

The Differential Undercount: When Government Disclosures of Census Data Undermine Constitutional Guarantees

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Article I, Section 2 of the U.S. Constitution balances state representation in Congress. Referred to as the Census Clause, the Constitution mandates an “actual Enumeration” of the American population so that all people have an equal voice in the House of Representatives. Since the first U.S. Census of 1790, however, intragovernmental sharing of census data has bred American distrust in the census process and in the government’s use of personally identifiable census information. Consequently, the federal government has never effectuated an “actual” counting of American residents. Importantly, minority groups are disproportionately undercounted in the census. As a result of this “differential undercount,” States with larger minority populations receive fewer Representatives in Congress. This Article looks critically at the “differential undercount” and discusses its impact on the upcoming 2020 Census. After providing a general history of the U.S. Census and the longstanding government practice of disclosing census data, this Article presents a case study to highlight how the differential undercount undermines Article I, Section 2. After discussing how disclosures of census data implicate the individual liberties secured by the Fourth and Fifth Amendments guaranteed in the Bill of Rights, this Article offers both judicial and legislative solutions to cure the current constitutional harms. This Article concludes by suggesting how the federal government may accomplish its national security and socio-economic objectives without disclosing census data, and in doing so, may avoid compromising constitutional commands.

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I. INTRODUCTION

From the Israelites wandering the desert and “numbering” their people¹ to the Romans registering their citizens to collect taxes,² governments have used censuses for vital organizational purposes. While central to structuring communities, censuses have also weaponized governments with intimate data on residents’ addresses, age, gender, and ethnicity.³ Exemplified by the Nazis rounding up and executing millions during the Holocaust or the Rwandan Hutu identifying and murdering Tutsi citizens, governments have used census data for nefarious purposes.⁴ The United States has contributed to this “darker side”⁵ of census-taking, and in doing so, has undermined its own efficacy in collecting personal data from its residents.⁶

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¹ See, e.g., Alan I. Friedman, *Taking a Census in the Wilderness*, TEMPLE BETH SHOLOM OF ORANGE COUNTY (Dec. 15, 2004), https://www.tbsoc.com/downloads/torahcommentaries/Bmidbar_DvarTorah.pdf (describing how the Book of Numbers in the Old Testament outlines the tribe-by-tribe census of the Israelites); *Numbers* 1:2 (NIV), <https://www.biblegateway.com/passage/?search=Numbers+1>

² See *Census*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Census#cite_ref-0 (last visited Nov. 17, 2017) (“The word ‘census’ origins in fact from ancient Rome, coming from the Latin word ‘censere,’ meaning ‘estimate.’ The Roman census was the most developed of any recorded in the ancient world and . . . was carried out every five years. It provided a register of citizens and their property from which their duties and privileges could be listed.”).

³ *Id.*

⁴ Douglas J. Sylvester & Sharon Lohr, *The Security of our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice*, 83 DENV. U. L. REV. 147, 148 (2005); see also Carrie Pixler, *Setting the Boundaries of the Census Clause: Normative And Legal Concerns Regarding the American Community Survey*, 18 WM. & MARY BILL RTS. J. 1097, 1097 (2010).

⁵ Sylvester & Lohr, *supra* note 4.

⁶ THOMAS S. MAYER, U.S. CENSUS BUREAU, *PRIVACY AND CONFIDENTIALLY RESEARCH AND THE U.S. CENSUS BUREAU* 9 (2002) (providing statistics demonstrating the public’s distrust of the federal government’s promise to keep census data private).

Of course, a census is just one way a government may collect information about its citizens.⁷ Increased technological capabilities allow governments to obtain information on citizens' purchasing behavior,⁸ Internet use,⁹ and political affiliations.¹⁰ In the United States, this increase in government access to resident information corresponds to an equally increasing level of resident distrust of government.¹¹ The U.S. Census is a microcosm of the increasingly heightened tension that sits at the nexus of government access to personal data and an individual's related privacy concerns.

In 1787, the Framers of the U.S. Constitution mandated a decennial census of the population to apportion the number of seats for each state in the House of Representatives.¹² Located in Article I, Section 2 of the Constitution, the Census Clause¹³ directs Congress to create laws to facilitate an "actual enumeration."¹⁴ The pressures to fulfill this "actual enumeration" came at a cost, however. In the earliest years of the census, the U.S. government's zeal to garner complete and accurate census data outweighed its concern for protecting any corresponding privacy concerns.¹⁵ For instance, the federal government at first posted individual census results in town squares to stigmatize those who did not respond accurately.¹⁶ This

⁷ See, e.g., Douglas J. Sylvester & Sharon Lohr, *Counting on Confidentiality: Legal and Statistical Approaches to Federal Privacy Law After the USA Patriot Act*, 2005 WIS. L. REV. 1033, 1061–64 (2005) [hereinafter *Counting on Confidentiality*] (outlining how federal agencies collect information from private airlines on individual passengers); *id.* at 1049 n.55.

⁸ See Bruce Schneier, *Do You Want the Government Buying Your Data From Corporations?*, THE ATLANTIC (Apr. 30, 2013), <https://www.theatlantic.com/technology/archive/2013/04/do-you-want-the-government-buying-your-data-from-corporations/275431/> (outlining how the government acquires data from credit card companies about what you buy).

⁹ *Id.*; see also Jonathan Strickland, *Can the Government see what Web sites I visit?*, HOWSTUFFWORKS (last visited Nov. 17, 2017), <http://computer.howstuffworks.com/government-see-website.htm>.

¹⁰ See Matthew Haag, *Judge Clears Way for Trump's Voter Fraud Panel to Collect Data*, N.Y. TIMES, July 25, 2017, at A14.

¹¹ See *Counting on Confidentiality*, *supra* note 7, at 1035, 1063 (noting how Americans are experiencing a "new era of heightened privacy anxiety"); *id.* at 1050 ("Life in cyberspace, if left unregulated . . . promises to have distinct Orwellian overtones.")

¹² Margo Anderson & Stephen E. Fienberg, *The 2000 Census: Litigation, Results, and Implications*, 77 N.D. L. REV. 665, 666 (2001).

¹³ Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration"*, 77 WASH. L. REV. 1, 1 (2002).

¹⁴ U.S. CONST. art. I, § 2, cl. 3. ("Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers 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.") *amended by* U.S. CONST. amend. XIV, § 2 (removing the Three-Fifths Clause).

¹⁵ See, e.g., Sylvester & Lohr, *supra* note 4, at 155–56 (noting how the government imposed fines and other compliance measures to ensure an accurate census).

¹⁶ *Id.* at n.36 (adding that public postings of census data were also aimed to allow respondents to conduct their own error checks).

disregard for census data privacy resulted in American residents growing distrustful of the government's collection and use of census information. Consequently, census response rates steadily declined from 1790 to 1870.¹⁷ To combat this downturn in response rates, the Census Office¹⁸ instructed that all information collected via the census be deemed confidential.¹⁹ Similar promises of privacy have endured for the past 150 years, with Congress and the Executive working in tandem to achieve the Article I, Section 2 mandate.²⁰

Despite promises of confidentiality, the federal government has abused American trust through its census data use.²¹ For example, the government used census data to facilitate the forced removal of American Indians in 1870 and the compulsory internment of Japanese Americans during World War II.²² More recently, the U.S. government used census data to increase its surveillance of Arab Americans after the attacks on September 11, 2001 ("9/11").²³ Aware that this history of abuse lowers census response rates,²⁴ Congress introduced a handful of bills within the past decade to address

¹⁷ *Id.* at 155 ("Although inaccuracies may have been caused by numerous factors, some viewed individual unwillingness to participate out of fear of government abuse of information as one cause.")

¹⁸ From 1790 to 1840, the State Department oversaw the decennial Census and ordered the U.S. Marshals of each federal district to collect the enumeration. The 1840 Census Act established a centralized Census Office for each enumeration. In 1880, Congress delegated supervision of the census to "supervisors" who were presidential appointees. The Census Act of 1910 established the Census Bureau to be a permanent agency operating under the Department of Commerce and Labor. Today, the Census Bureau sits under the Department of Commerce. *See generally, History*, U.S. CENSUS BUREAU (May 15, 2018), https://www.census.gov/history/www/census_then_now/.

¹⁹ Sylvester & Lohr, *supra* note 4, at 157.

²⁰ 13 U.S.C. § 214 (1954) (codifying privacy in the U.S. Census); *see also Title 13, U.S. Code*, U.S. CENSUS BUREAU (July 18, 2017), https://www.census.gov/history/www/reference/privacy_confidentiality/title_13_us_code.html.

²¹ *See* William Seltzer & Margo Anderson, *The Darker Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RES. 481 (2001).

²² *Id.*

²³ Khaled A. Beydoun, *A Demographic Threat? Proposed Reclassification of Arab Americans of the 2020 Census*, 114 MICH. L. REV. FIRST IMPRESSIONS 1, 7 (2015) ("[T]he Census Bureau provided specially tabulated population statistics on Arab-Americans to the Department of Homeland Security....") (internal quotation marks omitted).

²⁴ *See* discussion *infra* Part II.C. *See also Counting on Confidentiality*, *supra* note 7, at 1130 (highlighting how people may not contribute personal information to the census because of their concerns that the federal government will misuse their private data).

American census-related privacy concerns.²⁵ None of these bills became law.²⁶

This Article analyzes the census “undercount”²⁷ and argues that American residents purposefully do not respond to the census because of their privacy concerns. Part II provides a general history of the U.S. Census, and offers a view into the longstanding government practice of disclosing census data throughout Executive Branch agencies.²⁸ Part III highlights how government disclosures of census data disproportionately harm minority groups. In addition, Part III presents a case study on the Hispanic Undercount²⁹ to illustrate the implications of the “differential undercount” for the upcoming 2020 Census.³⁰ Next, Part III outlines how government disclosures of census data violate the individual liberties protected by the Fourth and Fifth Amendments of the U.S. Constitution.³¹ Part IV offers both judicial and legislative solutions to cure the constitutional harms caused by government census disclosures.³² This Article closes with data indicating how the government may accomplish its national

²⁵ Pixler, *supra* note 4, at 1105–06 (noting that Congress proposed bills to strike a proper balance between individual concerns for civil liberty and the governmental interest in collecting the census); *see also* Census Reform Act, H.R. 1638, 113th Cong. (2013); Michael McAuliff, *GOP Census Bill Would Eliminate America’s Economic Indicators*, HUFFINGTON POST (May 1, 2013, 7:31 AM), https://www.huffingtonpost.com/2013/05/01/gop-census-bill_n_3188043.html.

²⁶ Pixler, *supra* note 4.

²⁷ *See* Anderson & Fienberg, *supra* note 12, at 669–71 (explaining that “the undercount” is a phrase used to encompass those individuals not counted in the census enumeration and how a group can be “undercounted” in relation to other groups.). Policymakers are more concerned about the “differential undercount” than the general “undercount” of the Census. Historically, groups that have been missed the most in the counting process have been children, renters, residents of large cities, and racial minorities. *See* Nathaniel Persily, *The Right to be Counted*, 53 STAN. L. REV. 1077, 1083 (2001) (book review).

²⁸ *See infra* Part II.

²⁹ Classifying a group of people presents both social and political sensitivities, and this article therefore relies on the classifications used by the U.S. federal government as it relates to census enumeration. The Census Bureau uses “Hispanic” (and “non-Hispanic”) in its demographic statistics. This article also relies on data from Pew Research Center and the Stanford Center on Poverty and Inequality, which both use “Hispanic” to describe people of Spanish-speaking origin or ancestry. For a discussion on the challenges facing the Census Bureau in classifying people accurately by race and ethnicity, *see* Arthur R. Cresce & Roberto R. Ramirez, *Analysis of General Hispanic Responses in Census 2000*, U.S. Census Bureau (Working Paper no. 72); D’vera Cohn, *Seeking better data on Hispanics, Census Bureau may change how it asks about race*, PEW RES. CTR. (Apr. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/04/20/seeking-better-data-on-hispanics-census-bureau-may-change-how-it-asks-about-race/>; E. Dolores Johnson, *The Census Always Boxed Us Out*, NARRATIVELY (Oct. 30, 2017), <http://narrative.ly/census-always-boxed-us/>.

³⁰ *See infra* Part III.A.

³¹ *See infra* Part III.B.

³² *See infra* Part IV.

security and socio-economic objectives without disclosing census data and compromising constitutional commands.³³

II. THE U.S. CONSTITUTION MANDATES CONGRESS TO DIRECT AN ACTUAL ENUMERATION

A. Theory: The Decennial Census To Ensure Proportional Representation

The United States Congress incorporates competing structural concerns³⁴ and originates from the Framers' opposition to British Parliament.³⁵ The Framers of the U.S. Constitution established the House of Representatives to ensure that the national government would derive "from the people."³⁶ Reflecting this vision, the first U.S. Vice President, John Adams, aptly stated that a legislature should have "equal representation" because "equal interests among the people should have equal interests in [the assembly]."³⁷ This concept of proportional representation did not exist in England, where hereditary nobility and unequal representation marked British Parliament.³⁸ Intimately familiar with the imbalanced and unequal "Rotten Boroughs" of England³⁹ the Framers drafted Article I, Section 2 to safeguard the nation's political system.⁴⁰

At the same time, the Framers aimed to balance the diverse interests of both large and small colonies that formed the new Republic. With larger colonies insisting on proportional representation based on only population-totals, smaller colonies argued for equal representation in Congress to check majority rule.⁴¹

³³ See *infra* Part IV, Conclusion.

³⁴ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 631–641 (1833), http://press-pubs.uchicago.edu/founders/documents/a1_2_3s22.html.

³⁵ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1137–39 (2016) (Thomas, J., concurring).

³⁶ According to James Madison at the Constitutional Convention, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all." See 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed., 1911).

³⁷ John Adams, *Thoughts on Government*, in 4 WORKS OF JOHN ADAMS 195 (C. Adams ed., 1851).

³⁸ GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 171 (1998).

³⁹ "Rotten Boroughs" was a term applied to English parliamentary districts that retained the right to elect one member to Parliament although the district contained fewer people than other districts. See Michael V. McKay, *Constitutional Implications of a Population Undercount: Making Sense of the Census Clause*, 69 GEO. L.J. 1427, 1444, n.92 (1981).

⁴⁰ See WOOD, *supra* note 38 (noting that of all the electoral safeguards for the representations system, the most critical was equality of representation).

⁴¹ See *Evenwel v. Abbott*, 136 S. Ct. 1120, 138 (2016) (Thomas, J., concurring); McKay, *supra* note 39, at 1443 n.82. In the Continental Congress, each colony sent an equal number of delegates for its representation. *Continental Congress*, HISTORY.COM, <http://www.history.com/topics/american-revolution/the-continental-congress>. (last visited Oct. 17, 2018).

The “Great Compromise” that followed from these competing interests established America’s bicameral legislature, providing states equal representation in the Senate and proportional representation in the House.⁴² To ensure proportional representation based on population, the Framers instructed Congress to conduct an “actual enumeration” starting in 1790 and every 10 years thereafter.⁴³ The resulting balance between the malapportioned Senate⁴⁴ and proportioned House was considered indispensable to the nation’s federal Republic.⁴⁵

B. Implementation: Accuracy over Privacy

With the constitutional command of ensuring proportional representation in the House, census data accuracy has always been of utmost importance to Congress.⁴⁶ Still, even though the First Congress called for a “perfect enumeration” in the 1790 Census Act,⁴⁷ the practical difficulty of accurately counting the population was understood.⁴⁸ To ensure optimal census responsiveness, Congress authorized \$20 fines of those people refusing to answer the census in the 1790 Act.⁴⁹ This practice of fining noncompliant individuals persists today.⁵⁰ In addition to fines, the 1810 Census Act initiated a policy of sending U.S. Marshals door-to-door to collect data from residents.⁵¹ This door-to-door protocol appeared in the Census Act until 1950, when the Census Bureau (“Bureau”) replaced personal

⁴² THE FEDERALIST NO. 62, at 467 (Alexander Hamilton) (“The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion.”).

⁴³ U.S. CONST. art. I, § 2, cl. 3; *see also* Act of Mar. 1, 1790, ch. II, 1 Stat. 101 (amended 1800).

⁴⁴ According to Miriam-Webster’s dictionary, malapportionment is the “inequitable or unsuitable apportioning of representatives to a legislative body.” *Malapportioned*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/malapportionment>.

⁴⁵ *Reynolds v. Sims*, 377 U.S. 533, 573 (1963).

⁴⁶ *See, e.g., Sylvester & Lohr, supra* note 4, at 155.

⁴⁷ Act of Mar. 1, 1790; *see also* Lee, *supra* note 13, at 55.

⁴⁸ Margo Anderson & Stephen E. Fienberg, *Census 2000: Politics and Statistics*, 32 TOL. L. REV. 19, 21 (2000) [Hereinafter *Census 2000*].

⁴⁹ Act of Mar. 1, 1790 (“[O]n pain of forfeiting twenty dollars . . .”); Sylvester & Lohr, *supra* note 4, at 155 n.32.

⁵⁰ Census Act, 13 U.S.C. §§ 211–225 (1976) (providing for fines for refusing to answer questions, giving answers with the intent to cause an inaccurate enumeration, and providing false answers).

⁵¹ Act of Mar. 26, 1810, ch. 17, 2 Stat. 564 (amended 1820) (“[T]he said enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise.”); *see also* Lee, *supra* note 13, at 6.

visits with forms to be delivered and returned via postal service.⁵² While the Census Act does not technically include door-to-door visits today, the Bureau still dispatches enumerators to visit homes to conduct extensive nonresponse follow-up.⁵³

With its primary focus on effectuating an “actual enumeration,” the federal government routinely underestimated the privacy concerns of residents in their personal data.⁵⁴ For example, after Congress delegated census collection to the Executive Branch, President George Washington chose the State Department to oversee census administration.⁵⁵ However, the State Department, led by Thomas Jefferson, was improperly staffed to handle the logistics and technical details of this undertaking.⁵⁶ U.S. Marshals received little oversight and earned the reputation of using census results for personal gain or for embarrassing respondents.⁵⁷ Consequently, the early Republic’s primitive administration of the census yielded decreases in response rates.⁵⁸ Most importantly, the federal government’s early struggles to instill confidence in its census data collection foreshadowed today’s struggle to collect an “actual enumeration.”⁵⁹

C. Nonresponse Rates: Undelivered Promises and Government Distrust

The federal government understands how assurances of privacy may solve census non-responsiveness.⁶⁰ Accordingly, government promises of

⁵² See *Dep’t of Com. v. U.S. H. of Reps.*, 525 U.S. 316, 337 (1999) (explaining how in 1964, Congress repealed former § 25(c) of the Census Act, which had required that each enumerator obtain information by personal visit to each household); see also Lee, *supra* note 13, at 6.

⁵³ *Census 2000*, *supra* note 48 (discussing how after the 2000 Census, the Bureau “dispatched over 500,000 temporary enumerators, the largest peacetime work force ever assembled in the country’s history, to count the rest of the nation”). Today, enumerators visit households that do not return a form by mail to solicit information, and the Bureau instructs Enumerators to visit each household address up to six times before they close out a case. *Id.*

⁵⁴ See Sylvester & Lohr, *supra* note 4, at 155 (articulating how the government’s coercive system is illustrative of the federal government’s lack of consideration of American residents’ concerns for privacy or confidentiality).

⁵⁵ MARGO ANDERSON & STEPHEN E. FIENBERG, *THE HISTORY OF THE FIRST AMERICAN CENSUS AND THE CONSTITUTIONAL LANGUAGE ON CENSUSTAKING: REPORT OF A WORKSHOP 6* (1999).

⁵⁶ See *id.* at 11.

⁵⁷ Sylvester & Lohr, *supra* note 4, at 156.

⁵⁸ *Cf.* ANDERSON & FIENBERG, *supra* note 55, at 12 (citing a 1791 letter from George Washington to Gouverneur Morris in which President Washington wrote that the census returns were less than the “real numbers” of persons in America and that this undercount was, in part, because people feared the census would serve as the foundation of a government taxing scheme).

⁵⁹ See MAYER, *supra* note 6, at 3 (discussing the “inevitable conflict between an individual’s right to privacy and the government’s need for information”) (citation omitted).

⁶⁰ See generally Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981) (describing the phenomenon that when American concerns about census data privacy increase, the government instructs census enumerators to treat census data as confidential).

data privacy began in 1870 with the Census Office directing census enumerators to treat all collected information as strictly confidential.⁶¹ When Congress passed the 1890 Census Act, it included a provision imposing monetary fines on any census enumerator who divulged private information.⁶² After World War II ushered newfound public concern for census data privacy, Congress codified privacy into the U.S. Census structure and administration through Title 13 of the U.S. Code.⁶³ Title 13 remains the current legal framework for census administration and privacy protections.⁶⁴ Finally, responding to privacy concerns from the 2010 decennial census, Congress has proposed several additional bills aimed at limiting the amount of information the Bureau may collect.⁶⁵

Despite promises of privacy, the federal government has failed to fulfill its end of the bargain with the American people.⁶⁶ For example, after promising census data confidentiality in the 1890 Census Act, Congress passed the Second War Powers Act permitting the Bureau to disclose individually identifiable information throughout Executive Branch departments.⁶⁷ Under this law, the Bureau disclosed information about Japanese Americans to the War and Treasury Departments to facilitate their forced internment.⁶⁸ After codifying census data privacy in Title 13,

⁶¹ *Counting on Confidentiality*, *supra* note 7, at 1046. *But see* Sylvester & Lohr, *supra* note 4, at 158 (noting that the policy toward protecting census data began to take root in 1850).

⁶² Act of Mar. 1, 1889, ch. 319, §§ 8, 13, 25 Stat. 760 (amended in 1890); *see also* Note, *supra* note 61, at n.98 (“In 1870 the instructions read: ‘No graver offense can be committed by Assistant Marshals than to divulge information acquired in the discharge of their duty. . . . The Department is determined to protect the citizen in all his rights in the present Census.’”). The Executive Branch has similarly articulated the government’s promise of census data privacy. In 1929, President Herbert Hoover said: “There need be no fear that any disclosure will be made regarding any individual person or his affairs.” *See Census 2000*, *supra* note 48, at 26. Herbert Hoover delivered this Proclamation during his first year in office, on November 22, 1929. Prior to being elected President, Hoover was the Secretary of Commerce and was responsible for overseeing the Census Bureau during his eight years in that position. *Id.*

⁶³ *See*, *Counting on Confidentiality*, *supra* note 7; Pixler, *supra* note 4, at 1100–01.

⁶⁴ *See Data Protection and Privacy*, UNITED STATES CENSUS BUREAU, https://www.census.gov/about/policies/privacy/data_stewardship/federal_law.html (stating title 13 of the U.S. Code protects the confidentiality of all your information and that violating this law is a crime with severe penalties).

⁶⁵ *See* Pixler, *supra* note 4, at 1106.

⁶⁶ *Compare id.* at 1122 n.178 (quoting Bureau Director Kenneth Prewitt: “I believe it is hard to sustain the argument that government data collection is an invasion of privacy when there are such strong protections of the data, when they are used only for statistical purposes, not for regulation or law enforcement. . . .”) *with id.* at 1123 (quoting Bureau Director James Capt during World War II: “[I]f the defense authorities found 200 Japs missing and they wanted the names of the Japs in that area, I would give them further means of checking individuals.”).

⁶⁷ Second War Powers Act, ch. 199, 56 Stat. 176, § 1402 (1942) (Utilization of Vital War Information) (repealed 1978).

⁶⁸ *See* A. Michael Fromkin, *The Metaphor is the Key: Cryptograph, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 732–33 (1995); *see also* Haya El Nasser, *Papers show Census role in WWII camps*, USA TODAY, (Mar. 30, 2007, 1:33 AM), http://usatoday30.usatoday.com/news/nation/2007-03-30-census-role_N.htm (“The list contained names, addresses, and data on the age, sex, citizenship status, and occupation of Japanese-Americans in the area.”).

Congress passed the USA PATRIOT Act in 2001,⁶⁹ permitting the Bureau to again disclose information to Executive Branch departments. Subsequently, the Department of Homeland Security (“DHS”) requested information from the Bureau and, once armed with the newly acquired data, increased its surveillance of Arab Americans.⁷⁰ Finally, even with Congress proposing legislation since the last decennial census to curb the scope of information collected by the Bureau, none of these bills became law.⁷¹ Longstanding precedent thus indicates that the federal government will continue to disclose census data notwithstanding Executive proclamations and Congressional legislation to the contrary. Consequently, distrust of the government’s census collection and use will likely continue to persist and, perhaps, rise, resulting in declining census response rates.⁷²

III. GOVERNMENT DISCLOSURES OF CENSUS DATA ARE UNCONSTITUTIONAL

A. *Census Disclosures Undermine Article I, Section 2*

The Constitution mandates a decennial census to apportion the House of Representatives according to “their respective numbers, counting the whole number of persons in each State.”⁷³ Under current law, within nine months after completion of the census, the Secretary of Commerce reports the census findings to the President of the United States. The President then relays these findings to Congress, and Congress dictates to each state the number of representatives they will have in the House.⁷⁴ Congress calculates the apportionment of representatives for each state based on the state’s total resident population, including both citizens and non-citizens.⁷⁵ An accurate enumeration of all residents is thus necessary to fulfill the proportional

⁶⁹ USA PATRIOT Act, Pub. L. No. 107-56, 2001 U.S.C.C.A.N. (115 Stat.) 272 (2001).

⁷⁰ Beydoun, *supra* note 23, at 7–8 (outlining how the PATRIOT Act allowed the Bureau to share with the DHS 159 American cities with 1,000 or more persons of Arab ancestry).

⁷¹ Pixler, *supra* note 4, at 1106 (discussing six bills brought before the 106th Congress to limit the information the Bureau could collect through the census or to nullify any fines imposed on individuals who fail to respond).

⁷² See *supra* Part II.C for a discussion on the correlation between undelivered promises of privacy and census nonresponse rates.

⁷³ U.S. CONST. amend. XIV, § 2.

⁷⁴ See 13 U.S.C. § 141(b) (1990); see also *Smiley v. Holm*, 285 U.S. 355, 361 (1932) (explaining the Reapportionment Act).

⁷⁵ This process is called the “Method of Equal Proportion.” See *Determining Apportionment*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Apportionment/Determining-Apportionment/> (last visited Oct. 25, 2018); see also *Congressional Apportionment: Frequently Asked Questions*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q1> (last visited Nov. 17, 2018); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens From the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 971–72 (1991).

representation envisioned by the Framers to offset the malapportioned Senate.⁷⁶

1. *Census Disclosures Trigger the Differential Undercount*

When a person does not respond to the census, he or she is “undercounted.”⁷⁷ Not surprisingly, if people are concerned that the government will use their census data against them, they are less likely to respond to the census.⁷⁸ Research by the Bureau affirms this link: when people distrust the government’s promise to keep census data private, they think the government will use census data to harm them.⁷⁹ The Bureau’s report found that 45 percent of all people think that the Bureau discloses census data to other government agencies despite promises to the contrary.⁸⁰

The U.S. Census has always undercounted segments of the population.⁸¹ But the rate at which groups are undercounted is not spread evenly across all geographic areas, genders, and races.⁸² Rather, the undercount rate for racial and ethnic minority groups is substantially higher than the undercount rate for other demographic criteria.⁸³ This phenomenon is termed the “differential undercount.”⁸⁴ In the most recent release of the census undercount, the government undercounted African Americans by 4.8 percent and Hispanics by 5.2 percent. In comparison, the undercount for non-Hispanic Whites was only 1.2 percent.⁸⁵ Since the Bureau began calculating the undercount in the 1940s, legal scholars have proposed a variety of reasons for why minority groups are disproportionately

⁷⁶ See *supra* Part II.A, discussing the theory behind the Census Clause.

⁷⁷ See *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 322 (1999) (“Despite [the Bureau’s] comprehensive effort to reach every household, the Bureau has always failed to reach – and has thus failed to count – a portion of the population. This shortfall has been labeled the census ‘undercount.’”).

⁷⁸ See, e.g., Persily, *supra* note 27, at 1083 (listing the reasons why a person could be missed and undercounted, including deliberate avoidance due to fear that the census will be used to hurt them); see ELIZABETH MARTIN, U.S. CENSUS BUREAU, CHANGES IN PUBLIC OPINION DURING THE CENSUS 3 (2000) (“Declining public cooperation with the census and surveys has been attributed in part to increasing public concerns about privacy and confidentiality issues.”) (citation omitted).

⁷⁹ MAYER, *supra* note 6.

⁸⁰ *Id.*

⁸¹ See, e.g., Robert B. Hill, *Counting and Undercounting Diversity in the 21st Century*, 32 TOL. L. REV. 29, 30 (2000); see also James Pack, Note, *The Census Adjustment Cases: The Hunt for the Wily Trout*, 37 JURIMETRICS J. 35, 36 (1996).

⁸² *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 320 (1999) (mentioning that the Bureau aims to address a “chronic and apparently growing problem of undercounting certain identifiable groups of individuals.”) (internal quotation marks omitted); Pack, *supra* note 81 (“If the undercount were spread evenly across all areas, genders, and races, it would have little impact on governmental use of the results.”).

⁸³ See McKay, *supra* note 39, at 1437.

⁸⁴ *Id.*; see also *Wisconsin v. New York*, 517 U.S. 1, 7 (1996).

⁸⁵ Pack, *supra* note 81, at 43. The Bureau classifies whites as “Non-Hispanic Whites.” This undercount rate is equal to the overall national undercount. See also *Wisconsin v. New York*, 517 U.S. at 7.

undercounted.⁸⁶ One of the reasons cited for this “differential undercount” is distrust of the government’s use of census data.⁸⁷

The U.S. Census extends the federal government’s reach into a person’s home and provides the government statistical information⁸⁸ that can be used to advance prejudiced objectives. Through its decennial survey, the Bureau collects a person’s telephone number, address, and relationship to each person with whom he or she lives.⁸⁹ In addition, the Bureau asks questions that classify residents based on their race, ethnicity, and citizenship status.⁹⁰ On three particular occasions the federal government has used race, ethnicity, and citizenship data to threaten the liberty and security of distinct minority groups. The first instance took place after the 1870 Census, when the Census Office helped facilitate the forced removal of American Indians from their territorial lands.⁹¹ According to Francis A. Walker, head of the Census Office at the time, the inclusion of American Indians in the census helped the government find an “efficient solution to the Indian problem.”⁹² Next, two days after the Japanese attack on Pearl Harbor in 1941, the Bureau disclosed census data to the FBI about people of Japanese ancestry.⁹³ The Bureau provided maps showing where Japanese Americans lived, which the

⁸⁶ See Pack, *supra* note 81, at 36 n.9 (“The undercount is greater among minorities and the poor because of poverty, lack of education, and language communication problems between respondents and enumerators . . . irregular living arrangements, shifting of child care, lack of any fixed residence . . . fear of revealing information about family that may jeopardize eligibility for government income programs or may violate health or zoning codes, and general distrust of government operations.”) (internal quotation marks omitted).

⁸⁷ *Id.*

⁸⁸ See U.S. Census Bureau, SUBJECTS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY 1–15, (Mar. 2017), <https://www2.census.gov/library/publications/decennial/2020/operations/planned-subjects-2020-acs.pdf> [hereinafter SUBJECTS PLANNED FOR THE 2020 CENSUS]; see also John H. Thompson, *Asking for Input on Counting People in the Right Place in 2020*, U.S. CENSUS BUREAU (June 30, 2016), <https://www.census.gov/newsroom/blogs/director/2016/06/asking-for-input-on-counting-people-in-the-right-place-in-2020.html> (noting that people are counted at the U.S. residence where they live and sleep most of the time).

⁸⁹ There is a “short form” and a “long form” survey sent out by the Bureau decennially. The “short form” goes to each household while the “long form” survey is sent to a smaller sample of the population. The race and ethnicity question is only on the “short form” survey. Only the “short form” survey is used for purposes of Congressional apportionment. See SUBJECTS PLANNED FOR THE 2020 CENSUS, *supra* note 89.

⁹⁰ See *Questions Planned for the 2020 Census*, U.S. CENSUS BUREAU (Mar. 2018), <https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf>. The Office of Management and Budget (OMB), in coordination with the Bureau, constructs these *per se* definitions of race and ethnic categories. See Beydoun, *supra* note 23, at 1 n.2 (articulating how these categorizations are social constructions imposed by the federal government),

⁹¹ Seltzer & Anderson, *supra* note 21, at 488.

⁹² Because American Indians were not included under the original constitutional Art. I, § 2, cl. 3 mandate, Walker took the affirmative step to include their enumeration during the 1870 Census. *Id.*

⁹³ Even before the Japanese attack on Pearl Harbor, President Franklin D. Roosevelt ordered the Bureau to collect information on American-born and foreign-born Japanese from the 1940 Census data lists. Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 348 (2002).

government then used to facilitate the internment of 112,000 Japanese Americans.⁹⁴ Most recently, the Bureau disclosed information about Arab Americans to DHS to aid government surveillance.⁹⁵ DHS then shared this data with Customs and Border Patrol to help monitor border checkpoints.⁹⁶

When confronted with questions about this longstanding practice of disclosing census data, the Bureau's response has ranged from outright denial to resigned admission.⁹⁷ When first questioned about its role in the Japanese internment program, the Bureau denied any involvement and engaged in a deliberate and systematic cover-up. It was only after the *New York Times* released an article exposing the Bureau's actions that it acknowledged any wrongdoing.⁹⁸ Similarly, the Bureau intentionally suppressed its involvement in the Arab American surveillance program.⁹⁹ Another *New York Times* article exposed the Bureau's actions, forcing the Bureau to admit that it disclosed census data to DHS.¹⁰⁰ After the journalistic uncovering of Bureau disclosures, the agency expressed resignation about the inevitability of these disclosures throughout Executive Branch departments.¹⁰¹ According to Hermann Habermann, the Bureau's Deputy Director during the Arab American surveillance program, the Bureau is required to provide information to other federal agencies under current law.¹⁰² When pressed on the issue, Habermann said: "The only way we can guarantee that no one will ever be harmed by our information is to release nothing."¹⁰³ With the Bureau openly acknowledging that its longstanding disclosure practices will likely continue, the differential undercount will similarly continue to increase.¹⁰⁴

2. Case Study: *The Hispanic Undercount and the 2020 Census*

⁹⁴ See Pixler, *supra* note 4, at 1124.

⁹⁵ See Beydoun, *supra* note 23, at 7–8.

⁹⁶ *Id.* at 7.

⁹⁷ See generally Seltzer & Anderson, *supra* note 21 (discussing how the Bureau refused to take responsibility for its disclosure of Japanese American census data).

⁹⁸ *Id.* See also Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES, July 30, 2004, at A14, https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html?_r=0.

⁹⁹ Clemetson, *supra* note 98 (writing that it was only after the Electronic Privacy Information Center filed a Freedom of Information Act request did the Bureau provide evidence of these data disclosures to DHS).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (according to Habermann: "We are required to provide information to other federal agencies.").

¹⁰² *Id.* (according to Habermann: "We do worry about how information will be used. However, we have not been given the authority to determine which organizations get which information."). See also Pixler, *supra* note 4, at 1124.

¹⁰³ Clemetson, *supra* note 98. Hermann Habermann resigned less than two years after this story was uncovered. Neither he nor the Bureau provided any reason for his resignation. Elizabeth Williamson, *Top 2 Census Officials Resign*, WASH. POST (Nov. 15, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/14/AR2006111401181.html>.

¹⁰⁴ See *infra* Part IIC.

Within the larger differential undercount, the Hispanic undercount will especially impact Congressional apportionment during the upcoming 2020 Census.¹⁰⁵ To begin, racial and ethnic minority groups accounted for 91 percent of the nation's population growth between 2000-2010. Hispanics made up 56 percent of that increase.¹⁰⁶ In addition, Hispanic population totals have grown consistently since 1990, and currently comprise over 17 percent of the total U.S. population.¹⁰⁷

Figure 1: Total Population Growth in the America from 2000-2010.

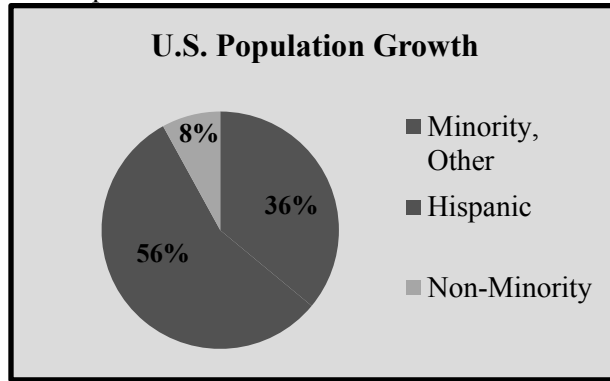


Figure 2: Hispanic Population Growth in America Since 1990

| Year | 1990 | 2000 | 2010 | 2015 |
|-------------------------------|------|-------|-------|-------|
| Total Population (Millions) | 21.8 | 35.2 | 50.7 | 56.5 |
| Percentage of U.S. Population | 8.8% | 12.5% | 16.4% | 17.6% |

In addition to being a large segment of the U.S. population, Hispanics face distinct social and political challenges that threaten their personal freedoms and safety, such as the danger of

¹⁰⁵ See, e.g., Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. 35, 38 (2011); JORGE DUANY, *THE CENSUS UNDERCOUNT, THE UNDERGROUND ECONOMY AND UNDOCUMENTED MIGRATION: THE CASE OF DOMINICANS IN SANTURCE, PUERTO RICO* 1 (1992), <https://www.census.gov/srd/papers/pdf/ev92-17.pdf> (noting how even compared to other minority groups, there is the possibility that the 5.2 percent undercount calculated in 1990 is a low estimate).

¹⁰⁶ López et al., *Illegal Immigration Backlash Worries, Divides Latinos*, PEW RES. CTR. (Oct. 28, 2010), <http://www.pewhispanic.org/2010/10/28/illegal-immigration-backlash-worries-divides-latinos/>.

¹⁰⁷ Flores et al., *Facts on U.S. Latinos, 2015*, PEW RES. CTR. (Sept. 18, 2017), <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos-trend-data/>.

deportation.¹⁰⁸ According to a study by Pew Research Center, 61 percent of all Hispanics report that discrimination against them is a “major problem,”¹⁰⁹ and nearly half of all Hispanics say that America is less accepting of immigrants than it was five years ago.¹¹⁰ Fifty-three percent of all Hispanic adults worry that they, a family member, or a close friend could be deported,¹¹¹ and 67 percent of foreign-born Hispanic adults worry that they may be deported.¹¹² It is therefore reasonable to foresee why Hispanic residents might be less likely to volunteer their personally identifiable census information to the federal government. Adding to these concerns, the 2020 census will ask about “Hispanic Origin,” along with questions of race, ethnicity, and citizenship status.¹¹³ These questions will pose distinct threats to Hispanic residents in America, who make up 80 percent of the 11.1 million unauthorized immigrants in America.¹¹⁴

On January 25, 2017, President Trump issued Executive Order 13,768 entitled “Enhancing Public Safety in the Interior of the United States,” which set forth the administration’s immigration enforcement

¹⁰⁸ See generally Douglas S. Massey, *The Real Hispanic Challenge*, PATHWAYS: HISPANICS IN AMERICA, Spring 2015, at 3–7, <http://inequality.stanford.edu/publications/pathway/hispanics-america>. See also Allan J. Lichtman & Samuel Issacharoff, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 9 (1993).

¹⁰⁹ López et al., *supra* note 106 (presenting evidence that discrimination is even worse for foreign-born Hispanics, with 70 percent indicating that they experience discrimination in their daily lives).

¹¹⁰ *Id.* (explaining how 64 percent of Hispanics say the debate over immigration policy, and Congress not passing immigration reform, have made life more difficult for Hispanics living in America).

¹¹¹ PEW RES. CTR., *2007 National Survey of Latinos: As Illegal Immigration Issue Heats up, Hispanics Feel a Chill*, (Dec. 13, 2007), <http://www.pewhispanic.org/2007/12/13/2007-national-survey-of-latinos-as-illegal-immigration-issue-heats-up-hispanics-feel-a-chill/>.

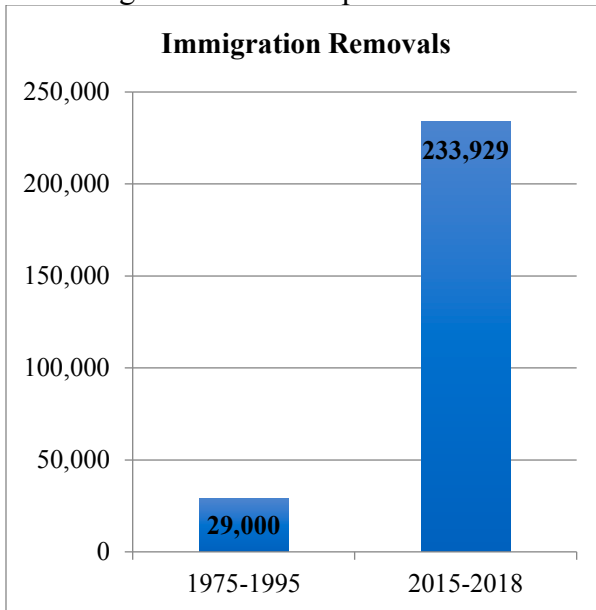
¹¹² *Id.*

¹¹³ *Questions Planned for the 2020 Census*, *supra* note 90. At the time of this Article’s publication, a federal district court blocked the Trump Administration’s efforts to include “citizenship” in the 2020 Census. See *New York v. U.S. Dep’t of Commerce*, No. 18-CV-2921, 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019). The U.S. Department of Justice filed a Petition for Certiorari with the U.S. Supreme Court for expedited review, so that the federal government could include the question of a resident’s citizenship status before its June 2019 deadline. See *U.S. Dep’t of Commerce v. New York*, Petition for Writ of Certiorari; Stephen Dinan, *DOJ Asks Supreme Court to Speed Census Citizenship Case*, Washington Times (Jan. 22, 2019), <https://www.washingtontimes.com/news/2019/jan/22/doj-asks-scotus-speed-census-citizenship-case/>.

¹¹⁴ López et al., *supra* note 106 (defining immigrants without legal documentation as “unauthorized”); see Hans A. von Spakovsky, *Evenwel v. Abbott: Destroying Electoral Equality and Eroding “One Person, One Vote”*, 2016 CATO SUP. CT. REV. 101, 105–06, 117 (referring to unauthorized Hispanic immigrants as “illegal aliens” and as “illegal immigrants”); Charles, *supra* note 105, at 38 (referring to unauthorized Hispanic immigrants as “unlawfully present aliens”); Murphy, *supra* note 75, at 969 n.1 (citing *Ridge v. Verity*, 715 F. Supp. 1308, 1310 n.1 (W.D.Pa. 1989) as saying ‘illegal aliens’ refer to all individuals who are unlawfully present in the United States.’); see also *2007 National Survey of Latinos*, *supra* note 111.

and removal priorities. According to the U.S. Customs and Immigration Enforcement (“ICE”) official website, the number of deportations in 2017 reflects ICE’s continued commitment to identifying, arresting, and removing aliens who are in violation of U.S. law.¹¹⁵ Because unauthorized immigration to the United States is in violation of U.S. law, many Hispanic immigrants are subject to the federal government’s increased commitment to immigration removals. Under the Trump Administration, ICE increased its arrests by 30 percent during 2017, detaining over 143,000 people for violating immigration laws.¹¹⁶

Figure 3. Average Number of Deportations in America



The U.S. legislative landscape further compounds current Hispanic fears and distrust of the government.¹¹⁷ For example, Congress passed legislation

¹¹⁵ U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2017), <https://www.ice.gov/removal-statistics/2017>.

¹¹⁶ *Id.*; see Miriam Valverde, *Have deportations increased under Donald Trump? Here’s what the data shows*, POLITIFACT (Dec. 19, 2017, 9:00 AM), <http://www.politifact.com/truth-o-meter/article/2017/dec/19/have-deportations-increased-under-donald-trump-her/>.

¹¹⁷ See, e.g., Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), ch. 113, 2010 Ariz. Sess. Laws 450 (allowing police officers to detain immigrants). On appeal, the U.S. Supreme Court struck down parts of S.B. 1070, but retained the provision allowing for police to detain people until confirmation of their immigration status. See *Arizona v. United States*, 567 U.S. 387 (2012); see also 2007 *National Survey of Latinos*, *supra* note 111 (noting that the increased public attention to immigration issues has negatively impacted Hispanics’ lives by making it more difficult to keep a job, to

in response to the recent growth in Hispanic immigration that imposed criminal and civil sanctions on unauthorized immigrants as well as on employers who employ unauthorized immigrants.¹¹⁸ In addition, under the Alien and Nationality Act, Congress requires immigrants to register with the federal government and to carry proof of alien registration.¹¹⁹ Failure to register and carry documentation constitutes a federal misdemeanor.¹²⁰ Similarly, state legislatures have imposed harsh laws on authorized and unauthorized immigrants alike.¹²¹ For instance, Arizona passed S.B. 1070 in 2010,¹²² which provided law enforcement the authority to ask Hispanics for their immigration identification during a routine stop.¹²³ Texas passed Senate Bill 4 in May 2017, making it a crime for any state official to impede federal immigration enforcement policies.¹²⁴ Other states have either passed, or attempted to pass, similar legislation imposing penalties on unauthorized immigration.¹²⁵

Not surprisingly, the election of President Trump in and of itself exacerbated the fear and concern Hispanics feel toward the government.¹²⁶ During his campaign for presidency, then-candidate Trump routinely articulated incendiary and intolerant remarks about Hispanics.¹²⁷ Since

find or keep a house, and by making them produce documents to prove their immigration status more often than in the past).

¹¹⁸ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445, (codified as 8 U.S.C. §§ 1324–1326 (1988)) (amending the Immigration and Nationality Act); *see also Arizona*, 567 U.S. at 395.

¹¹⁹ *See* 8 U.S.C. §§ 1304(e), 1306(a) (2012). *But see* Nancy Morawetz & Natasha Fernandez-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 U.C. DAVIS L. REV. 142, 161–72 (2014) (arguing that the government has relaxed its enforcement of immigrants carrying registration materials).

¹²⁰ 8 U.S.C. § 1306(a)(2012).

¹²¹ *Id.*

¹²² S.B. 1070 § 1 (2010) (“[T]his act [is] intended . . . to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”); *see also* H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (amending S.B. 1070).

¹²³ S.B. 1070 § 2(B); *see also Arizona v. United States*, 567 U.S. 387 (2012) (striking down three provisions of S.B. 1070, but upholding the constitutionality of § 2(B)).

¹²⁴ S.B. 4, ch. 4, 2017 Tex. Gen. Laws 7 (providing civil and criminal penalties for cities, counties, law enforcement agencies, and university police departments in Texas that implement new policies that build trust with immigrant communities). *But see* Richard Gonzales, *Federal Judge Temporarily Blocks SB4, Texas Law Targeting Sanctuary Cities*, NPR (Aug. 30, 2017, 11:11 PM), <https://www.npr.org/sections/thetwo-way/2017/08/30/547459673/federal-judge-temporarily-blocks-sb4-texas-law-targeting-sanctuary-cities> (explaining how the district court in the Western District of Texas issued an Order enjoining enforcement of the law); *see also* Julian Aguilar, *Texas back in federal court over anti-“sanctuary cities” law*, TEX. TRIB. (Nov. 7, 2017, 12:00 AM), <https://www.texastribune.org/2017/11/07/texas-sanctuary-cities-law-federal-court/> (articulating how S.B. 4 is currently being challenged in the 5th Circuit Court of Appeals).

¹²⁵ South Carolina, Pennsylvania, Minnesota, Rhode Island, Michigan and Illinois introduced similar bills. *See* Nat’l Conference of State Legislatures, *Arizona’s Immigration Enforcement Laws*, (July 28, 2011) <http://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx>.

¹²⁶ *See generally* Pew Research Ctr., *Latinos and the New Trump Administration: Growing Share Say Situation of U.S. Hispanics is Worsening* (Feb. 23, 2017), <http://www.pewhispanic.org/2017/02/23/latinos-and-the-new-trump-administration/>.

¹²⁷ Carolina Moreno, *9 Outrageous Things Donald Trump Has Said About Latinos*, HUFFINGTON POST (Nov. 9, 2016), <https://www.huffingtonpost.com/entry/9-outrageous-things-donald-trump-has->

being elected, President Trump has continued to make Hispanics uneasy through his rhetoric and legislative actions. For example, President Trump's pardon of former Maricopa County, Arizona Sheriff Joe Arpaio signaled the President's hardline stance toward deporting unauthorized immigrants.¹²⁸ The pardon of Arpaio—who was criminally convicted for abusing Hispanics in Arizona prisons—“enraged” Hispanics, and lent credence to their distrust of the federal government.¹²⁹ In addition, President Trump's decision to phase out the Deferred Action for Childhood Arrivals program (“DACA”)¹³⁰ and to support Congressional legislation like the Raise Act¹³¹ further confirmed his aggressive position toward unauthorized Hispanic immigrants.

In general, fear of government intrusion decreases a community's civic engagement.¹³² In light of current socio-political conditions in America, 22 percent of Hispanics say they are unlikely to use federal or state government services.¹³³ In addition, the Hispanic community decreased its spending by nearly 40 percent in 2017, with people fearing that they may need extra capital to protect family or friends from deportation.¹³⁴ These instances of Hispanic withdrawal from economic and government participation provide further reason to believe that Hispanics will likely refuse to answer the upcoming 2020 Census.

Legal scholars provide a handful of reasons for the differential undercount, including language difficulties and irregular living arrangements.¹³⁵ To these scholars, distrust of the federal government is

said-about-latinos_us_55e483a1e4b0c818f618904b (“When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.”).

¹²⁸ See, e.g., Gary Silverman, *Trump crackdown has US Latinos too scared to spend*, FIN. TIMES, (May 21, 2017) <https://www.ft.com/content/b3e2c7ba-3c76-11e7-821a-6027b8a20f23>; Stephen A. Nuno, *Opinion: For Many Latinos, Trump's Arpaio Pardon Is a Strategic Monument to Hate*, NBC NEWS (Aug. 26, 2017, 11:02 AM), <https://www.nbcnews.com/news/latino/opinion-many-latinos-trump-s-arpaio-pardon-strategic-monument-hate-n796216>.

¹²⁹ See Melissa Etehad, *Joe Arpaio, former sheriff in Arizona, is found guilty of criminal contempt*, L.A. TIMES (July 31, 2017, 5:55 PM), <http://www.latimes.com/nation/la-na-joe-arpaio-verdict-20170706-story.html>; Michelle Mark, *How former Arizona sheriff Joe Arpaio became the most hated lawman in America*, BUS. INSIDER (Jan. 10, 2018, 5:24 PM), <http://www.businessinsider.com/maricopa-county-sheriff-joe-arpaio-pardoned-by-trump-2017-8>; see also Nuno, *supra* note 128.

¹³⁰ *The Year of Living Dangerously: Immigration in the Era of Trump*, LPB NETWORK: IMMIGRATIONPROF BLOG (Jan. 3, 2018), <http://lawprofessors.typepad.com/immigration/2018/01/the-year-of-living-dangerously-immigration-in-the-era-of-trump.html>.

¹³¹ *Id.*; *The RAISE Act: What Lies Beneath the Proposed Points System?*, AM. IMMIGRATION COUNCIL (Aug. 11, 2017), <https://www.americanimmigrationcouncil.org/research/raise-act>.

¹³² See Michele Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1441–42 (2012) (showing that increased surveillance of the poor results in communities voting less than half of the time they otherwise would).

¹³³ PEW RESEARCH CTR., *supra* note 126.

¹³⁴ *Id.*

¹³⁵ See, e.g., Persily, *supra* note 27, at 1083; Pack, *supra* note 81, at 36 n.9.

simply one of the many reasons why the Hispanic community is less likely to respond to the census. This Article maintains that distrust of government and concern for census disclosures is *the primary reason* for the differential undercount. More specifically, this Article argues that Hispanic distrust of the government will lead to an unprecedented differential undercount in the 2020 Census. The concerns Hispanics face today are not misplaced in light of the government's longstanding practice of targeting minority groups through census disclosures.¹³⁶ This precedent, along with the current political tenor of the country, provides the Hispanic community ample reason to fear contact with government officials. Considering the direct contact the federal government has with residents through the U.S. Census, absent judicial or legislative solutions, the 2020 Census will likely yield an unprecedented Hispanic undercount.

The consequence of this likely increase in the Hispanic undercount will have profound consequences. The Hispanic undercount will not be evenly dispersed across all states, and as a result, states will be disproportionately impacted.¹³⁷ Six states account for 59 percent of the unauthorized Hispanic immigrants—California, Texas, Florida, New York, New Jersey, and Illinois.¹³⁸ In addition, 26.9 percent of the total Hispanic population lives in California, 18.9 percent lives in Texas, and 8.8 percent lives in Florida.¹³⁹ Therefore, if unauthorized Hispanic immigrants are more likely to forego responding to the census, these states will have lower population totals than other states for purposes of Article I, Section 2 apportionment.

¹³⁶ Lichtman & Issacharoff, *supra* note 108, at 9.

¹³⁷ See McKay, *supra* note 39, at 1436–37 (providing an overview of proportionate and disproportionate undercounting rates, and highlighting that “unlike a proportionate undercount, a disproportionate undercount does affect the distribution of political rights” when the Bureau undercounts certain areas or groups at a higher rate than average); Pack, *supra* note 81.

¹³⁸ Jens M. Krogstad, et. al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-us/>.

¹³⁹ Flores et al., *supra* note 107.

Figure 4. Hispanic Percentage of State Population [greater than 20 percent or less than 5 percent]

| Hispanic Percentage of Total Population | |
|--|-------|
| New Mexico | 48.1% |
| Texas | 38.8% |
| California | 38.8% |
| Arizona | 30.7% |
| Nevada | 28.1% |
| Florida | 24.5% |
| Colorado | 21.4% |
| <hr/> | |
| Louisiana | 4.9% |
| Missouri | 3.9% |
| Ohio | 3.5% |
| Mississippi | 2.9% |
| Maine | 1.6% |
| West Virginia | 1.5% |

Even if the 5.2 percent Hispanic undercount from past censuses persists without change for the 2020 Census, states with greater Hispanic population totals will receive fewer seats in the House of Representatives compared to those states with lower Hispanic populations. More alarmingly, if the 2020 Hispanic undercount *increases* because of the current socio-political climate, those states with sizeable percentages of Hispanic populations will receive even fewer seats in the House of Representatives than they deserve under Article I, Section 2 of the U.S. Constitution.¹⁴⁰

B. American Residents Have a “Reasonable Expectation of Privacy” in their Census Data

Samuel Warren and Louis Brandeis’ 1890 article, *The Right to Privacy*,¹⁴¹ serves as the foundation of modern informational privacy law.¹⁴² After his nomination to the Supreme Court, Justice Brandeis spearheaded the Court’s shift to protect a person’s private, personally identifiable

¹⁴⁰ *Id.*

¹⁴¹ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁴² Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 BRANDEIS L.J. 643, 645 (2007); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 907 (2009).

information from unreasonable government searches.¹⁴³ The Court has since developed the “reasonable expectation of privacy” test,¹⁴⁴ maintaining that the government commits a “search” under the Fourth Amendment¹⁴⁵ when it intrudes on a person’s subjective expectation of privacy that society recognizes as reasonable.¹⁴⁶ As Chief Justice Roberts wrote in *Carpenter v. United States*,¹⁴⁷ “official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.”¹⁴⁸

Since the first U.S. Census of 1790, American residents have always expressed an “expectation of privacy” in their census data.¹⁴⁹ The federal government itself has recognized these expectations as reasonable, and has explicitly promised protection of this personally identifiable data since 1870, culminating in codification of the Census Act in Title 13.¹⁵⁰ In addition to Title 13, Congress passed other legislation in the 1960s and 1970s to limit the Executive Branch’s ability to disclose personally identifiable information that it collects.¹⁵¹ For example, the Wiretap Act,¹⁵² Fair Credit Reporting Act,¹⁵³ and Privacy Act¹⁵⁴ all include Fair Information Practices (“FIPs”) that limit the government’s right to use and disseminate personally identifiable data. FIPs also require the government to provide individuals

¹⁴³ See *Chemerinsky*, *supra* note 142, at 645–46 (quoting Justice Brandeis in *Olmstead v. United States*:

The makers of our Constitution . . . conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)).

¹⁴⁴ See *United States v. Jones*, 565 U.S. 400, 409 (2012).

¹⁴⁵ U.S. CONST. amend. IV (“The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

¹⁴⁶ *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁴⁷ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁴⁸ *Id.* at 2213 (citing *Smith*, 442 U.S. at 740).

¹⁴⁹ For the history of American residents articulating privacy concerns about government use of census data, see *supra* Part II; see also *The Right to Privacy in Nineteenth Century America*, *supra* note 60, at 1904 n.95 (highlighting how the 1790 Census was opposed on privacy grounds).

¹⁵⁰ Title 13 protects census data privacy in three distinct ways. First, it imposes limitations on the Bureau and government officials in their use of census data. Second, it prevents an individual’s census information from being admitted as evidence or used for any legal action, suit, or administrative proceeding without the consent of the individual. Finally, it protects people from giving the Bureau information about their religious beliefs or membership in a religious organization. See 13 U.S.C. § 9(a)(1)–(3) (2012); 13 U.S.C. § 221(c) (2012).

¹⁵¹ Schwartz, *supra* note 142, at 907 (“The law’s chief reaction to these new developments has not been through tort law, but FIPs.”).

¹⁵² Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–22 (1968).

¹⁵³ Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970).

¹⁵⁴ Privacy Act, 5 U.S.C. § 522a (2012) (codified in 1974).

notice before disclosing their private information, and to allow people the opportunity to correct any inaccurate information collected.¹⁵⁵

Despite the formal protections found in Title 13 and the FIPs passed by Congress, federal law fails to hold the government responsible for breaches of information disclosures.¹⁵⁶ According to the U.S. Department of Justice, the Privacy Act contains “imprecise language” and “outdated regulatory guidelines” that have rendered it meaningless.¹⁵⁷ Moreover, despite over 40 years of administrative and judicial decisions on this federal legislation, the Justice Department acknowledges that issues in the Privacy Act’s application “remain unresolved or unexplored.”¹⁵⁸ The failure to enforce the Privacy Act and Title 13 are microcosmic of the undelivered promises of privacy that sit at the forefront of American residents’ minds as they decide whether to fill out the census.¹⁵⁹ Furthermore, the U.S. Supreme Court has yet to fully grasp the statutory failures of laws like Title 13 and the Privacy Act that purport to protect informational privacy.¹⁶⁰ While the Court is aware of the dangers present in the “vast amounts of personal information in computerized data banks or other massive government files,”¹⁶¹ it has yet to explicitly recognize a federally protected Fourth Amendment right in a person’s personally identifiable data.¹⁶² Consequently, federal courts continue to express “grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.”¹⁶³ The failure of the federal justice system to protect American residents’ reasonable expectation of privacy in their census data further contributes to the increasing nonresponse rates and failure to meet the Article I, Section 2 mandate.

It is time to recognize a Fourth Amendment right for American residents in their census data, especially the information that society recognizes as

¹⁵⁵ Schwartz, *supra* note 142, at 908.

¹⁵⁶ See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006).

¹⁵⁷ U.S. DEP’T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974 (2015), <https://www.justice.gov/opcl/introduction>.

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* Part II.C.

¹⁶⁰ This failure may be due to the lack of clarity in the modern legal definition of informational privacy. See generally Solove, *supra* note 156, at 477–478 (“Privacy is far too vague a concept to guide adjudication and lawmaking” and that it “suffers from an embarrassment of meanings”); see also Chemerinsky, *supra* note 142, at 650 (noting how courts are confused by the various and broad definitions of privacy).

¹⁶¹ *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

¹⁶² Chemerinsky, *supra* note 142, at 644 (pointing out that informational privacy remains unprotected while the Court has used the right of privacy to protect the right to purchase contraceptives, the right to abortion, and the right to engage in consensual homosexual activity).

¹⁶³ *Nat’l Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, at 159–60 (2011) (Scalia, J., concurring) (“Like many other desirable things not included in the Constitution A federal constitutional right to ‘informational privacy’ does not exist.”); *American Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir.1997).

reasonably private.¹⁶⁴ For instance, while a person's street address is not necessarily private, an individual's citizenship status or racial and ethnic identification might reasonably be protected under the Fourth Amendment.¹⁶⁵ The affirmative safeguards outlined in Title 13 endow American residents with this "reasonable expectation of privacy."¹⁶⁶ Accordingly, when an Executive Branch department acquires personally identifiable data from the Bureau, it commits a "search" under current Fourth Amendment doctrine.¹⁶⁷ As evident from the longstanding tradition of the federal government searching census data based on ethnic, racial, and citizenship classifications, Title 13 by itself does not adequately protect against census disclosures.¹⁶⁸ Absent statutory provisions with teeth, the private data disclosed by residents in the census form requires court protection.¹⁶⁹

Some scholars have observed that the reasonable expectation of privacy doctrine rests on a "notice theory," and that the federal government may sidestep Fourth Amendment violations by simply letting people know not to expect any privacy in the first place.¹⁷⁰ As such, the federal government may simply put American residents on notice that all of the personally identifiable data collected by the Bureau will not be afforded any privacy protections. Not surprisingly, this is exactly the legal theory that the government has used when disclosing census data since passing Title 13.¹⁷¹ The PATRIOT Act abrogated longstanding confidentiality guarantees under Title 13 and other informational privacy laws,¹⁷² and according to the "notice theory," would have given proper notice to American residents that they should not expect privacy of their census data.¹⁷³

¹⁶⁴ This Article does not take a position on whether the Reasonable Expectation of Privacy test is a good doctrine in the first place. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (Gorsuch, J., dissenting). Nevertheless, the Court applies this doctrine to Fourth Amendment challenges. Consequently, private census data—like citizenship status and ethnic identification—should be protected.

¹⁶⁵ See *Carpenter*, 138 S. Ct. at 2215–16 (comparing *United States v. Knotts* with *United States v. Jones* to demonstrate the difference between information shared with the public and private information generally kept out from the public domain).

¹⁶⁶ See *supra* Part II.B.

¹⁶⁷ While this article outlines how acquiring census data constitutes a "search" under the Fourth Amendment's "reasonable expectations" test, it is beyond the scope of this Note to discuss whether or not such a "search" is reasonable. The conclusion of this Note, that the government may use other means at its disposal to acquire data on American residents, indicates that such a "search" is "unreasonable" under the Fourth Amendment and therefore requires a warrant. For a discussion of the balancing test required to determine whether a search is "unreasonable," see *United States v. Jones*, 565 U.S. 400 (2012).

¹⁶⁸ Compare 13 U.S.C. §9 (a) (1)–(3) (2012), with 5 U.S.C. §§ 522a (b), (a)(i)(1) (2012).

¹⁶⁹ See *Carpenter*, 138 S. Ct. at 2219 (holding that when the Government accessed CLSI from the wireless carriers pursuant to the Stored Communications Act, it invaded Carpenter's "reasonable expectation of privacy").

¹⁷⁰ See Chemerinsky, *supra* note 142, at 650.

¹⁷¹ See Sobel, *supra* note 93, at 376; *Counting on Confidentiality*, *supra* note 7, at 1057–59.

¹⁷² *Counting on Confidentiality*, *supra* note 7, at 1057–59.

¹⁷³ See Chemerinsky, *supra* note 142, at 650.

According to this argument, it follows that American residents may not assert Fourth Amendment protections over any of their personally identifiable census data.

The Court's decision in *Carpenter v. United States* seems to undermine this "notice theory," however. In *Carpenter*, the Court addressed the constitutionality of the Stored Communications Act, which permits the federal government to access a person's cell-site location information ("CSLI") without obtaining a warrant.¹⁷⁴ The *Carpenter* Court held that, while American residents might have notice that the government might procure their CSLI data, the government's acquisition of CSLI data still constituted a "search" under the Fourth Amendment.¹⁷⁵ If simply providing American residents "notice" not to expect privacy was sufficient to divest them of their Fourth Amendment protections, *Carpenter* would have come out differently. *Carpenter* thus affirmed that Congress may not legislate away those individual liberties guaranteed in the Bill of Rights.

Next, one may argue that government disclosures of census data do not violate an individual's "reasonable expectation of privacy" because American residents voluntarily fill out their census forms.¹⁷⁶ The Supreme Court in *United States v. Miller*¹⁷⁷ outlined the modern third-party doctrine, holding that a person "assumes the risk" of a third party disclosing voluntarily conveyed information to the public, including the police.¹⁷⁸ In *Miller*, the Court held that the defendant did not have a reasonable expectation of privacy in his bank statements because he voluntarily conveyed his private information to the bank.¹⁷⁹ It follows that, like the defendant in *Miller*, American residents fill out the census voluntarily and thereby release any "reasonable expectation of privacy" they may have once held in that personally identifiable data.¹⁸⁰ Therefore, once a person

¹⁷⁴ See *Carpenter*, 138 S. Ct. at 2212.

¹⁷⁵ The *Carpenter* Court held that accessing this data for 7 days of information constituted a "search" under the Fourth Amendment. It is not clear if 6 days of information would constitute a "search." For purposes of this Article however, it is sufficient that the Court explicitly rejected the "notice theory" of Fourth Amendment protections. Simply because a federal statute tells American residents *not* to expect privacy in certain data, does not mean they may not still hold a reasonable expectation of privacy in that data.

¹⁷⁶ See generally Sebastian Zimmeck, *The Information Privacy Law of Web Applications and Cloud Computing*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 451, 477 (2013) (explaining the third-party doctrine).

¹⁷⁷ *United States v. Miller*, 425 U.S. 435 (1976).

¹⁷⁸ Zimmeck, *supra* note 176, at 479.

¹⁷⁹ *Miller*, 425 U.S. 435 (1976).

¹⁸⁰ See *id.*

provides their personal information to the Bureau, all Executive departments and agencies may acquire it without a warrant.

This argument fails, however, because the third-party doctrine requires a person to “voluntarily convey” information.¹⁸¹ Unlike a person who voluntarily uses a bank, people provide their private information to the Bureau under the threat of a monetary fine.¹⁸² There is no legal liability for abstaining from banking. Conversely, American residents do not truly “volunteer” their personal information to the Bureau.¹⁸³ As such, the third-party doctrine is not a legitimate defense for an Executive department’s “search” of census data disclosed by the Bureau.

C. *The Government Does Not Provide “Requisite Procedures” Before Disclosures*

Procedural due process gives individuals the right to notice and a fair hearing regarding governmental actions that threaten to take away their life, liberty, or property.¹⁸⁴ This right to notice and a fair hearing requires transparency, accuracy, accountability, and participation.¹⁸⁵ In *NASA v. Nelson*,¹⁸⁶ the Supreme Court addressed a challenge to the Privacy Act’s statutory protections of a person’s Fourth Amendment interests. In *NASA*, independent contractors brought claims against the federal government for requiring them to share information about past drug use on a NASA background check.¹⁸⁷ The unanimous Court rejected that the background check violated the independent contractors’ Fourth Amendment rights, holding that the background check was subject to the Privacy Act and that petitioners were therefore adequately protected against government disclosure of their private information.¹⁸⁸

In his concurring opinion, Justice Scalia addressed the potential legal redress available in the event that the government did in fact violate its

¹⁸¹ See *id.* (holding that petitioner did not have a reasonable expectation of privacy because the documents obtained by the government were voluntarily conveyed to the banks).

¹⁸² 13 U.S.C. § 221 (2012).

¹⁸³ A person has even less of a choice to fill out the census than to use a cell-phone. See *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (“[I]n no meaningful sense does the user voluntarily assume the risk of turning over a comprehensive dossier”) (internal quotations omitted) (internal brackets omitted).

¹⁸⁴ Mary Madden, et. al., *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH U. L. REV. 53, 119–20 (2017).

¹⁸⁵ *Id.*

¹⁸⁶ *Nat’l Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134 (2011).

¹⁸⁷ *Id.* at 139–44.

¹⁸⁸ *Id.* at 145 (citing *Whalen v. Roe* to note that this sort of “statutory or regulatory duty to avoid unwarranted disclosures of accumulated private data was sufficient . . . to protect a privacy interest that arguably ha[d] its roots in the Constitution.”); 5 U.S.C. §§ 522a(b), (a)(i)(1) (2012) (requiring written consent before disclosure of individual records and imposing criminal liability for violations of nondisclosure obligations).

confidentiality requirements.¹⁸⁹ Justice Scalia discussed the procedural due process protections the independent contractors *could have* asserted if the federal government did not provide them the “requisite procedures” prior to any potential deprivation of liberty.¹⁹⁰ Justice Scalia highlighted how the independent contractors in *NASA* did not make this argument against the government’s Privacy Act procedures, but only objected to the government collecting the data in the first place.¹⁹¹ Consequently, they failed to state a legal claim for relief.¹⁹² Nevertheless, Justice Scalia pointed out that *had* NASA disclosed the independent contractors’ data, and *if* NASA did not provide “certain procedures” prior to disclosing this information, they could assert viable due process claims.¹⁹³

Justice Scalia’s concurrence in *NASA* opens the door for Fifth Amendment causes of action when the federal government, without providing adequate notice, discloses personally identifiable information protected under federal law.¹⁹⁴ And, for purposes of collected census data, Title 13 differs in important ways from the Privacy Act analyzed in *NASA*. Unlike the Privacy Act, Title 13 does not provide procedural guidance to the federal government when it decides to disclose personally identifiable information. Rather, Title 13 categorically prohibits the government from disclosing personal census data.¹⁹⁵ Accordingly, following *NASA*, courts might find that Title 13 does not even satisfy the minimum protections required by federal law.

In *NASA*, the Court noted that while the Privacy Act’s procedural protections might be “porous,” at least they existed.¹⁹⁶ On the other hand, Title 13 is entirely silent with respect to the circumstances in which the Executive departments may access census data collected by the Bureau.¹⁹⁷ It follows that, if Justice Scalia’s concurrence holds any weight, Congress must add specific procedural safeguards to Title 13 to ensure that people receive the “requisite” procedural protections in the event that their data is disclosed.¹⁹⁸ Without “requisite procedures” codified textually into Title 13,

¹⁸⁹ *Nelson*, 562 U.S. at 159–69 (2011) (Scalia, J., concurring).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 161.

¹⁹² *Id.* at 162, 169.

¹⁹³ While Justice Scalia does not outline exactly what the “procedures” are that NASA would need to provide petitioners in the event it disclosed their private information, the Privacy Act in its text articulates notice as an important safeguard provided individuals before data is disclosed. *See Nelson*, 562 U.S. at 169.

¹⁹⁴ *See Nelson*, 562 U.S. 134 (Scalia, J., concurring).

¹⁹⁵ *Compare* Privacy Act, 5 U.S.C. § 522a (2012) (codified in 1974), with 13 U.S.C. §9 (a) (1)–(3) (1954).

¹⁹⁶ *Nelson*, 562 U.S. at 156–57 (“[T]he mere fact that the Privacy Act’s nondisclosure requirement is subject to exceptions does not show that the statute provides insufficient protection against public disclosure”).

¹⁹⁷ *See* 13 U.S.C. §§ 1–401 (1994).

¹⁹⁸ *See Nelson*, 562 U.S. at 162–69 (Scalia, J., concurring).

people are left unprotected by the statute.¹⁹⁹ Therefore, following Justice Scalia's concurrence, the government arguably violates an individual's Fifth Amendment right to procedural due process when it discloses census data across Executive departments.²⁰⁰ Neither the Japanese Americans nor Arab Americans received notice or any other "procedures" before the Bureau disclosed their census data.²⁰¹ Under *NASA*, it appears as though these disclosures violated the Fifth Amendment.²⁰²

IV. OFFSETTING THE IMPACT OF GOVERNMENT DISCLOSURES OF CENSUS DATA

Congress and the Executive have worked in tandem to assuage American residents' concerns about government disclosures of census data.²⁰³ Yet, despite issuing promises of privacy through legislation and verbal proclamations,²⁰⁴ the federal government has time and again undermined its trust with the people.²⁰⁵ History indicates that the Bureau will continue to share statistical data with other Executive departments.²⁰⁶ Therefore, even if the Bureau affirms its promise that collected data is not used "for law enforcement,"²⁰⁷ minority groups remain at risk of federal census disclosures.²⁰⁸ Although this Article specifically looked at the Hispanic nonresponse rates to illustrate the constitutional implications of the differential undercount, government disclosures of census data impact all minority groups.²⁰⁹ As the 2020 Census approaches, the memory of American Indian displacement, Japanese American internment, and Arab American surveillance looms large in the minds of minorities.²¹⁰ Consequently, all minorities share equally in the fear of answering race, ethnicity, and citizenship questions on the census.²¹¹ Only through

¹⁹⁹ *Id.*

²⁰⁰ *See id.*

²⁰¹ *See Sylvester & Lohr, supra note 4, at 148.*

²⁰² *See Nelson, 562 U.S. 134.*

²⁰³ *See generally Sylvester & Lohr, supra note 4; Pixler supra note 4; Beydoun, supra note 23.*

²⁰⁴ *See supra Part II. B, C.*

²⁰⁵ *Id.*

²⁰⁶ *See Beydoun, supra note 23, at 5.*

²⁰⁷ Pixler, *supra note 4, at 1121 n.178* (quoting Kenneth Prewitt, former Director of the Census Bureau: "[T]here are such strong protections of data . . . [T]hey are used only for statistical purposes, [and] not for regulation or law enforcement . . .").

²⁰⁸ *See Beydoun, supra note 23.*

²⁰⁹ *See supra Part III.A.1.*

²¹⁰ Beydoun, *supra note 23, at 7* ("Indeed, the past sharing of confidential Arab-American demographic data signals the likelihood that the same will happen if the proposed MENA American box is adopted in 2020.").

²¹¹ *See generally Sobel, supra note 93, at 348; Beydoun, supra note 23; TIMOTHY M. WEBER, N.Y. UNIV., VALUES IN A NATIONAL INFORMATION INFRASTRUCTURE: A CASE STUDY OF THE U.S. CENSUS 10 (n.d.), <https://crypto.stanford.edu/portia/papers/weber.pdf> ("To identify oneself as of Arab descent on a census form is an informational act . . . aligned with more suspect acts such as racial profiling.").*

legislative or judicial action may Congress implement a trustworthy, “accurate enumeration” and fulfill its Article I, Section 2 mandate.

*A. Legislative Solution: Ratifying a Constitutional Amendment to Bar Census Disclosures.*²¹²

From its inception in 1790 to today, the U.S. Census has undergone tremendous change surrounding its primary purpose. Congress has steadily shifted the census from a mere enumeration of the population to an ever-expanding collection of socio-economic data aimed at intelligent policymaking.²¹³ This shift is not a recent phenomenon, as the Founders debated about the “rationale” or “true purpose” of the census.²¹⁴ James Madison argued for increasing the number of questions on the census, viewing the enumeration as a mechanism to support government initiatives beyond Congressional apportionment.²¹⁵ Congress began formally expanding the scope of the census in 1810, when it first collected data pertaining to economic and religious institutions.²¹⁶ In 1830, Congress ordered the Executive Branch to collect data pertaining to a person’s health or disability.²¹⁷ In 1850, Congress began collecting information on all individuals within a household rather than just head of the house.²¹⁸ In 1970, Congress directed the Bureau to publish city block data for any town with at least 10,000 inhabitants.²¹⁹ Today, the Bureau collects a wide range of data through the census to inform Congressional spending for hospitals, schools, emergency services, and other social benefits.²²⁰ While the census certainly serves important governmental needs, Congress has demonstrated that it cannot provide true privacy protections when collecting such a wide array of census data.

As evidenced by the passage of the USA PATRIOT Act, Congress may preempt its own laws.²²¹ The PATRIOT Act effectively nullified Title 13’s privacy safeguards and made any future assurances within Title 13

²¹² See U.S. CONST. art. V (outlining two ways to pass an Amendment: through a 2/3 vote by both houses in Congress, or if 2/3 of the state legislatures call a national convention where 3/4 of the states vote for the Amendment).

²¹³ See WEBER, *supra* note 211.

²¹⁴ *Id.*

²¹⁵ See *id.* (citing *Annals of Congress*, 1. P. 1077 and *The Federalist Papers* to articulate how Madison’s initial proposal for the census included its extension “so as to embrace some other objects besides the bare enumeration of the inhabitants” so that Congress could collect this “most useful information [to] enable them to adapt the public measures to the particular standards of the community.”).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See WEBER, *supra* note 211.

²¹⁹ *Id.*

²²⁰ *Why It’s Important*, CENSUS.GOV, <https://www.census.gov/2010census/about/why-important.php> (last updated Oct. 19, 2017). Over \$400 million in annual spending is allocated through the census.

²²¹ See *supra* Part II.C.

speculative at best.²²² In fact, because the PATRIOT Act is still operational, it is debatable whether Title 13's privacy sections are even currently operative.²²³ Passing a constitutional amendment to bar the use of census data for any purpose other than apportionment will immediately solve the differential undercount.²²⁴ No longer will the Hispanic community—or any minority group—be afraid of sharing their personal information with the Bureau.²²⁵ Most importantly, this type of protective shield will assure that states with large minority communities will be properly represented in the House of Representatives, fulfilling the Framers' Article I, Section 2 mandate.²²⁶

B. Judicial Solution: Finding Government Disclosures of Census Data Unconstitutional

Of course, amendments to the U.S. Constitution are rare,²²⁷ so the federal court system might consider enjoining Congress and the Executive Branches from disclosing census data. The U.S. Supreme Court has presided over litigation initiated by states to argue that the differential undercount harms them by disproportionately decreasing their representation in Congress.²²⁸ In these challenges, states have argued for courts to force the Bureau to adopt statistical sampling to account for the differential undercount.²²⁹ The Court has responded that only Congress may direct the census under the Constitution, and that it is thus up to Congress whether or not to incorporate sampling.²³⁰

Courts are responsible for preventing unconstitutional practices and policies.²³¹ While courts should not prescribe particular affirmative steps for Congress or the Executive to adopt when conducting the census, courts may prohibit specific conduct that directly harms American residents. Prohibiting the political branches from actions that violate the Constitution is the cornerstone of Judicial Review.²³² Courts may consider the research and evidence presented in this and other publications that demonstrate the

²²² See Sobel, *supra* note 93.

²²³ USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); See Sobel, *supra* note 93.

²²⁴ See *supra* Part III.A for an outline of how government disclosures of census data trigger the differential undercount.

²²⁵ See *supra* Part III demonstrating minority groups' reasonable fears of responding to the census.

²²⁶ See generally Pixler, *supra* note 4; Beydoun, *supra* note 23.

²²⁷ *How Many Amendments to the Constitution?*, LAWS, [how-many-amendments-to-the-constitution](http://www.laws.com/how-many-amendments-to-the-constitution) (last visited Oct. 21, 2018).

²²⁸ See, e.g., *Wisconsin v. New York*, 517 U.S. 1 (1996).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

²³² See, e.g., *Marbury*, 5 U.S. 137.

constitutional harms caused by government disclosures of census data.²³³ Courts often hesitate to enter “the political thicket.”²³⁴ Therefore, rather than prescribing a political solution, federal courts may categorically eliminate census disclosures as a type of preventative measure.²³⁵ As evidenced in this Article, federal government disclosures present both individual and structural constitutional concerns.²³⁶ By forbidding census disclosures, courts may rectify the differential undercount and cure the current constitutional defect of apportioning a House of Representatives that does not fairly represent the U.S. population.²³⁷

V. CONCLUSION

The Framers drafted Article I, Section 2 of the Constitution to ensure that Congress would represent all U.S. residents.²³⁸ Inextricably connected to the malapportioned Senate, the House of Representatives provides an equal voice for all people in the federal government.²³⁹ However, intragovernmental sharing of census data since the nation’s founding has clouded the government’s ability to collect an “accurate enumeration.”²⁴⁰ Since the first U.S. Census in 1790, American residents have been rightfully concerned that the government might use their personal census data for nefarious objectives.²⁴¹ As a result, people have consistently chosen to not respond to the census.²⁴²

Minority groups are disproportionately undercounted in the census.²⁴³ This Article has outlined how census disclosures are the direct cause of this differential undercount.²⁴⁴ Census disclosures can, and did, target minority groups; those at risk of these disclosures are justifiably concerned about answering the census questionnaire.²⁴⁵ While scholars present a handful of reasons explaining the differential undercount, no scholar specifically identifies fear and distrust of government as the primary rationale for the disproportionately low census response rate among minority groups.²⁴⁶ This

²³³ See *supra* Part II–III and accompanying text.

²³⁴ See *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

²³⁵ See *supra* Part III for a discussion of how government disclosures of census data violate the U.S. Constitution.

²³⁶ *Id.*

²³⁷ See *supra* Part II.A addressing the theory behind Article I, Section 2 to balance the malapportioned Senate.

²³⁸ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016).

²³⁹ See 1 ALEXANDER HAMILTON, RECORDS OF THE FEDERAL CONVENTION OF 1787, 473 (M. Farrand ed., Yale Univ. Press 1911) (“There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government.”).

²⁴⁰ U.S. CONST. art. I, § 2, cl. 3. See *supra* Part II.

²⁴¹ See *supra* Part II.

²⁴² *Id.*

²⁴³ See *supra* Part III.A.

²⁴⁴ See *supra* Part III–IV.

²⁴⁵ *Id.*

²⁴⁶ See *id.*

Article maintains that if minority groups were secure in sharing intimate information to the Bureau, they would participate in the census as fully as they do in other areas of American life.²⁴⁷ With minority groups answering the census more consistently and accurately, Congress could apportion the House of Representatives according to the states' "respective Numbers."²⁴⁸

Today, government tracking of American residents begins when a child is born.²⁴⁹ The government's capacity to collect and share data is sufficient to accomplish all federal funding or national security objectives.²⁵⁰ Even before the passage of the PATRIOT Act, the federal government began initiating an expansive collection of personal data and integration of its databanks across bureaucratic departments.²⁵¹ For example, the 104th Congress passed five laws²⁵² that increased the government's databank of American residents and collected data on over 280 million Americans.²⁵³ Since passing the PATRIOT Act, the Executive Branch has expanded its data-sharing practices to integrate its administrative, criminal justice, and national security databanks and procedures.²⁵⁴ Consequently, the federal government can now collect information on a person's address, family members, and ethnicity, independent of a decennial survey.²⁵⁵ The government therefore does not need the decennial census for its legislative purposes.²⁵⁶ The integration of government databanks, along with other information the government may purchase from commercial entities, provides the government the tools needed to accomplish its objectives.²⁵⁷

However, historical practice indicates that the government is not likely to cease its sharing of census data.²⁵⁸ In times of national security or other

²⁴⁷ See *supra* Part III.A (discussing how fear and distrust of government has resulted in decreased civic engagement among Hispanics).

²⁴⁸ U.S. CONST. art. I, § 2, cl. 3; see argument *supra* Part III–IV.

²⁴⁹ Sobel, *supra* note 93, at 321, 352 (noting that the government begins tracking residents when a child receives a Social Security number at birth).

²⁵⁰ See e.g., Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 Harv. C.R.-C.L. L. Rev. 435 (2008) (outlining the government's capacity to have relevant information and an integrated databank on citizens).

²⁵¹ See Sobel, *supra* note 93, at 321, 352.

²⁵² *Id.* at 323–27 (mentioning the Immigration Reform and Control Act of 1986 ("IRCA"), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act"), the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and the Federal Aviation Administration ID requirement and Computer Assisted Passenger Screening system ("CAPS")).

²⁵³ *Id.* at 330.

²⁵⁴ *Id.* at 332; see also *Counting on Confidentiality*, *supra* note 7, at 1040.

²⁵⁵ See Sobel, *supra* note 93, at 332.

²⁵⁶ Sobel, *supra* note 93.

²⁵⁷ Cate, *supra* note 250, at 436. The PATRIOT Act provided government increased ability to conduct secret searches unrelated to terrorism and granted to the government broad access to review personal records without having to obtain a court order. It expanded government powers by amending preexisting laws governing the collection, analysis, sharing, and investigation of data. Importantly, the PATRIOT Act provides State and local law enforcement officials with access to federally collected information.

²⁵⁸ See Beydoun, *supra* note 23, at 7.

government urgencies, the federal government will likely access this data to help in its objectives.²⁵⁹ With this understanding of history and likely future practice, only a constitutional amendment barring government census disclosures will ensure that all residents may comfortably participate in the U.S. Census.²⁶⁰ This amendment would permit the federal government to accurately apportion Congress.²⁶¹ In the event that a constitutional amendment is untenable, federal courts may prohibit Congress and the Executive Branches from disclosing census data.²⁶² Government disclosures of census data violate the Fourth and Fifth Amendments.²⁶³ Most disturbing though is that government disclosures of census data undermine the very purpose of the census: to collect an accurate enumeration to apportion the House of Representatives.²⁶⁴ Until either the legislature or judiciary stops these disclosures, minority groups will continue to purposefully not respond to the census.²⁶⁵ If so, the federal government will never achieve its Article I, Section 2 constitutional mandate.²⁶⁶

²⁵⁹ *Id.*

²⁶⁰ *See supra* Part IV.A.

²⁶¹ *See supra* Part III.A–B.

²⁶² *See supra* Part IV.B.

²⁶³ *See supra* Part III.B–C.

²⁶⁴ *See supra* Part III.A.

²⁶⁵ *See supra* Part II.C, Part III.A.

²⁶⁶ *Id.*

