Notes

IDENTIFYING THE IDENTIFIED: THE CENSUS, RACE, AND THE MYTH OF SELF-CLASSIFICATION

By: Manav Bhatnagar*

INTRODUCTION 86

I. CHANGING PROCESS, CONSTANT CONTESTATION: FROM THE CONSTITUTION TO THE 2010 CENSUS 89

A. *The Evolution of the Decennial Census* 89

B. *Changing Attitudes Towards Racial Data and the Census* 91

C. *Courts and the Census* 92

II. WHAT IS RACIAL CLASSIFICATION? 95

III. CENSUS CLASSIFICATIONS AND THE *MORALES* "MISUNDERSTANDING": WHAT DOES THE GOVERNMENT *DO*? 98

A. *"Self-Classification"* 99

B. *Implications of Holding the Census* 100

C. *Control over the Categories* 102

D. *Re-assignment of Individual Responses* 105

E. *Re-aggregation for Enforcement* 108

F. *Alternative Sources of Identification* 109

G. *Lack of Free Agency* 110

IV. THE INSTITUTIONAL DIMENSION: CONGRESS AND THE COURTS 111

* J.D., Yale Law School, 2009. A.B., Harvard University, 2006.

A. *Complicating Factors* 111
B. *Levels of Scrutiny* 112
C. *Congressional Action* 113
D. *A Role for Courts?* 113
V. CONCLUSION 116

The Constitution mandates an "actual [e]numeration . . . in such manner as [the Congress] shall by law direct."[1] Although it was originally conceived as a tool to apportion taxes and representatives,[2] the census has evolved into a fundamental institution of government that commentators have described as a "national, secular ceremon[y] . . . provid[ing] a sense of social cohesion, and a kind of non-religious communion."[3] While congressional debates over the census in the mid-nineteenth century emphasized the need for census data in order to "display the grandeur of American society,"[4] modern incarnations of the census demonstrate grandeur in their very undertaking.

The upcoming 2010 census is a complex and enormous logistical project with far-reaching consequences. Preparations for the decennial census have warranted the allocation of $694.1 million in the 2007 budget, just one installment of an aggregate $11 billion budget being used, in part, to equip each census-taker with a handheld GPS computer providing a direct data link to the Census Bureau.[5] Unable to bear the burden of conducting the census alone, the government has signed a $500 million contract with Lockheed Martin for electronic data processing,[6] marking more than a tenfold increase from the $49 million

---

1. U.S. CONST. art. I, § 2, cl. 3.

2. Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 899 (2000).

3. PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY AND THE EVASION OF POLITICS 5 (2000) (quoting *Statistics and National Needs: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, and Government Processes of the S. Comm. on Governmental Affairs*, 98th Cong. 49 (1984) (testimony of William Kruskal).

4. Steven Kelman, *The Political Foundations of American Statistical Policy*, *in* THE POLITICS OF NUMBERS 275, 287 (William Alonso & Paul Starr eds., 1987).

5. Press Release, The Census Project, Senate Clears '07 Appropriations Bill (Feb. 15, 2007) (on file with author), *available at* http://www.thecensusproject.org/newsbrief2-15-07.pdf; David Alexander, *2010 Census to Cover Shorter List of Topics*, REUTERS, Mar. 30, 2007, http://www.reuters.com/article/domesticNews/idUSN3035373120070330. The $11 billion allocated for the census surpasses the Fiscal Year 2007 requested budgets for the Judicial Branch, Legislative Branch, Environmental Protection Agency, Office of the President, Social Security Administration, and Departments of Commerce, Labor, and Interior. The GPS computer stands in marked contrast to the first census in 1790 which was conducted by marshals on horseback.

6. Press Release, Lockheed Martin, Lockheed Martin Awarded $500 Million Contract to Implement System for 2010 U.S. Census (Sep. 26, 2005) (on file with author), *available at* http://www.lexdon.com/article/Lockheed_Martin_Awarded_$500_Million/10522.html.

data processing contract signed for the 2000 census.[7] The magnitude of resources invested in conducting the census should not be unexpected,[8] since the stakes include enforcement of antidiscrimination legislation, legislative redistricting that implicates voting rights, and the allocation of over $200 billion in federal and state funding.[9]

While the means through which the census is conducted have become increasingly complex and costly, the implications of quantifying the nation's identity have remained constant and contested. Despite the purported fidelity of the census apparatus to the notion of racial self-classification,[10] many have identified what Naomi Mezey refers to as the government's exercise of "constitutive power . . . with respect to race."[11] This power is made evident by the role that census data plays in shaping our understanding of racial categories and identity.[12] The census is alleged to have enabled the exclusion and social control of groups, such as Native Americans[13] and Chinese immigrants,[14] while serving as a medium of expression and official recognition for other groups, including Hispanics[15] and multiracial individuals.[16] These simultaneously exclusionary and affirming powers have rendered the census the site of much political contest. This politicization has been compounded by its centrality to the enforcement of civil rights laws and government function. The racial data gathered by the census is used to determine "education grants, affirmative action programs, community

---

7. *Census Contract Awarded*, N.Y. TIMES, Mar. 25, 1997, at D5. The increase in contract price reflects the changes in technology—while the 2000 contract only called for conversion of census form data into electronic data, the 2010 contract calls for the design of a web platform to enable the online submission of data.

8. In addition, the Census Bureau requested an additional $18 million in the 2008 budget in order to fund a "partnership program"—an initiative to network with community groups with the goal of ensuring the participation of all Americans in the census. The Bush Administration, however, denied the request and did not allocate any money in the 2008 budget for the program. Some sources suggested that Republicans are reluctant to take measures that would increase census enumeration of minorities since they typically vote for Democrats. *See Shortchanging the Census*, N.Y. TIMES, May 10, 2007, at A32.

9. Alexander, *supra* note 5.

10. "Self-classification" is used interchangeably with "self-identification." The terms refer to the idea that respondents are autonomously choosing racial affiliation.

11. Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1703 (2003).

12. *See, e.g.*, DAVID THEO GOLDBERG, RACIAL SUBJECTS: WRITING ON RACE IN AMERICA (1997) (analyzing the census from a Foucaultian perspective and emphasizing the controlling function played by other agencies); MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS (2000); CLARA E. RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES (2000); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853 (2002).

13. Mezey, *supra* note 11, at 1704–05.

14. *Id.* at 1722–45.

15. *See id.* at 1748 (contending that the use of "Hispanic" in the 1970 Census led to its mainstream use).

16. *Id.* at 1744–59 (highlighting the debate over the multiracial category instituted for the 2000 census).

reinvestment and development, public health programs, mortgage lending, low-income housing tax credits, voting rights, employment rights, legislative redistricting, government contracting, food stamps, and veteran benefits."[17]

While the constitutional permissibility of racial data collection for the census is often taken for granted, it belies the history of census politics: even the NAACP opposed collection as late as the 1960s.[18] The increasing role played by census data in the enforcement of civil rights legislation has changed public perception, but opposition to racial data collection has resurfaced, even appearing in federal courts. This paper explores how the reality of government involvement in racial data collection deviates from its description in equal protection case law. In addressing the issue, this paper draws upon both the volume of work that approaches the effect of the census on race from a predominantly theoretical perspective[19] and from the highly technical, process-oriented analyses[20] of the collection and use of data.[21] While census scholars accept the impact of the census process on social meaning and structure, few have attempted to reconcile the apparent tension between the notion that government collection of racial data is an involved process which implicates our understanding of race and the idea that the census is an exercise of genuine and autonomous racial self-classification.

This paper seeks to address that tension by identifying where the boundary between autonomous individual choice and government classification exists in the census process. The argument addresses three questions. First, is the distinction between neutral government data collection and meaningful governmental use found in case law valid? If not, does the nature of the data collection reach the threshold required to constitute governmental use of suspect classifications? Finally, having determined the extent to which self-classification is actually governmental classification, should the courts play a different role in monitoring the use of race in census data collection? The paper concludes that the government's role in racial data collection for the census is far from neutral, and instead contravenes the principle of self-classification. While the legal landscape has incrementally changed in a manner that encourages judicial oversight, the decidedly benign uses of census data would undermine any constitutional challenge. Therefore,

---

17. *Id.* at 1745.
18. *See infra* note 37 and accompanying text.
19. *See* sources cited *supra* note 12.
20. *See, e.g.*, Persily, *supra* note 2; SKERRY, *supra* note 3.
21. For example, scholars such as Naomi Mezey and Christine Hickman have criticized the racist underpinnings of the "One Drop Rule," an anachronistic rule that classifies any individual with even "a drop" of non-white blood as non-white. Other scholars, including Nathaniel Persily, have focused on the mechanics and practical implications of the rule and concluded it has a positive impact on minority voting strength and serves as a counterweight to efforts to improperly redistrict. This paper attempts to employ both lenses in analyzing the census process.

while the ultimate result of previously litigated equal protection challenges to the census's race question is appropriate, the characterization by courts of the government's role in data collection is fundamentally flawed.

I. CHANGING PROCESS, CONSTANT CONTESTATION: FROM THE CONSTITUTION TO THE 2010 CENSUS[22]

A. *The Evolution of the Decennial Census*

The Constitution provides that "[t]he actual [e]numeration 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."[23] The Census Bureau was established in 1902 under the Department of the Interior,[24] but was formally brought under the purview of the Secretary of Commerce by the 1954 Census Act.[25] The Act provided that "[t]he Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April . . . known as the 'decennial census date,' in such form and content as he may determine."[26] The 1960 and 1970 censuses witnessed the "liberalization and loosening of racial classifications," introducing categories, ethno-racial identity, and the option for "other" race respondents to specify their identity.[27] The third attribute, the option for respondents to self-identify, was significant because it "introduced the standard" of racial self-identification into the discourse surrounding the federal census.[28] This paper focuses on how the self-classification standard has played out in light of the tremendous changes introduced in both twenty-first century iterations of the census.

The 2000 iteration of the census ushered in significant changes with regard to implementation. In response to political mobilization, the Census Bureau, while stopping short of a separate multiracial race category, introduced a "multiracial checkoff" option, which enabled

---

22. For a more complete and detailed historical trajectory of the census, see MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY (1988); GOLDBERG, *supra* note 12, at 27–59; SKERRY, *supra* note 3.

23. U.S. CONST. art. I, § 2, cl. 3.

24. GOLDBERG, *supra* note 12, at 229 n.6. It later moved to the now-defunct Department of Commerce and Labor. When that department split in 1913, the Bureau fell under the jurisdiction of the Department of Commerce.

25. 13 U.S.C. § 2 (2000).

26. 13 U.S.C. § 141(a) (2000).

27. GOLDBERG, *supra* note 12, at 41–42.

28. *Id.* at 42.

respondents to select more than one race. The 2000 census was the first decennial census conducted in the aftermath of a series of "conflicting congressional, executive, and especially judicial decisions in the 1990s" regarding the differential undercount—the statistical phenomenon whereby minority groups are disproportionately undercounted—and various technical and statistical techniques employed to correct the discrepancy.[29] As a result of the political controversy, the Census Bureau began releasing two sets of data for the purpose of redistricting—one set of unadulterated numbers and another of statistically adjusted data—leaving the decision of which to employ and the legal consequences to the enforcing agencies.

While the 2000 changes to the census have primarily affected details of the process—the number or scope of categories or the manner in which data is released, etc.—the planning for the 2010 census has introduced fundamental structural changes. The infamous "long-form," which began circulating in 1940 and included additional and detailed socioeconomic questions, has been abandoned. Instead, households will receive only the "short-form," which asks only for "name, sex, age, date of birth, race, ethnicity, relationship and housing tenure."[30] The information formerly collected through the "long-form" is no longer within the mandate of the census; it is now gathered through the American Community Survey, a separate initiative of the Census Bureau that conducts an annual survey in an attempt to provide a "rolling snapshot" of the nation. For the purposes of legislative redistricting, the relevant government agencies shall receive only data classifying individuals on the basis of gender, age, and race, which, as will be discussed later, may create legal complications in ensuring compliance with jurisprudence that bars race from playing a significant role in redistricting.

The legal landscape surrounding racial classifications and data collection has also been altered, creating the possibility of renewed legal challenges to the census. Jack Balkin and Reva Siegel have argued that courts may be more receptive to future challenges for two reasons: first, there is a broader consensus that "census categories do not merely describe race; they also construct race"; second, since the last series of challenges to data collection in the 1970s, courts have expanded the reach of the antidiscrimination principles to also restrict "benign" race-conscious policies.[31]

---

29. Persily, *supra* note 2, at 900.

30. 2010 Census is Different, http://www.census.gov/2010census/about_2010_census/007622.html.

31. Jack Balkin & Reva Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 941 (2006).

B. *Changing Attitudes Towards Racial Data and the Census*

While attitudes towards the collection of racial data have historically varied, the centrality of such data to the enforcement of civil rights legislation has served a legitimating function for its collection.[32] Court decisions from the 1960s demonstrate a deep suspicion of government racial data collection. In *Tancil v. Woolls*, the Supreme Court annulled a statute that separated voting and property records according to race, holding that the law "serve[d] no other purpose than to classify and distinguish official records on the basis of race or color."[33] During the same term the Court found that the compulsory designation of race on voting ballots was unconstitutional because it put "the power of the State behind a racial classification that induces racial prejudice."[34] In 1967, the Court continued its opposition to racial data collection by ruling that jury selection based on a racially divided tax digest created an "opportunity for discrimination."[35]

The civil rights movement and antidiscrimination laws changed perceptions of racial data collection by expanding their range of uses. Owen Fiss highlights the change within employment law, noting that prior to civil rights legislation, "the requirement of colorblindness" in fair employment law was interpreted to include "a ban on racial record-keeping," since "[t]he antidiscrimination prohibition was thought to preclude any form of record-keeping that identified . . . race."[36] Yet, by the late 1960s, racial record-keeping was not only constitutionally permissible, but also required of employers in order to meet their obligations under the 1964 Civil Rights Act and other federal regulations.[37] Reva Siegel has documented the shift in attitude of the NAACP, which, as late as 1962, had opposed the collection of racial data with regard to crime and illegitimate births but was willing to withhold criticism of racial data that depicted the socioeconomic difficulties faced by African-Americans. Not surprisingly, as racial data from the census became increasingly important for the enforcement of civil rights statutes, the NAACP began supporting its collection.[38]

The increasing importance of census data in the enforcement of

---

32. Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1515 n.158 (2004).

33. Tancil v. Woolls, 379 U.S. 19, 19 (1964) (per curiam), *aff'g* Hamm v. State Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964).

34. Anderson v. Martin, 375 U.S. 399, 402 (1964).

35. Whitus v. Georgia, 385 U.S. 545, 552 (1967).

36. Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 265 (1971).

37. *See* Siegel, *supra* note 32, at 1515 n.158 (citing to racial record-keeping obligations of employers under the Civil Rights Act); Fiss, *supra* note 36, at 265 n.32 (citing to federal regulations requiring reporting of racial data).

38. Balkin & Siegel, *supra* note 31, at 938–39; Siegel, *supra* note 32, at 1515 n.158.

civil rights legislation did not, however, lead to a unidirectional change in attitude. The relationship between racial data and affirmative action policies sparked a predictable backlash from the political right.[39] The debates over racial data collection and affirmative action are so intertwined[40] that a Secretary of Commerce advisor claimed that "[w]ere it not for the civil rights aspects of this issue, [the census] would not be something" that would merit so much attention.[41] The census is understood by political groups as an inherently allocative exercise with values and norms at stake. Scholars of the census have noted that "much of the energy directed against [an accurate census] derives from hostility to affirmative action," since the census is viewed as a "vital cog" of the government's race-conscious policies.[42]

C. *Courts and the Census*

Despite the controversy over the census's racial categories in the political sphere, there has been surprisingly limited litigation of the issue. In *People v. Hall*, the California Supreme Court overturned the 1854 conviction of a murderer who had appealed on the basis of a law that barred court testimony by blacks, mixed race persons, or American Indians against a white person. The defendant had been convicted as a result of testimony by a Chinese witness and argued on appeal that the

39. Recent opposition to racial data collection has also cast its argument through the lens of privacy. This is not a new phenomenon—historians of the census documented allegations of intrusiveness as the range of topics covered by census questions grew. Privacy-based objections were lodged against 1940 census questions regarding income and 1960 census questions regarding bathroom facilities. *See* ANDERSON, *supra* note 22, at 211. In response to renewed privacy concerns over the 2000 census, Republican political leaders and publications criticized the intrusiveness of the census and went as far as to suggest noncompliance. *See* Mezey, *supra* note 11, at 1720 n.100 (citing senators, representatives and newspaper articles criticizing the invasive nature of the Census and encouraging noncompliance). Naomi Mezey has highlighted the testimony of Edward Judgins, a Cato Institute director, as representative of the pro-privacy argument: "Most of the census questions are none of your damned business. We hire you to protect our lives, liberties and property, not, I repeat, not to butt into our affairs. Stop your meddling and stick to your jobs." *Id.* (quoting Congressional testimony during a hearing on the American Community Survey). A recent initiative by anti-affirmative action activists in California gained considerable national attention by attempting to amend the state constitution to bar racial data collection. The effort combined the two strands of opposition by relying on the antidiscrimination principle while naming the initiative the Racial Privacy Initiative. *See* Balkin & Siegel, *supra* note 31, at 942 n.48.

40. The racial data collected by the census serves as the foundation for arguments from both sides of the political spectrum about race. Peter Skerry has suggested that some critics of census data collection are guilty of hypocrisy: for example, Dinesh D'Souza has argued against data collection since "race categories are being obviated," a claim based on the increasing prevalence of racial intermarriage—an argument that "he would not be able to make if the census did not collect racial and ethnic data!" SKERRY, *supra* note 3, at 202.

41. *Oversight Hearing to Review the Progress of Coverage Evaluation Procedures: Hearing before the Subcomm. on Census and Population of the H. Comm. on Post Office and Civil Service*, 102nd Cong. 66 (1991) (quoting the testimony of Eugene Ericksen).

42. SKERRY, *supra* note 3, at 3.

Chinese, for the purposes of the statute (and consistent with census categories), were to be considered American Indians because of their shared heritage.[43] In a well-documented and more contemporary case, Lockheed Martin responded to a racial discrimination suit brought by a Hindu employee by arguing that the plaintiff did not have standing under California labor law. Lockheed Martin claimed that as an East Indian, he was a Caucasian under the law. Again, the trial court agreed that the plaintiff failed to state a claim based on national origin.[44] After the category of "Asian Indian" was added to the census, however, the Court of Appeals found that the plaintiff was "subject to a discriminatory animus based on his membership in a group which is perceived as distinct."[45]

While equal protection claims against census data collection have rarely been litigated, the census process has often been contested in courts. The 1990s witnessed heavy litigation regarding the differential impact of census procedures on racial minorities and the constitutionality of statistical remedies.[46] Scholars have argued that such litigation was a prime contributor to the further politicization of the census.[47] The former director of the census stated that lawsuits in the 1990s "precipitated the [Commerce] [D]epartment's 'takeover' of the Census Bureau ... [and that] [t]he lawsuits have diminished the bureau's autonomy, moving adjustment decisions away from the purely statistical arena."[48] The parameters of the census have also been litigated in federal courts, resulting in rulings that directed if and how illegal aliens,[49] the overseas population,[50] college students,[51] and prisoners[52] should be included in the census enumeration. In the view of some scholars, the complex procedural changes in the two most recent iterations of the census have also created potential conflicts with existing redistricting law, paving the way for future litigation.[53]

---

43. People v. Hall, 4 Cal. 399, 399–400 (1854).

44. Sandhu v. Lockheed Missiles & Space Co., 31 Cal. Rptr. 2d 617, 619 (Cal. Ct. App. 1994) (citing Superior Court of Santa Clara County, No. 718352, Peter G. Stone, Judge (unpublished opinion)).

45. *Id.* at 624.

46. *See* Utah v. Evans, 536 U.S. 452 (2002); Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999).

47. *See, e.g.*, SKERRY, *supra* note 3, at 29.

48. BARBARA EVERITT BRYANT & WILLIAM DUNN, MOVING POWER AND MONEY: THE POLITICS OF CENSUS TAKING 221 (1995).

49. *See* Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980).

50. *See* Franklin v. Massachusetts, 505 U.S. 788 (1992); Utah v. Evans, 143 F. Supp. 2d 1290 (D. Utah 2001).

51. *See* Borough of Bethel Park v. Stans, 449 F.2d 575 (3d Cir. 1971).

52. *See* District of Columbia v. United States Dep't of Commerce, 789 F. Supp 1179, 1180 (D.D.C. 1992); *Bethel Park*, 449 F.2d at 582.

53. *See* Persily, *supra* note 2, at 938–42 (noting that the limited range of data used in redistricting may make race a "predominant" factor in any redistricting decisions, thus violating the Supreme Court's holdings in a number of cases, including *Shaw v. Reno*, 509 U.S. 630 (1993), to refrain from assigning race "predominant" importance).

Despite the litigation focusing on the structure, logistics, and application of census data, there has been virtually no modern litigation in federal courts regarding the constitutionality of the census's race categories or the collection of racial data.[54] This trend exists despite the fact that government data collection on race has greatly expanded in scope, and political contestation over the meanings of such data has similarly intensified. The court system has not been used by either side to institutionalize its position. The only federal lawsuit on the subject, which will serve as a starting point for analyzing the authenticity of self-classification, is *Morales v. Daley*, in which the plaintiffs advanced both an equal protection and a First Amendment challenge to the racial identification questions on the census.[55] The relevant issue facing the court was whether "requiring a person to self-classify racially . . . knowing to what use such classifications have been put in the past, can violate the due process implications of the Fifth Amendment."[56]

In *Morales*, the plaintiffs argued that the race and ethnicity questions on the census infringed upon their rights because "any classification based on race or national origin demands a strict scrutiny evaluation and requires a classification to be narrowly tailored to a compelling, overriding, governmental interest."[57] They alleged that in the case of the census there was not only "a lack of governmental interest, but . . . also a strong public policy reason to ensure that such information is not collected."[58] The court rejected this claim, instead relying on a First Circuit decision which held that "[p]ossible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather *neutral entity* which only becomes meaningful when it is interpreted."[59] Relying on this distinction between neutral data collection (self-classification) and governmental use of data (government classification), the court concluded that the plaintiffs' case was "based upon a misunderstanding of the distinction between collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and governmental use of suspect classifications without a compelling interest."[60]

54. The one exception is *Georgia v. Ashcroft*, 539 U.S. 461 (2003), in which the Supreme Court stated that anyone who checked off black plus another racial category would be included in the enumeration of the Black Voting Age Population (BVAP) in order to prevent any limitation on African-American voting power. This standard, often cast as the "One Drop Rule," was codified into practice by Office of Management and Budget directives.

55. Morales v. Daley, 116 F. Supp. 2d 801 (S.D. Tex. 2000), *aff'd sub nom.* Morales v. Evans, No. 00-020693, 2001 U.S. App. LEXIS 23316 (5th Cir. Oct. 10, 2001).

56. *Id.* at 814–15.

57. *Id.* at 810.

58. *Id.* at 811.

59. *Id.* at 814 (emphasis added) (quoting United States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976)).

60. *Morales*, 116 F. Supp. 2d at 814.

This paper is concerned with resolving whether there is, in fact, any misunderstanding. Is the distinction between neutral government data collection and meaningful governmental use valid? If not, does the nature of the data collection reach the threshold required to constitute a governmental use of a suspect classification? In attempting to square the idea of self-classification with the jurisprudence on the race-based classifications, it becomes clear that the government's role in data collection goes far beyond neutral collection. Ironically, it is the *Morales* court that is operating under a misunderstanding—namely that the census is a neutral data collection process. The government's manipulation of racial data to exclude groups is not just a historical occurrence; the current process through which the government collects and tabulates data implicitly assigns individuals to racial categories in violation of the spirit of self-classification.

II. WHAT IS RACIAL CLASSIFICATION?

Courts may only play a role in regulating the census process if the government's action triggers heightened scrutiny. Simply transcending the bounds of neutrality in collecting, tabulating, and applying census data is not enough. This section seeks to explore what constitutes an impermissible racial classification, leaving the validity of the *Morales* distinction between the government's role in the census and impermissible use of race for Part III.Scholars have noted that the application of the antidiscrimination principle after *Brown v. Board of Education*[61] was complicated by twin challenges: facially neutral statutes with disparate impacts and explicit uses of race for "benign" purposes, such as affirmative action.[62] The racial categories in the census appear to fall in a third category that combines elements from these two problematic categories. While the census explicitly uses and, as later argued, assigns racial categories, the impact of the process cuts both ways. It can be cast as a "benign use" of race, since the racial data is the linchpin of the statutory antidiscrimination regime. Yet it also has a disproportionately adverse impact on minorities since the census process systematically undercounts minority groups.

Courts have traditionally refrained from applying heightened scrutiny because the collection of census data is primarily put to benign uses. As mentioned above, however, that mode of analysis has recently been under attack in the context of the voluntary school desegregation

---

61. 347 U.S. 483 (1954).

62. *See, e.g.*, Jack Balkin & Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 11 (2003); Siegel, *supra* note 32.

cases.[63] The court in *Morales* emphasized the significance of the governmental interest in data collection, tying it to "racial disparities in health and environmental risks," re-districting, governance, and anti-discrimination efforts.[64] The *Morales* court, in finding the racial categories to be constitutionally permissible, relied on two key elements to distinguish the census from impermissible racial classifications. First, the "benign" and important governmental uses for the data, and second, the notion that "hypothetical" misuse does not necessitate a heightened level of scrutiny since any subsequent interpretation of the data would be subject to judicial scrutiny.[65]

Not all courts have taken such a favorable view of the "benign" uses of racial data. In *City of New York v. United States Department of Commerce*,[66] the court directly adopted the language of *Carolene Products*' Footnote Four,[67] holding that the proper standard of review for the differential minority undercount should be heightened scrutiny because of the nature of the right (to vote) and the nature of the affected class (minorities).[68] The decision in *City of New York* did not consider the enforcement of civil rights legislation as a mitigating factor in its claim that the undercount should be subject to strict scrutiny. While the census may play an important role in protecting the rights of minority groups, the current structure discriminates against minority groups and, by not accurately enumerating their size, fails to provide them the level of protection intended by law. Further, as Part IV will discuss, the elements of the census criticized by civil rights groups, such as the "One Drop Rule," may actually hedge against the dilution of minority voting power through re-districting. Whether the courts should have any role in adjudicating this dispute—which could necessitate expressing a preference for voting strength or genuine self-classification—will also be discussed in Part IV.

There is no authoritative precedent or criteria for determining what constitutes an impermissible race-based group classification. Judicial decision-making on the issue is dictated by prevailing social norms and has fluctuated in the decades since *Brown*. The earlier discussion of data collection suggests that courts routinely found racial data collection to be impermissible until it became intertwined with the enforcement of civil rights legislation. Legal scholars have noted the contradictory signals that the Supreme Court sends as it grapples with the proper role of

---

63. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (holding that public schools may not use race as the sole factor in assigning students to schools).

64. *Morales*, 116 F. Supp. 2d at 813–15.

65. *Id.* at 814.

66. City of New York v. United States Dep't of Commerce 34 F.3d 1114 (2d Cir. 1994).

67. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

68. *City of New York*, 34 F.3d at 1128.

antisubordination and anticlassification values in its race jurisprudence.[69] Recognizing the fluidity of the debate surrounding classifications, Reva Siegel has argued that social movements and political mobilization around various practices will play the key role in compelling the courts to "draw on anticlassification discourse to express or limit concerns about status harm that the practices pose."[70] Current mobilization around the census is occurring on both sides. Civil rights groups champion the use of racial data collection and conservative groups espouse anticlassification and color-blind rhetoric in arguing against the racial data. Yet courts, for now, seem content to retain their distance from the debate.

How will future courts adjudicate the claims of the *Morales* court for sustaining the permissibility of racial data collection—namely, the "benign" use of such data and the descriptive, as opposed to distributive, character of data? The question raised in *Morales*—whether descriptive racial data can have inherently distributive or status-related meaning—has already reached the federal courts. In *Brown v. City of Oneonta*, the Second Circuit's denial of rehearing en banc prompted several dissenting opinions that explored the parameters of racial classifications in the criminal context. The Second Circuit originally held that "where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the *Equal Protection Clause*."[71] In response to the denial of rehearing en banc, one dissent proposed a rule under which all uses of race by police in criminal profiles constitute a suspect classification and are prone to strict scrutiny,[72] while another suggested that strict scrutiny is triggered when police ignore the non-racial aspects of the criminal profile and act on the basis of the racial elements.[73]

The intra-bench debate in *Oneonta* implicates issues at play in the census debate. Most notably, the court addresses the relationship between third-party-classification (witnesses providing a description of the suspect) and government use of the information (how the police interpreted the data), similar to the relationship between self-classification of racial identity on the census and how the government collects and tabulates the data. The majority opinion, much like the

---

69. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 510–15 (2003); Siegel, *supra* note 32, at 1536–38 (contrasting the Court's decisions applying the antisubordination principle in *Bakke* and rolling back its reach by issuing anticlassification-based decisions in *Davis* and *Feeney*).

70. Siegel, *supra* note 32, at 1544.

71. Brown v. City of Oneonta, 221 F.3d 329, 333–34 (2d Cir. 1999) (emphasis in original).

72. Brown v. City of Oneonta, 235 F.3d 769, 789 (2d Cir. 2000) (Straub, J., dissenting from denial of rehearing en banc).

73. *Id.* at 779 (Calabresi, J., dissenting from denial of rehearing en banc).

Morales court, suggests that any future inappropriate action based on the racial data would still face judicial scrutiny and that preemptive scrutiny is not necessary.[74] Yet the dissenting judges, especially Judge Calabresi, signal a willingness to recognize that even if the racial classification is initially created by a third-party, the manner in which the government uses or acts upon that data can constitute constitutionally impermissible conduct.[75]

For now, the census's racial classifications and data collection appear to be constitutionally protected. Yet the parameters of what constitutes a racial classification are in flux, informed by prevailing social norms and political mobilization. Given its centrality to the enforcement of civil rights measures, racial data collection has enjoyed widespread acceptance. Yet, over the last decade courts have slowly gutted the constitutional protection that "benign" uses of race once enjoyed. In court, proponents of the census and racial data collection have primarily relied on distinguishing data *collection* from impermissible *use* of race. In the context of criminal suspect profiles, however, federal courts have already started to debate the validity of this distinction.

III. CENSUS CLASSIFICATIONS AND THE *MORALES* "MISUNDERSTANDING": WHAT DOES THE GOVERNMENT *DO*?

The census asks respondents to "indicate what race [the] person considers himself/herself to be."[76] The Office of Management and Budget (OMB), which has established the racial categories used by the census, insists that it "does *not* tell an individual who he or she is, or specify how an individual should classify himself or herself."[77] This section explores whether the OMB's view is reflective of the government's role in the processing and tabulation of answers to the race question. This paper concludes that the government's role is a far cry from *Morales*'s portrayal of the neutral actor merely collecting statistics. Instead, the descriptive and distributive aspects of the data collection process are inextricably linked. The census process is inherently allocative—one in which the government sets the terms of the exchange. As David Goldberg has observed, Information [from the census's race

74. *Id.* at 775–76 (Walker, J., concurring in the denial of rehearing en banc).

75. *Id.* at 779 (Calabresi, J., dissenting from denial of rehearing en banc).

76. 2000 Census Questionnaire, U.S Census Bureau, *available at* http://www.census.gov/dmd/www/pdf/d02p.pdf.

77. Office of Management and Budget (OMB) Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874 (July 9, 1997) (emphasis added).

question] thus has two meanings: detailed facts about racial nature and the forming of racial character."[78]

A. "Self-Classification"

The idea of self-classification has evolved to place greater agency in the individual: originally, the notion of self-classifying meant that individuals were affiliated with groups when they had "observable social ties to members of fairly well-defined racial or ethnic groups."[79] Scholars have noted, however, that the notion of self-classification has evolved to encompass a different understanding, one that was growing in popularity at the state level during the previous decade.[80] The prevalent understanding of self-classification, informed by the increasing relevance of identity politics, is "a matter of individual psychology, of an individual's highly subjective feelings of attachment to some group, its culture or language, or perhaps its historical experience."[81] The legal significance of the concept is that it animates the conventional understanding of racial data collection on the census, reflected by the analysis in *Morales*: i.e., that there is no government wrongdoing in collecting autonomous and genuine self-classifications.

In addition to its logistical ease, scholars have lauded the self-classification regime for its consistency with the American understanding of democracy and individualism. Given the historical baggage associated with forced racial classifications—slavery, the Japanese internment, and the Jim Crow regime, for example—self-classification marks a welcome reaffirmation of individualism.[82] Conversely, critics of racial data collection have seized on the voluntary nature of self-classification to allege that it creates perverse incentives by inviting free-riders. Individuals may identify with disadvantaged groups to gain benefit, such as students claiming minority heritage to improve their chances for college admission. In the 1990 census, the number of people that identified as "American Indian" was nearly double the number of individuals on the Bureau of Indian Affairs tribal rolls.[83] Yet this criticism is a misunderstanding of how the census process allocates benefits. Since census data is used to help disadvantaged groups, and

---

78. GOLDBERG, *supra* note 12, at 30.

79. SKERRY, *supra* note 3, at 43.

80. *See* GOLDBERG, *supra* note 12, at 44. Scholars have noted that self-classification was applied to the race question in 1960 in an effort to reduce costs—instead of determining how individuals affiliate, respondents were now to supply the answer themselves. SKERRY, *supra* note 3, at 46.

81. SKERRY, *supra* note 3, at 43.

82. For a discussion of the relationship between ideals of individualism, American history and the nature of self-classification, see SKERRY, *supra* note 3, at 47.

83. *Id.* at 52.

their constituent members only benefit indirectly, "there are no such direct or tangible incentives *for individuals*."[84] Other critics of self-identification have argued that if the goal of data collection is to halt discrimination, "the relevant issue for purposes of enumeration is appearance rather than self-identification."[85] In other words, people are discriminated against on the basis of appearance, so the enumeration should concern appearance, not the way they psychologically identify.

Current work on the government's involved role in census data processing, as previously discussed, tends to fall into one of two categories: it is either grounded in deep theoretical argument or it employs highly technical and detail-oriented analysis. This section seeks to bridge the gap between the two approaches and to advance a comprehensive description of the disconnect between the government's purported commitment to self-classification and the reality of its involvement in data manipulation.

This paper argues that there are six aspects of the government's involvement in the processing and tabulation of census data that violate the spirit of self-classification: (1) given the history of the census, the fact that the government facilitates a census necessarily imputes social meaning to the process; (2) the OMB has the power to limit, expand, and define the field of racial categories; (3) the Census Bureau automatically re-assigns individuals to categories that they did not autonomously select; (4) the OMB re-aggregates the self-classifications into other categories for the purpose of enforcement by federal agencies; (5) logistical complications regularly require the Census Bureau to abandon self-classification at the data collection stage; and (6) the enforcement of racial identification under the threat of legal sanction undercuts the individual agency in self-classifying by race.

B. Implications of Holding the Census

The Constitution does not require the census to provide anything beyond a raw enumeration of the nation's population. Yet that information can be "equally well obtained from births, immigration, and other sources."[86] Why then are the detailed questions found on census forms needed? There appears to be scholarly consensus that historically the census was "an instrument of state authority," the exercise of which was "inherently political" and used to preserve the stability of the state

---

84. *Id.* at 76 (emphasis in original).

85. Mezey, *supra* note 11, at 1753 (describing common criticisms of the race politics used by the multi-racial lobby).

86. Nathan Keyfitz, *Statistics, Law and Census Reporting*, 18 SOC'Y 5, 5 (1981).

by "drawing boundaries."[87] The importance of the census to state power is underscored by the long history of its use, which dates to as early as 3800 BC.[88]

This claim was at the heart of *Morales*, where the plaintiffs alleged that racial data had been "misused under the justification of a national emergency" in order to intern Japanese Americans, and that census questions that solicit data beyond a mere headcount were an invasion of privacy.[89] Naomi Mezey has argued that the census enables social control because statistics create "the idea of 'the average person' and its corollary, the deviant."[90] Mezey has cast the census as an "examination and disciplinary instrument" used for its regulatory functions.[91] Historical examples in addition to the Japanese internment abound, including the use of the census in response to a growing "threat" from Chinese immigrants to monitor, control, and exclude them from social integration.[92] Similarly, the 1840 Census was used by pro-slavery advocates to undercut the trend towards releasing slaves by arguing that "insanity and idiocy" were more prevalent among blacks in the North.[93]

Such examples of the state and interest groups abusing census data for social and political ends are just the tip of the iceberg; it is apparent that the census is not the neutral and apolitical exercise it is often portrayed to be. The fundamental purpose of collecting data beyond a mere headcount is to create an ordered snapshot of society. That data is influential in creating norms,[94] and thus prone to misuse. With roots in the Babylonian and Roman empires, the census has long been a tool used by the state to cement its power. Even recent iterations of the American census have been used for such ends. The Census Bureau, unsurprisingly, has strongly resisted any characterization of it as a political actor, and has attempted to distance itself from the debate over racial data. Census experts have cited, as the source of this resistance, the domination of the Bureau by "demographers, statisticians, and other highly trained professionals," who view themselves as "politically neutral . . . 'factfinders.'"[95] Nevertheless, the fact that the United States holds a census that goes beyond the constitutional mandate and collects detailed socio-economic information should put courts on guard that there may be a deeper meaning to government data collection.

87. SKERRY, *supra* note 3, at 10, 11.

88. *Id.*; *see* sources cited *supra* note 10.

89. *Morales*, 116 F. Supp. 2d at 811.

90. Mezey, *supra* note 11, at 1715.

91. *Id.* at 1720.

92. See *id.* at 1722–42.

93. GOLDBERG, *supra* note 12, at 38.

94. *See* Mezey, *supra* note 11, at 1702 (discussing how the census has created the "soccer mom" and other social stereotypes).

C. *Control over the Categories*

The parameters of self-identification on the census have always been limited because the categories are supplied by the government, specifically the OMB. With the ability to add, remove, expand, or limit the available categories, the government has always defined the range of potential responses within which individuals can "self-classify." The categories have greatly expanded over the years to reflect contemporary understandings of race. The 1790 census, for example, recognized Free White Males and Females; All other Free Persons, Except Indians Not Taxed; and Slaves.[96] The 2000 census included White; Black, African American or Negro; American Indian or Alaskan Native; Asian Indian; Japanese; Chinese; Filipino; Korean; Vietnamese; Other Asian; Native Hawaiian; Guamanian or Chamorro; Samoan; Other Pacific Islander; and Some Other Race.[97] Despite this expansion in categories, many major immigrant communities are no longer or not yet explicitly represented in the census categories. Perhaps the most notable exclusion is a category for individuals of Middle Eastern or Arab descent, who are predominantly classified as "white"—though many commentators have suggested that the effects of 9/11 may lead to a separate category being added in the future.[98]

The racial categories used by the census are derived from OMB Statistical Directive No. 15, a landmark circular issued in 1978, which David Hollinger has famously called "'the single event most responsible for the lines' that configure our understanding of race."[99] The directive originally issued categories for four races and two ethnicities,[100] but 1997 amendments split one category and changed the name of two others. The categories now include: "American Indian or Alaskan Native," "Asian," "Black or African American," "Native Hawaiian" or "Other Pacific Islander," and "White," for race, and "Hispanic or Latino" or "Not Hispanic or Latino" for ethnicity.[101] The significance of Directive No. 15 is enhanced because, while federal agencies are allowed to expand the range categories, virtually none of them do so.[102] The

95. SKERRY, *supra* note 3, at 4.

96. GOLDBERG, *supra* note 12, at 36.

97. *See* 2000 Census Questionnaire, U.S. Census Bureau, *available at* http://www.census.gov/dmd/www/pdf/d02p.pdf.

98. Mezey, *supra* note 11, at 1766.

99. *Id.* at 1746 (quoting Hollinger in describing the prevalence of the "ethno-racial pentagon").

100. Directive No. 15 laid out the following race categories: "white," "black," "American Indian or Alaskan Native," and "Asian or Pacific Islander." The ethnicity question allowed two responses: "Hispanic origin" and "not of Hispanic origin." OMB Directive No. 15: *Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, 43 Fed. Reg. 19,269 (May 4, 1978).

101. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782 (Oct. 30, 1997).

102. The Census Bureau, purportedly committed to self-classification, is one of the few agencies

Directive No. 15 categories, therefore, have grown "influential far beyond [their] original intent" and have "become reified as absolute standards."[103] Juanita Lott has argued that Directive No. 15 signaled the moment when the use of race-based classifications "shifted from one of exclusion to one of explicit inclusion of specific groups,"[104] setting the stage for intensive lobbying by minority groups seeking categorical inclusion—most notably in the debate over a multi-racial check-off option for the 2000 Census.[105]

The mere existence of racial categories has drawn criticism from the anti-classification camp, which alleges that continued racial data collection stunts the development towards a race-blind society. There is also an anti-subordination argument to be made, since the ambiguous boundaries of the current racial categories, complicated by logistical difficulties in conducting the census, lead to a differential undercount that disproportionately affects minority groups.[106] Historically, the census categories have served to recognize and affirm group identity while simultaneously excluding others by denying recognition. Historian Margot Anderson argues that census categories provide the "categories we think in."[107] The census "does more than facilitate a body count,"[108] because the recognized categories tell us "whose body counts, and for how much."[109] By limiting the scope of categories, respondents entrench understandings of race because they must define their identity by choosing from "a mix of *traditionally* racial, ethnic and national categories."[110]

The social implications of the evolving race categories on the census have been the subject of much academic work.[111] While this paper does not explore the historical evolution of the categories,[112] a brief discussion of how census categories affirm and exclude groups will demonstrate the significance of limiting self-classification to pre-

---

that does so; not only has the Bureau expanded the range of available categories, it has also allowed respondents the option to write-in their own race if not listed. However, the next sub-section on data re-aggregation will discuss how this flexibility is a mirage, and that the Census Bureau violates the spirit of self-classification by forcibly re-allocating individual responses in accordance with its pre-existing defined categories.

103. SKERRY, *supra* note 3, at 69–70; SPOTLIGHT ON HETEROGENEITY: THE FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION 8–9 (Barry Edmonston et al. eds., 1996).

104. JUANITA TAMAYO LOTT, ASIAN AMERICANS: FROM RACIAL CATEGORY TO MULTIPLE IDENTITIES 28 (Alta mira Press 1998).

105. For history and analysis of the debate surrounding a multi-racial category or check-off option for the 2000 Census, see Mezey, *supra* note 11, at 1744–64.

106. *See, e.g.*, Persily, *supra* note 2, at 900.

107. ANDERSON, *supra* note 22, at 5.

108. Mezey, *supra* note 11, at 1705.

109. *Id.*

110. GOLDBERG, *supra* note 12, at 44 (emphasis added).

111. *See* GOLDBERG, *supra* note 12; SKERRY, *supra* note 3; Mezey, *supra* note 11.

112. For a discussion of how the range of census categories has evolved from 1790 to 1990, see GOLDBERG, *supra* note 12, at 34–44.

determined government categories. As previously discussed, the account of Chinese-American exclusion, the use of census data to justify slavery, and court cases pushing the boundaries of race categories demonstrate the power of the census to exclude and marginalize groups. The first census in 1790 did not explicitly recognize Blacks or Indians, instead offering five categories in which 'white' was the only explicit racial marker: "free white males aged sixteen years and older, free white males under sixteen, free white females, all other free persons and slaves."[113]

Scholars have also taken note of the implicit hierarchy of races that may be inferred from the decision not to alphabetize the race categories on the census.[114] David Goldberg argues that:

> [A]n alphabetical listing of categories or names would signify a commitment not to differentiate irrelevantly between the entities listed and would be a commitment to treat all equally. The ethnoracial categories . . . however, have *never* been alphabetically ordered. Indeed, invariantly, "whites" have been listed first . . . there is never a census concern to enumerate the ethnic subdivision of whites in the way that the census count has obsessed over those deemed not white. "White" is the *only* category that remains formally unchanged throughout the two-hundred-year history of the census count.[115]

While expansion of the available range of categories is often equated with aspirational lobbying—e.g., the multi-racial lobby seeking a separate category—and the contraction of the available range of categories is equated with disciplinary action against a group, these binaries fail to account for the nuanced politics of the census. Expanding the range of categories may be a political tool to combat the strength of minority groups: one of the few legal ways to undercut black voting power in light of the Voting Rights Act is to dilute black census numbers by including ambiguously defined categories, such as "Hispanic," that may attract voters who had previously identified themselves as "black."[116] Jewish lobby groups have found it in their best interest, given the history of "exclusionary categorization [of Jews] in and by the law," to block the addition of a Jewish category, despite the inclusion of Hindu and Hispanic—identity markers that correspond to race no more than "Jewish."[117]

---

113. Mezey, *supra* note 11, at 1704.

114. Dvora Yanow, "Administrative Implications of American Ethnogenesis," Paper Presented to the Public Administration Section, American Political Science Association Annual Meeting, Washington, D.C., September 1, 1993, *cited with approval in* GOLDBERG, *supra* note 12, at 53.

115. GOLDBERG, *supra* note 12, at 53 (emphasis added).

116. *Id.* at 51.

117. *Id.* at 54.

D. Re-assignment of Individual Responses

The previous two aspects of government involvement with the census—namely, its role in administering the census and control over categories—cast doubt upon the legitimacy of "self-classification" at a theoretical level. The traditional uses of census data by states and the manner in which census categories are created both suggest that the information gathered from respondents is more than an unfiltered racial affiliation. Instead, the exchange of data is an inherently structured interaction that occurs on terms that are dictated by the state. The remaining aspects of government involvement address the technical process through which data is tabulated, processed, and applied.

Since the census now allows write-in and multiracial check-off answers to the race question, the dilemma facing the Census Bureau is how to tabulate myriad responses in a consistent manner. Government agencies find themselves "[t]orn between the regime principle of self-identification and the bureaucratic requirements of the contemporary administrative state."[118] For example, even putting aside the ability of respondents to submit write-in answers to the race question, the multiracial check-off option creates sixty-three potential responses. When combined with the two-answer ethnicity question, there are 126 different combinations under which respondents could self-classify. Legislative redistricting relies on the racial data from the census,[119] but how can it incorporate over one hundred different race permutations in determining permissible district boundaries? Logistically, it is unfeasible; the only way of making use of new census data is to "reaggregate[ ] the data into some more usable format."[120] The Census Bureau does so, in part, by automatically reassigning responses into broad predetermined categories, in spite of nuanced self-identification to the contrary.[121]

The ability for respondents to submit write-in responses, primarily under the "other race" category, compounds the bureaucratic complications posed by the multi-racial check-off. Approximately eight million write-in responses were submitted during the 1990 census. Many of the responses, including "South African," "Guyanese," "Moslem," or

---

118. SKERRY, *supra* note 3, at 79.

119. The reliance on census data is not exclusive. Political party registration and voting records also play a key role in redistricting efforts.

120. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them* 16 (2005), http://www.law.upenn.edu/fac/npersily/workinprogress/persily.census.8.6.doc; *see* Persily, *supra* note 2, at 930.

121. *See infra* notes 126–127 and accompanying text.

"American," had "no clear racial meaning."[122] Similarly, many respondents submitted the names of ethnic groups in response to the "other race" question, including "Irish," "Arab," "Iranian," and "Jamaican."[123] Both of these situations required the Census Bureau to violate the self-identification principle and determine under which category to classify them; all the aforementioned responses were subsequently reclassified into the four Directive No. 15 categories: "white," "black," "Asian or Pacific Islander," or "American Indian or Alaskan Native."[124] Further, the 1990 census received a quarter of a million responses to the question that asked respondents which "multiracial" combination with which they identified.[125] In order to classify these individuals in a racial category, the Census Bureau simply chose whichever racial category was listed first—i.e., if a respondent wrote in "white/black," they were classified as white, while someone writing "black/white," was classified as black.[126] Thus, even if respondents identified with more than one racial group, they were reclassified as only belonging to one race.[127]

All in all, nearly ten million individuals were reclassified by the Census Bureau during the 1990 census into a racial category other than what they had specified on their form.[128] Regardless of the nuance, specificity, or intention of an individual's self-classification, each answer was reclassified into one of the four categories promulgated by the OMB in Directive No. 15. Although that directive was originally conceived to merely provide a starting point for federal agencies, it has been adopted as a "de facto standard" by "state and local agencies, the private sector, the nonprofit sector, and the research community."[129] A National Academy of Sciences report issued after the 1990 census declared that while "'Directive 15 was never intended to establish a national standard for race categories, it has come to function partly in that way.'"[130]

In an attempt to make the process of data tabulation and reclassification uniform, the OMB adopted universal guidelines in 2000 under Bulletin No. 00-02.[131] While the new guidelines for dealing with

---

122. SKERRY, *supra* note 3, at 50.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. There are alternatives to this tabulation technique. Persily has argued that individuals could be double counted (as members of both race), or fractionally counted (across both races). *See* Persily, *supra* note 2, at 931.

128. SKERRY, *supra* note 3, at 51.

129. SPOTLIGHT ON HETEROGENEITY, *supra* note 103, at 36.

130. SKERRY, *supra* note 3, at 70.

131. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BULL. NO. 00-02, GUIDANCE ON AGGREGATION AND ALLOCATION OF DATA ON RACE FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT, (2000), *available at* http://www.whitehouse.gov/OMB/bulletins/b00-02.html [hereinafter OMB Bulletin No. 00-02].

multiracial responses are discussed in the next section, it is worth noting that the Bulletin is silent on how to deal with errant responses to the race question, such as those answers that have no racial meaning or are ethnic groups.[132] Presumably, such responses will continue to be classified by the Census Bureau into the OMB race categories in the discretionary and ad hoc manner in which responses to the 1990 census were reclassified.[133] The Bulletin explicitly requires respondents identifying as both white and a minority race to be allocated to the minority race category for tabulation purposes.[134] Thus, an individual with one white and one black parent, who strongly identifies as either a mixed-race or white person, will be *automatically* tabulated and classified as black by federal agencies using that data. Yet an individual that selects two races, neither of which is white, will *not* be reassigned or tabulated as one race or another.

Despite its tension with self-classification, reclassification is cast in favorable terms because it "creates a presumption for the enforcement of civil rights laws . . . . [D]ata will be tabulated in a light most favorable to the alleged victim of a civil rights violation."[135] In contrast, the practice of assigning a racial designation to an individual was historically frowned upon.[136] Such a rule is reminiscent of the much-criticized "One Drop Rule," a remnant of the Jim Crow era, where *one drop* of black blood would be sufficient to render an individual non-white.[137] Critics have argued that the modern rule "reduce[s] a black-white respondent to 'black' and ignore[s] the more complex self-identity expressed on the census form."[138] This is problematic because it both defeats the purpose of self-classification and "misallocate[s] people who would otherwise not want to group themselves with members of a certain single-race category."[139]

While the automatic reassignment of responses to the race question marks a departure from the Census Bureau's commitment to honoring self-classification and the respondent's intention, its benefits with regard to civil rights legislation have led scholars to defend it. As with many of the debates surrounding tabulation techniques for the census, the implications cut both ways—a choice between practical and logistical benefits on one hand, and a commitment to racial self-classification on the other. This dual nature that runs through the debates surrounding the

132. *See supra* text accompanying notes 121–123.

133. *See supra* text accompanying notes 118–121.

134. OMB Bulletin No. 00-02.

135. Persily, *supra* note 120, at 17.

136. *See* Hickman, *supra* note 12 (discussing critical treatment of One Drop Rule).

137. For a history and discussion of the "One Drop Rule," see Hickman, *supra* note 12; *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

138. Persily, *supra* note 2, at 933 (summarizing the critique of the 2000 OMB guidelines vis-à-vis their similarity to the One Drop Rule).

139. *Id.*

census will be explored further in Part IV as part of a larger discussion on the appropriate role of courts in resolving these issues.

The intuitive response to criticism of the OMB guidelines is that they bolster the size of minority populations, an essential element in enforcing the Voting Rights Act. Christine Hickman has argued that criticism of the One Drop Rule (and by extension, its modern corollaries) ignores the positive effects it has for the black community, especially in "forg[ing] a unified Black community that has been an effective force in battling racism."[140] Nathaniel Persily has advanced a more technical response to criticisms of the OMB, suggesting that the impact on voting rights is unclear. Under the current guidelines, cases may arise where a minority group that has established the existence of vote dilution may not be able to successfully advance a voting rights claim because "the group would be too small to elect its candidate of choice . . . [and their] only chance at a successful [suit] is through a coalition with a multiracial group."[141] Still, Persily notes that voting rights claims do not turn solely on the size of the minority group, but instead that the key issue is whether or not "the racial composition of an area operates alongside trends in race-based voting behavior to decrease" minority voting power.[142] Thus, critics of the OMB guidelines have overemphasized the importance of group size.[143]

E. Re-aggregation for Enforcement

The 2000 OMB guidelines also suggest rules to allocate multi-race responses for the purpose of enforcing civil rights laws.[144] In cases where respondents identify themselves as belonging to two or more minority races, the OMB guidelines re-aggregate the responses into a single racial category depending on the nature of the enforcement action. The OMB Bulletin specifies the parameters of the allocation:

> Responses that include two or more minority races are allocated as follows: If the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on. If the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations

---

140. Hickman, *supra* note 12, at 1170 (highlighting the benefits of the One Drop Rule by contrasting it with the seemingly symmetrical South African rule which was more effective at ensuring the subordination of blacks).

141. Persily, *supra* note 2, at 933.

142. *Id.*

143. *See id.*

144. These rules do not apply to multi-race responses when one of the races listed is white: that situation is automatically reassigned and discussed in the previous section.

to each of the minority groups.[145]

Under these rules, if an individual self-classifies as both "Asian" and "black," regardless of whether he was doing so because of mixed parentage or cultural affinity, he would be tabulated in different single-race categories depending on the enforcing agency. The self-classification is not honored because respondents are not treated as multiracial people by federal agencies; their eventual assignment will be at the discretion of the government. In cases where disparate impact needs to be assessed, it is worth noting there are options that are consistent with self-classification *and* that will result in the same tabulation—i.e., replacing the system of "alternative allocations" with Persily's proposal for fractional counting.[146]

F. *Alternative Sources of Identification*

Commitment to a regime of self-classification is further undermined by logistical and administrative limits in data collection. Given the frequency with which individuals fail to respond or are unwilling to cooperate, Census Bureau fieldworkers are forced to look elsewhere in order to make a racial determination. While alternative sources of identification may not be problematic for answering objective questions, such as the number of family members, deriving racial identity from alternative sources vitiates an individual's ability to determine how the government will classify him racially. The use of alternative sources of identification makes clear that the government's commitment to self-classification extends only to individuals willing to self-classify.

Peter Skerry has identified four "administrative limits on self-identification" which force the Census Bureau to resort to external sources of information to assign responses for the race question.[147] The most common situation in which individuals are denied the ability to self-classify is "head of household" identification: i.e., when one person responds to the census form on behalf of his family.[148] In these cases a family member is given the discretion to identify other members of the household by race. The most susceptible area for dissonance is when parents classify children who may grow up to identify with a different racial group.[149] In cases where individual respondents have not replied through mail and cannot be found, Census Bureau fieldworkers often rely on third-party classifications where the testimony of neighbors or

145. OMB Bulletin No. 00-02, *supra* note 131.
146. *See* Persily, *supra* note 2, at 931.
147. SKERRY, *supra* note 3, at 49.
148. *Id.* at 49–50.
149. *Id.*

others familiar with the respondent serves as the basis for answering the race questions.[150] In similar cases, fieldworkers have used doctor-identification by examining birth and death records.[151] The final logistical limit arises in situations where fieldworkers encounter respondents who are unwilling to cooperate or are asleep, as is often the case during interview attempts with homeless individuals.[152] In these cases the Census Bureau relies on observer-identification, where the fieldworker must estimate the race according to his or her best judgment.[153]

G. *Lack of Free Agency*

The Census Act is cognizant of the sensitivity of forced religious affiliations, requiring that "no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body."[154] The right to withhold racial identification, however, is not similarly protected. Under the provisions of the Census Act, the government, in order to compel cooperation with the enumeration effort, may use the weight of legal sanction. Although it is rarely, if ever, invoked, the Census Act provides that anyone who "refuses or willfully neglects" to comply with the census "shall be fined not more than $100," while false answers "shall be fined not more than $500."[155] David Theo Goldberg has asked, "Whatever happened to the right of self-identification to *refuse* to identify oneself racially?"[156] Given the increasing scholarly acceptance of the fluidity of racial categories and the impact of multiracial individuals on traditional understandings of race, forcing racial identification under the threat of legal sanction appears anachronistic.[157] Without the option of withholding an answer, respondents are forced to either classify themselves within the government's accepted categories or enumerate their own category—non-identification is not an option.

---

150. *See id.* at 49.

151. *Id.*

152. *Id.*; Felicity Barringer, *Counting the Homeless: Inexact but Not Invalid?*, N.Y. TIMES, March 4, 1990, at 24; Barbara Vobejda, *Census-Takers Struggle to Tally the Homeless*, WASH. POST, March 21, 1990, at A1.

153. *See* SKERRY, *supra* note 3, at 49.

154. 13 U.S.C. § 221(c) (2000).

155. 13 U.S.C. § 221(a), (b) (2000).

156. GOLDBERG, *supra* note 12, at 45.

157. Although, the *Morales* court held that there was no First Amendment protection for individuals seeking to withhold census answers because their individual right is superseded by the

IV. THE INSTITUTIONAL DIMENSION: CONGRESS AND THE COURTS

Despite the involved role played by the Census Bureau and other government agencies in the racial classification of individuals, equal protection challenges have rarely been litigated. Given the controversy over government racial data collection in the 1960s and 1970s,[158] the lack of litigation is especially surprising. After all, collection has only become more frequent and intrusive while being increasingly contested by organized interest groups. In the few cases where race-salient aspects of the census were litigated, courts have been reluctant to act. For example, the *Morales* court found data collection to be benign.[159] Courts were not bothered by the differential undercount cases in the 1990s because of the importance of the census to civil rights laws, and the Supreme Court has even proposed wholesale deference to the executive.[160]

Given the authority that Congress and relevant agencies are delegated by the Constitution and Census Act, as well as the high level of deference accorded by courts, strong judicial oversight may not be prudent or warranted. Census data is, because of its role in the enforcement of antidiscrimination legislation, primarily put to benign ends. Yet given the vexed history of data collection, the use of race categories to marginalize groups, and the social value accorded to self-classification, complete deference to the executive may also be imprudent.

A. Complicating Factors

A host of other issues complicate attempts to define the role of courts. Is action by courts normatively desirable given the constant changes with the census? After all, the rules and structure are in constant flux; the 2000 Census marked the first time respondents could check multiple races, changing the dynamic of how race self-classification is treated. The 2010 census abandoned the traditional "long-form," instead relying on the "short-form," which means that race/ethnicity classifications will constitute twenty-five percent of all census data. The Census Bureau has changed its standards for the release of census data so that enforcement agencies will only receive data classifying individuals

---

Congressional authority to pass any "necessary and proper" laws to facilitate the census.

158. *See supra* notes 28–30 and accompanying text.

159. *See supra* notes 55–60 and accompanying text.

160. *See infra* note 162 and accompanying text.

based on gender, age, and race.[161] Further, the Court's jurisprudence has evolved to apply strict scrutiny to "benign" classifications.[162]

B. *Levels of Scrutiny*

There is also disagreement among courts on how to structure their approach to race-salient aspects of the census. In determining what level of scrutiny is appropriate for reviewing the census, the Second Circuit proposed a test directly borrowing from the language of *Carolene Products*' Footnote Four:[163] The court held that strict scrutiny was the appropriate level of review based on considerations of the nature of the group (i.e., minority groups adversely affected) and the nature of the violated right (i.e., voting rights implicated by census data).[164] This decision, however, was overturned by *Wisconsin v. City of New York*, in which the Supreme Court held that heightened scrutiny was not appropriate.[165] Instead, the Supreme Court proposed deference to Congress in census-related decisions and granting the legislature broad discretion in construing its constitutional mandate.[166]

This exchange between the Second Circuit and Supreme Court raises broader questions about the relationship between strict scrutiny and the notion of deference. The ruling in *Wisconsin v. City of New York* suggests that there is no place for heightened scrutiny in cases where courts have traditionally deferred to Congress. This is at odds with recent iterations of *Grutter*-style heightened scrutiny in which the Court has deferred to third-party authority in a different manner—applying the strict scrutiny test, but deferring and giving leeway on the application of the two-prong test. [167] The underlying factor animating the difference between these two styles may be the object of deference. Perhaps the Court is more sensitive to separation of power concerns and is unwilling to apply strict scrutiny when deferring to Congress, as opposed to its application of strict scrutiny to the schools in *Grutter*. That

161. *See* Persily, *supra* note 2, at 940 (Nathaniel Persily suggests that this new data release format will not be consistent with the Supreme Court's holding in *Shaw v. Reno*, 509 U.S. 630, 649 (1993), against the use of race as a "predominant factor" in redistricting.).

162. Balkin & Siegel, *supra* note 31, at 940.

163. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

164. City of New York v. U.S. Dep't of Commerce, 34 F.3d 1114, 1128 (2nd Cir. 1994). Although in the case of the government's vitiation of the self-classification ideal a legal argument may not clearly meet the first requirement, evidence suggests that minority groups are still disproportionately reclassified because they form the majority of respondents that respond to the open fill-in and multiracial categories.

165. Wisconsin v. City of New York, 517 U.S. 1 (1996).

166. *Id.*

167. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny to an affirmative action policy, but deferring to the university in determining whether racial diversity was a compelling interest).

understanding would be consistent with the *Morales* court, which held that "the issue raised by the plaintiffs is one properly addressed by Congress, not by the courts."[168]

C. *Congressional Action*

Instead of confronting the complex moral decisions inherent to the census, the federal government has chosen to "rely on broad, vague delegations of authority by Congress to bureaucrats in executive agencies and independent regulatory bodies."[169] Congress has delegated responsibility to the OMB to create the official government race categories while authorizing the Census Bureau to administer the actual enumeration. Commentators highlighted the reluctance of Congress to get involved with proposed amendments to Directive No. 15 in the run-up to the 2000 census, noting that "[c]ongress has been reluctant to insert itself into the issue of racial classifications,"[170] instead leaving the OMB tremendous discretion.

Change in the census process with regard to use of racial categories must occur within the administrative agencies that control the process. Since these agencies are not operating under direct public or Congressional oversight, courts may be the only recourse for compelling change. Intra-agency recognition of the evolving understandings of race is difficult since the agencies are reluctant to categorize the census process as subjective and socialized. Peter Skerry has argued that "because the uses to which these numbers are put are so controversial and politically explosive, the bureau must cling ever more tightly to the mantle of objectivity."[171]

D. *A Role for Courts?*

The ideal approach would be an alternative to strict scrutiny or absolute deference—one in which the courts and agencies could play a collaborative role.[172] Given the centrality of census data to the

---

168. Morales v. Daley, 116 F. Supp. 2d 801, 815 (D. Tex. 2000).

169. SKERRY, *supra* note 3, at 78. Even in cases where Congress has required data collection on specific groups, it has left the authority over categories to the OMB. The wide discretion and responsibility accorded to the OMB has led an agency statistician to describe the OMB-Congress relationship as "The tail . . . wagging the dog." *Id.*

170. Steven A. Holmes, *Panel Balks at Multiracial Census Category*, N.Y. TIMES, July 9, 1997, at A12.

171. SKERRY, *supra* note 3, at 78.

172. A similar legislature-court dynamic to Judge Calabresi's dissent from the denial to rehear en banc in *Oneonta* suggests:

functioning of government institutions, strict scrutiny challenges would likely fail since courts could easily find a compelling governmental interest in the collection of racial data.[173] Further, the census is a highly technical process for which the relevant agencies have experience and expertise; courts may not be in the best position to oversee process-related decisions pertaining to the census.

Aside from the *Morales* lawsuit, a California referendum initiative, and incremental changes in racial classification jurisprudence, there is little evidence to suggest that social mobilization around racial data collection is mounting. Thus, courts are not likely to treat racial data collection with the same scrutiny they applied prior to the civil rights era, nor would that be desirable given the importance of census data to civil rights enforcement. The benign and compelling uses of race data from the census would likely foil any constitutional challenge, regardless of the tier of scrutiny applied by courts. Proving a constitutional violation would also entail establishing harm, yet a denial of self-classification is not a constitutionally cognizable offense; courts have held that rhetorical "harms" (e.g., unintended classification) are not cognizable without physical or tangible harm.[174] Thus, while the *Morales* court may have reached the appropriate conclusion—that racial data collection did not constitute an equal protection violation—relying on the government's neutrality in the process to reach that conclusion was incorrect.

A threshold role for courts, in which the presence of certain conditions would trigger judicial review, is still warranted by the concerns surrounding the census. How should this form of judicial review look? It should focus on two aspects of the census: first, the initial stages of determining the permissibility of questions and categories, and second, the application of collected census data. In the first stage, courts would attempt to elucidate the existence of compelling governmental interests for changes proposed to the census, since their

---

> [C]ourts should recognize severe limitations on their competence to deal with victim racial descriptions. But limitations do not mean impotence, they mean that courts ought to be reluctant to act alone. Rather, courts should encourage legislatures to develop guidelines for this area. Such legislative guidelines could make nuanced distinctions between what is needed and acceptable police behavior, and what is not. Courts could then both enforce those guidelines, and if a jurisdiction made distinctions that were inadequately sensitive, perhaps even strike some of them down.

Brown v. City of Oneonta, 235 F.3d 769, 786–87 (2nd Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc).

173. *See also* Frank Goodman, *Principles in Practice: "Unstuck" or Sticky?*, 154 U. PA. L. REV. 26, 36 (2006) (arguing that the constitutional fate of census racial classifications would "depend heavily on the use to which [they were] put. Collection of such data for the purpose of civil rights enforcement would almost certainly survive whatever scrutiny it received, even if nominally 'strict.'").

174. *See, e.g.*, Kerrigan v. State, 909 A.2d 89, 100 (Conn. Super. Ct. 2006) (holding that rhetorical separation in the context of gay marriage versus civil unions are not a harm; must prove physical separation or tangible harm to merit legal relief).

implementation could implicate the voting rights of minority groups. For example, changes or additions to the categories must be vetted to ensure they will not have adverse consequences for minority voting power and are not motivated by exclusionary rationale. Given the increasing resistance to the intrusive nature of census questions, courts could also determine the consistency of new questions with Fourth Amendment protections of privacy. Just as respondents can opt out of the religion question for privacy reasons, courts may consider extending that to race. Courts should maintain their role in negotiating the boundaries of census categories, as they did in *Sandhu*[175] and in *Hall*,[176] since there is very little congressional oversight on defining the qualifications of race.[177] Given the history of census categories, it is not difficult to imagine the need for court action to adjudicate the permissibility of data collection initiatives targeted at Muslim-Americans[178] in a post-9/11 world. Court action with regard to the second stage—the application of collected data—would not be a new role for the courts. In this area, courts would focus on ensuring that redistricting is executed in accordance with established norms and addressing the problem of the differential undercount—aspects of the census that courts have already acted upon.

If these minimal standards are met, however, courts should defer to executive agencies and Congress. In cases involving technical complexity or ambiguity, courts should leave decisions to the political process and agencies, as judicial review would only aim to filter out the most egregious aspects of government action related to the census. This would allow courts to help facilitate politics of a higher order without intruding into the technical aspects of the census. The goal would be to provide a preliminary check on the Executive in an attempt to prevent the census process from being misused as it has been in the past.

It is also prudent to limit the scope of court action to government decisions or arrangements that flagrantly implicate equal protection concerns. Many of the concerns raised by the census cut both ways. For example, as previously discussed, the "One Drop Rule" may violate the principle of self-classification and have a vexed history, yet it is crucial in forging political unity and strengthening minority voting power. Courts should not play a role in cases that involve a necessary choice between disempowering people from self-identification or vitiating the voting power of a minority group. Short of addressing clear-cut problems that the legislature and agencies have failed to act upon, courts

---

175. Sandhu v. Lockheed Missiles & Space Co., 31 Cal. Rptr. 2d 617, 619 (Cal. Ct. App. 1994).

176. People v. Hall, 4 Cal. 399 (1854).

177. *See* text accompanying notes 169–70.

178. The Census does not currently have a category that specifically identifies Arabs, Arab-Americans, Muslims, Muslim-Americans, or those of Middle Eastern descent. "Muslim-Americans" is used here as a hypothetical identity marker, but the census may choose from a whole range of identifiers.

should abstain from making decisions that imply a preference between competing rights when reasonable census respondents may disagree.

V. CONCLUSION

The upcoming 2010 census is a vastly different process than its previous iterations, yet its problems and complications with regard to race—differential undercounts, minority participation, adequacy of categories, etc.—are the same. Another old problem, the constitutionality of racial data collection, has also resurfaced: federal lawsuits and grassroots initiatives challenging the race questions on the census began cropping up after the 2000 census. Further, changes in the legal landscape affecting the relationship between strict scrutiny and benign uses of race have moved in a direction conducive to equal protection challenges. So far, however, courts have not been the site of much contest. In *Morales*, the Court resisted applying strict scrutiny on the grounds that the government's role in data collection was passive and neutral. This paper concludes, however, that the government's role was far from neutral. Instead, the government actively re-aggregates, adjusts, and repackages racial classifications to convert it into applicable data. While the admittedly benign and important uses of census data should insulate its collection from equal protection scrutiny, courts should recognize the areas of concern implicated by the government's involved role in tabulating census data, and monitor them to protect against impermissible action.