1988, Anderson and Fienberg 2001, Mitroff Mason and Barabba, 1983).

A successful action to have more people counted is not just an action that affects the census. It has a ripple effect throughout the decade leading to the next census because

the census is the starting point for a set of annual estimates done by the Bureau that in themselves also distribute resources. For the 1980 census, Prevost and McKibben (1988) found that annual population estimates done by the Census Bureau affected the distribution of \$40 billion in federal grants each year subsequent to the 1980 census. Murray (1992: 319) found that \$58.7 billion in federal funds distributed to state and local government in 1989 were made according to formulas that involved census population counts. Murray (1992: 330) went on to point out that adjusting the 1990 census for undercount would add an average of \$56 per person annually through the 1990s for the 40 percent of communities that would have gained population in the 1990 census through adjustment. That is, if a community saw its 1990 population increase by 100 through an undercount count adjustment, it would have gained \$56,000 ($\$56 \times 100 \times 10$) over the following decade. Presumably, the communities losing 100 people cumulatively in a 1990 census adjustment would have lost \$56,000 collectively over the following decade. Post-2000 determinations of the volume of federal funding linked to census numbers can be found in *The Consolidated Federal Funds Report for Fiscal Year 2002* (US Census Bureau 2003).

Clearly, even if the perception exceeds the reality, the stakes are significant for interest groups in a census. These perceived and real stakes have substantial political implications for methodological choices, which, in turn, are subject not only to cost and time constraints, but also disagreements among methodologists (Anderson and Fienberg 2001, 2002, Anderson et al. 2000, Darga 1999, Freedman and Wachter 2004, Brown et al. 1999, Wright 1996) It is perhaps no wonder that as late as 2003 the Census Bureau still had not made a decision about adjusting the 2000 census results for non-

redistricting/re-apportionment purposes (Anderson and Fienberg 2002, Martin Fay and Krejsa 203).

RE-ENCLOSING THE CENSUS COMMONS: THE 21ST CENTURY

The tragedy of the Census Commons is inexorable. Public costs and private benefits are the very definition of the tragedy. The solution in the case of pastureland is straightforward: Fence the pasture into separate lots for each herdsman. Each herdsman now gains the benefits of each new animal but also pays the full price in potential overgrazing. With enclosure, it is to the advantage of each herdsman to maintain a herd consistent with the carrying capacity of the land.

To avoid the tragedy of the Census Commons, would it be too radical to repeat here Swanson's (1998) suggestion to consider a campaign to fence in the census? If, for example, citizens in Arizona gain congressional clout after Census 2010 because the state has as a higher share of the national population then they should also "pay" something in return. Perhaps the Census Enclosure should be rebuilt? Would it be it too radical to suggest repealing the 16th Amendment and reverting to the original language in article I? Is it possible to apportion income taxes to the states according to population and let the states determine how to collect it? Why should any legislation or regulation that provides census-based private benefits not be balanced with census-based private costs?

Clearly, the task of weighing benefits and costs is not an easy one and fencing in the census will be even more difficult than enclosing pastureland. The general acceptance of the census as a Commons that has built up since the passage of the 16th Amendment is

probably too much to overcome. Moreover, the reasons why the census was enclosed by the 16th Amendment (to place limits on the Commercial Commons) were well-intentioned. One possible path to some form of enclosure is proposed by Teitelbaum and Winter (1998) – a permanent and non-political oversight panel similar in structure and function to either the Federal Reserve Board or the Congressional Budget Office. Would such an approach be sufficient? If so, it would have to fend off “Stakeholders” (i.e., the special interest groups) who do not appear to want the Census Commons fenced in to any degree. For that matter why would the Census Bureau? The Bureau’s staff may not relish the legal and methodological battles in which they are embroiled, but at the same time they understand that the battles are over reasons that give the Census Bureau some clout and stature. Similarly, it may not be in the interest of the Legislative Branch to fence in the Census Commons because, on the one hand, it would mean having to deal with the issue of “direct” and “indirect” taxes; and on the other, there is no pressure from constituents to do so. Although it is not likely that many in Congress (or the Courts) are thinking at all about “direct” and “indirect” taxes, who could blame them for not wanting to re-open these issues, which a movement to re-enclose the Census Commons would require? As for the Executive Branch, a major source of stable revenue would be at risk if major adjustments were made to the income tax laws such that the Census Commons was enclosed.³⁸

Perhaps it is not a surprise that the focus by academics, stakeholders, the Census Bureau, and the Congress is largely on methodological developments as the solution to census conflicts (Anderson and Fienberg 2002, Anderson et al. 2000, Brown et al. 1999, Brunell 2002, Census Monitoring Board 2001, Slivka and Anchors 2001, U. S. Census

Bureau 2001, U. S. GAO 2003, Wright 1998). In spite of methodological developments such as the de-coupling of the long form from the decennial census (Hough and Swanson 2004, 1998, Salvo Lobo and Lowe 2003, US Census Bureau 2004), nothing has occurred that would suggest that methodological developments will reduce litigation and other forms of conflict over census results, however.³⁹ In fact, there is evidence to suggest that conflicts over census counts will only intensify, as the realization of net undercount differentials extend beyond the current stakeholders (e.g., political, social, and economic interest groups) to include others - residents of small areas of geography, for example (Census Monitoring Board 2001, Dick and You 2003, Freedman and Wachter 2004). As conflicts intensify, it is likely that public confidence in the Census will be further eroded. With erosion of public confidence comes higher levels of non-response (Dillman 2000), which, in turn, bring about higher levels non-response and increase the need for the wider use of existing statistical procedures and adjustments to compensate for those not responding, as well as calls for even more procedures and adjustments (see. e.g., Anderson et al. 2000, Brown et al 1999, Edmonston and Schultze 1995: 384-437, Freedman and Wachter 2004). These additional procedures will require more funding, forcing the Census Bureau to make choices about methods that cannot provide optimal results for all populations. This will lead to more litigation and other forms of conflict as the special interest groups struggle to get their populations into the Census Commons. Once glimpsed, the outcome of this downward spiral is not reassuring for the future of the census. As a stark example of the possible end result, this type of erosion happened in the Netherlands, where public cooperation has been deemed to be so low that a legally mandated census scheduled to have taken place in 1981 was

indefinitely postponed. With the last conventional census having been taken in 1971, the Dutch government and other users of census data (e.g., planners, market researchers, bureaucrats, and academics) were desperate for current data. So, as a substitute, the Dutch government authorized Statistics Netherlands to use a combination of survey results and administrative data to come up with a “census” for 2001 (van der Laan 2000). While better than data from 1971, the Dutch “Census of 2001” has its limitations (van der Laan 2000). However, even this limited form of data collection would be more difficult to achieve in the United States, where administrative records are, by law, custom, and usage, not as comprehensive as those in the Netherlands - the United States does not have a continuous population register, for example (Bryan 2004). Add to this the likely litigation and methodological disagreements before, during and after such a process, and it becomes clear that this is not likely to be a solution in the United States.

Clearly, the ultimate resolution to these conflicts is to balance private benefits with private cost - to eliminate the Census as a Commons. However, re-enclosing the Census Commons is not a methodological development; it is inherently a political process. The ultimate political nature of the task of resolving census conflicts is perhaps most clearly recognized by Teitelbaum and Winter (1998), although there are others (e.g., Anderson 1988, Prewitt 1987, Starr 1987 and Sutton 1997) who acknowledge the political nature of census conflicts and, as such, provide at least a hint as to where solutions to census conflicts are likely to be found. We believe that however difficult the task, such a political process is needed because if the census remains a Commons, tragedy is inexorable and nobody will be pleased with a national resource eroded by

varying undercount estimates, littered with different adjustment methodologies, and stripped by numerous special interest groups.

END NOTES

¹ 13 U.S.C. §1 et seq.

² 517 U.S. 1 note (1996).

³ 195 Stat. 635 (1991) note following, 13 U.S.C. §141 notes.

⁴ 525 U.S. 316 (1999).

⁵ H.R. Doc. No. 96, 105th Cong., 143 CONG. REC. H3633 (1997). Available at <http://www.gpoaccess.gov/crecord/retrieve.html> , last accessed May 2004.

⁶ 1997 Emergency Supplemental Appropriations Act for Recovery From Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those in Bosnia, Pub. L. No. 105-18, 111 Stat. 158 (1997). Available at <http://www.gpoaccess.gov/>, last accessed May 2005.

⁷ *House of Representatives v. Department. of Commerce*, 19 F. Supp. 2d. 543 (1998).

⁸ 525 U.S. 316 (1999).

⁹ *Id.*

¹⁰ National American Indian Housing Council. Office of Governmental Affairs. (2004). *List of Indian Housing Budget & Appropriation from 1998 – 2004* (<http://naihc.net>., last accessed May 2004). Other examples of the magnitude of federal funds being distributed using formulas involving census and related numbers, as well as the formulas themselves can be found at the following websites:

<http://www.census.gov/govs/www/cffr02.html> (last accessed May 2004)

<http://www2.census.gov/pub/outgoing/govs/cffr/> (Last accessed May 2004)

<http://www.ksg.harvard.edu/taubmancenter/publications/fisc/> (Last accessed May 2004)

<http://www.nap.edu/books/0309075807/html/R2.html> (Last Accessed May 2004)

http://govinfo.library.unt.edu/cmb/cmbp/reports/080601.pricewaterhouse/downloads/undercount_080601.pdf (last accessed May 2004)

http://www.usmayors.org/uscm/wash_update/census/census_findings.htm (Last accessed May 2004).

However, it is important to note that Skerry (2000) points out that many of the fears over undercounting are misplaced and that the pros and cons of undercount adjustment are often misunderstood. Skerry (2000) finds, for example, that a statistical adjustment for net undercount may not have yielded an overall advantage for the Democrats in the reapportionment following the 2000 census, contrary to their belief that it would.

¹¹The term “Enclosure” has a history of both positive and negative connotations. To some, it implies the gain of powerful market interests at the expense of individuals (Boyle, 2003); while to others, such as Hardin (1968), it implies the recognition that there are some resources that have finite capacity. We take the view that the census was not intended to support private gain at public expense and, as such, was viewed by the Founding Fathers as a positive enclosure.

¹² *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 559 (1895).

¹³ *Id.* at 561.

¹⁴ 2 CONG. REC. 350 (1787). RECORDS OF THE FEDERAL CONVENTION. Available at <http://memory.loc.gov/ammem/amlaw/>, last accessed May 2004.

¹⁵ *Pollock.* at 564.

¹⁶ *Id.* at 563.

¹⁷ 3 U.S. 171 (1796).

¹⁸ *Id.* at 174.

¹⁹ *Id.* at 179.

²⁰ *Pollock* at 573.

²¹ 13 ANNALS OF CONG. 715-716 (1814). Available at <http://memory.loc.gov/ammem/amlaw/>, last accessed May 2004.

²² *Id.*

²³ *Id.*

²⁴ e.g. U.S. Senate Journal, 20th Cong. 2nd. Sess., February 10, (1829).

²⁵ 12 Stat 309 (1861).

²⁶ 12 Stat. 473 (1862).

²⁷ 13 Stat. 281 (1864).

²⁸ 16 Stat. 257(1870).

²⁹ *U.S. v. E.C. Knight Co.* 156 U.S. 1(1895).

³⁰ *In Re Debs*, 158 U.S. 564 (1895).

³¹ 102 U.S. 586 (1880).

³² *Id* at 596.

³³ *Id.* at 598.

³⁴ *Id.* at 603.

³⁵ 157 U.S. 429 (1895).

³⁶ *Id.*

³⁷ It is perhaps with no little irony that the US income tax system has, in the eyes of some, become so riddled with loopholes and exceptions that in practice it is itself viewed as a commons where a wealthy few have gained private benefits at the expense of the public (Lundberg 1938, 1968, Stern 1964).

³⁸ In regard to the idea of revenue stability and predictability, it is of interest that the initial breaches and even the final breach of the Census Enclosure occurred because of the need for revenue by the Federal Government to fund an immediate or imminent war. In the era of the on-going and indefinite “War on Terror” that started in the late 1990s, the need for such revenues is likely to far outweigh the cost of conflicts affecting the Decennial Census and its related products.

³⁹ We make this statement largely because here are unanswered questions about the measurement of undercount error and whether or not undercount error has declined or increased over time (Anderson and Fienberg 2002). With this type of uncertainty, it is hard to believe that methodological developments will reduce conflict. However, we add that the de-coupling of the long form from the Decennial Census could make it easier for initiating the political process needed to have some form of enclosure around the census, such as “Federal Reserve Model” suggested by Teitelbaum and Winter (1998).

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