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Making Democracy Count: The Seemingly Technical Procedures That Can Make or Break a Census

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**MAKING DEMOCRACY COUNT:
THE SEEMINGLY TECHNICAL PROCEDURES
THAT CAN MAKE OR BREAK A CENSUS**

**CHARLOTTE SCHWARTZ,
JEFFREY ZALESIN,
& RACHEL BROWN***

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INTRODUCTION

Under the Constitution the government must conduct a census—an “actual enumeration” of the population—every ten years.¹ This enumeration has enormous significance, as governments use it to divvy up political representation and resources across the country. The United States Census Bureau begins preparing for the decennial count years in advance, producing tens of thousands of pages detailing their plans, often in technical, inaccessible language. On first glance, the minutiae of carrying out a census might not appear to implicate civil rights. But the details of completing the decennial census have always been bound up with larger questions of power, equality, and race. And from the

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1. U.S. CONST. art. I, § 2, cl. 3.

beginning of our nation, those in power have recognized that *how* you count the people can result in some people counting more than others.²

The founders initially deployed that understanding to count African American slaves as three-fifths of a person.³ The Three-Fifths Clause helped augment the political power of Southern Whites, while denying the full humanity of African Americans. After the Civil War, Congress finally undid the Clause by passing the Fourteenth Amendment, requiring that congressional apportionment be based on “the whole number of persons in each State.”⁴ Conscious of the grotesque inequality the Clause enshrined, Congress made this change in practically the same breath as guaranteeing “equal protection of the laws.”⁵ The drafters of the Amendment thus recognized that “the only true, practical, and safe republican principle”—the only bulwark against political subjugation reminiscent of slavery—is representation based on “the *whole* population.”⁶

Yet this principle is not self-enforcing. Just as with other manifestations of official racism and discrimination, simply revoking a policy without developing an adequate alternative is insufficient to create actual change. Just as declaring segregation unconstitutional, for example, was not enough to desegregate schools,⁷ declaring that African Americans are full people has not been enough to ensure that they are counted as such in the census. The vestiges of the Three-Fifths Clause linger to this day. African Americans remain one of the “hardest to count” populations in the United States.⁸ The 2010 Census omitted 9.3%

2. See, e.g., *Utah v. Evans*, 536 U.S. 452, 500-502 (2002) (Thomas, J., concurring in part and dissenting in part) (“The Framers knew that the calculation of populations could be and often were skewed for political or financial purposes Discussion revealed a keen awareness that absent some fixed standard, the numbers were bound to be subject to political manipulation.”).

3. U.S. CONST. art. I, § 2, cl. 3.

4. U.S. CONST. amend. XIV, § 2.

5. *Id.* § 1.

6. CONG. GLOBE, 39th Cong., 1st Sess. 2767, 2759 (1866) (statement of Sen. Howard) (emphasis added).

7. See, e.g., *Santamaria v. Dallas Indep. Sch. Dist.*, No. Civ.A.3:06CV692-L, 2006 WL 3350194 at *32 (N.D. Tex. Nov. 16, 2006) (“Plaintiffs presented direct evidence that Principal Parker intended to segregate Latino students from their Anglo counterparts by reserving General Education classes for Anglo students and concomitantly assigning non-[Limited English Proficiency] Latino and African-American students to [English as a Second Language]-designated classes, even though their language learning needs were the same as those of the Anglo students.”).

8. NAT’L ADVISORY COMMITTEE ON RACIAL, ETHNIC & OTHER POPULATIONS, U.S. CENSUS BUREAU, *HARD TO COUNT POPULATION WORKING GROUP 7-9* (2016), <https://www2.census.gov/programs-surveys/2010/summary-products/working-groups/7-9-hard-to-count-population-working-group.pdf>.

of the African American population.⁹ Like other Communities of Color, they are now missing out on their fair share of trillions of dollars in funding¹⁰ and representation in Congress, state legislatures, and local governing bodies.¹¹ It takes continuous, affirmative effort to ensure that the bedrock of our democracy—the census—is accurate rather than discriminatory.

Federal courts have an important role to play in defining the contours of the government’s constitutional obligation to achieve equality through an accurate census.¹² Although case law on the census is relatively thin, the Supreme Court has made clear that the government may not simply conduct the census in whatever manner it desires; instead, census procedures must bear “a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census.”¹³ This “purpose” involves two interrelated interests: the “strong constitutional interest in

[census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf](https://www.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf) [https://perma.cc/VG6S-TWDF]; *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census*, U.S. CENSUS BUREAU (May 22, 2012), https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html [https://perma.cc/GBC6-4Z82].

9. THOMAS MULE, U.S. CENSUS BUREAU, *CENSUS COVERAGE MEASUREMENT ESTIMATION REPORT 16* (2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf [https://perma.cc/PM9V-XKMA].

10. MARIA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, *USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION 3* (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf> [https://perma.cc/DBN3-HZ6E]; *see generally* Andrew Reamer, *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds* (Sept. 3, 2019), <https://gwipp.gwu.edu/counting-dollars-2020-role-decennial-census-geographic-distribution-federal-funds>.

11. *Evenwel v. Abbott*, 578 U.S. ___, 136 S. Ct. 1120, 1124 (2016) (“Today, all States use [data] from the census when designing congressional and state-legislative districts . . .”).

12. Courts are frequently called upon to put meat on the bones of constitutional obligations. *See, e.g.*, *Harris v. Champion*, 15 F.3d 1538, 1547 (10th Cir. 1994) (holding that excessive delay in filing an appellate brief constitutes a violation of the right to effective counsel); *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 18-474, 2019 WL 4383205 (2d Cir. Sept. 13, 2019) (discussing the meaning of the term “emolument” as it pertains to the Constitution); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013) (holding appointed counsel should be given the opportunity to represent defendants in the manner required by the Sixth Amendment); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 348 (N.Y. 2003) (holding that it is a constitutional right to obtain a basic fundamental public education); *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990) (holding that the constitution is violated where schools are not providing a thorough and efficient education).

13. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).

accuracy,”¹⁴ and the “constitutional goal of equal representation.”¹⁵ And courts have recognized that policy decisions that might, at the outset, seem technical or minute, can actually have significant ramifications for the accuracy of the census, and, in turn, for equality.¹⁶

In its preparations for the 2020 Census, the Trump Administration has made a series of decisions that threaten to yet again undermine the political and economic power of People of Color through an inaccurate census.¹⁷ Among other serious problems, the Census Bureau has failed to utilize all its funding, cancelled critical pre-census tests, made major cuts to its field operations and staff, and implemented risky new methodologies without adequate vetting.¹⁸ These problems have particular significance against the backdrop of the first ever census conducted primarily online. Each of these decisions imperils the accuracy of the 2020 Census, and will make already “hard to count” populations even harder to count. Absent intervention, the 2020 Census is likely to significantly undercount Communities of Color across the country.¹⁹

This article will discuss three illustrative examples of procedures that are critical to the accuracy and legitimacy of the census: address canvassing, nonresponse follow up, and census coverage measurement. The Trump Administration cannot reinstate the Three-Fifths Clause, but

14. *Utah v. Evans*, 536 U.S. 452, 478 (2002); *see also* *City of Detroit v. Franklin*, 4 F.3d 1367, 1376 (6th Cir. 1993) (emphasizing constitutional requirement to conduct “a good-faith enumeration”); *U.S. v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) (“The authority to gather reliable statistical data reasonably related to governmental purposes and functions [through the census] is a necessity if modern government is to legislate intelligently and effectively.”).

15. *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

16. *See, e.g., id.* (analyzing the constitutionality of the Census Bureau’s method for counting overseas personnel of the Department of Defense); *Utah v. Evans*, 536 U.S. 452 (2002) (noting that Census Bureau’s use of “hot-deck imputation” resulted in an additional congressional seat for North Carolina, at the expense of Utah, after the 2000 Census).

17. Memorandum on the Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire from Sec’y Wilbur Ross, U.S. Dep’t of Commerce, to Under Sec’y for Econ. Affairs Karen Dunn Kelley, U.S. Dep’t of Commerce (Mar. 26, 2018), <https://assets.documentcloud.org/documents/4426785/commerce2018-03-26-2.pdf> [<https://perma.cc/L7FB-LNT2>]; Exec. Order No. 13880, 84 Fed. Reg. 33,821, 33,821-22 (July 11, 2019); Molly Danahy & Danielle Lang, *Distortion in the Census: America’s Oldest Gerrymander?*, 49 U. MEMPHIS L. REV. 1065 (2019).

18. *See generally* DIANA ELLIOTT ET AL., URBAN INSTITUTE, *ASSESSING MISCOUNTS IN THE 2020 CENSUS* (2019).

19. *Id.* at 15 (projecting undercounts of the Black population between 2.43% and 3.68%, and for the Latinx population between 2.01% and 3.57%).

mishandling these procedures²⁰ could reduce the count of certain communities to only a fraction of their true population. In the leadup to 2020 and in future census cycles, advocates who care about equal representation and the fair allocation of resources would do well to lend their attention to the Census Bureau's proposals in these and other areas of the decennial census program.

THE CONTENT OF A CENSUS: THREE ILLUSTRATIVE EXAMPLES

“[Y]ou might be thinking that the Census Bureau is a boring place for math nerds,” wrote a journalist reporting on the effects of President Trump's 2017 hiring freeze. “And you would be correct. But that boring place for math nerds is vital to a functioning democracy.”²¹ In that spirit, this article will explore three procedures that play a major role in the design and conduct of the census, and ultimately, in the equality of power and resource distribution across the country.

A. Address Canvassing

Before the Census Bureau sends out its questionnaires and begins the count, it determines where people live through a process called address canvassing.²² Although this process is complete before the census year even begins, it can introduce significant errors into the ultimate count if the Census Bureau does not know the addresses of the households it must contact. The Census Bureau's address canvassing work in the leadup to 2020 raises red flags. The Bureau is using a new, ostensibly cost-cutting approach, but appears to have miscalculated the amount of effort, testing, and funding necessary to implement this approach properly.²³ This

20. *Id.* at 14 (detailing the factors that make their “high risk” scenario “plausible”); Edward Kissam, *Differential Undercount of Mexican Immigrant Families in the U.S. Census*, 33 STAT. J. IAOS 797, 799 (2017) (warning of a substantial risk that the 2020 Census will be of the lowest quality since 1970 and will undercount low-income minorities and immigrants).

21. Matt Novak, *Here are the Jobs the Census Bureau Can't Fill Because of Trump's Stupid Hiring Freeze*, GIZMODO (April 10, 2017), <https://gizmodo.com/here-are-the-jobs-the-census-bureau-cant-fill-because-o-1794169356> [<https://perma.cc/K9PA-EB4U>].

22. Address Canvassing Operation Notice, 82 Fed. Reg. 37,424 (Aug. 10, 2017).

23. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-414, ACTIONS NEEDED TO IMPROVE IN-FIELD ADDRESS CANVASSING OPERATION 4-5 (2018), <https://www.gao.gov/assets/700/692493.pdf> [<https://perma.cc/6J7P-KGY7>] [hereinafter GAO, ACTIONS NEEDED] (reporting the Census Bureau's budget cuts are affecting the address canvassing operations, which led the Bureau to abandon the traditional door-to-door canvassing in order to verify addresses); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-317, PROGRESS ON MANY HIGH-RISK AREAS, WHILE

means either that the census will likely cost significantly more than the Bureau has projected, or that the address canvassing operation will be under-resourced, imperiling the accuracy of the census. To make matters worse, the types of housing units that are most likely to be missed during address canvassing are disproportionately likely to house People of Color.²⁴

The address canvassing process requires the Bureau to confirm the addresses of approximately 133.8 million households in the lead-up to 2020.²⁵ The Bureau uses a database known as the Master Address File (MAF)/Topologically Integrated Geographic Encoding and Referencing (TIGER) System to keep address records for each census. In past censuses, enumerators walked every block and identified each housing unit to account for any address changes.²⁶ The process was costly. Address canvassing operations in 2010 cost \$443 million and required nearly 150,000 field workers.²⁷

To cut costs for the 2020 Census, the Census Bureau is taking a new approach that risks leaving out large numbers of minority households.²⁸ For the first time, the majority of the address canvassing operation has been conducted in-office, rather than in-field.²⁹ In-office canvassing operations center around a process known as interactive review, which uses satellite imagery to evaluate each of the 11.1 million blocks covered by the census.³⁰ By comparing current images with images from around 2010, reviewers can see how much a block has changed. If a block looks different from past years, or if a reviewer cannot determine via satellite imagery how many housing units are on a block, then the block will be

SUBSTANTIAL EFFORTS NEEDED ON OTHERS 225 (2017), <https://www.gao.gov/assets/690/682765.pdf> [<https://perma.cc/Z9MR-BD9X>] [hereinafter GAO, PROGRESS] (reporting the Census Bureau's decision to cancel two field tests because of fiscal concerns).

24. GAO, ACTIONS NEEDED, *supra* note 23; Kissam, *supra* note 20, at 802.

25. GAO, ACTIONS NEEDED, *supra* note 23 at 9.

26. DECENNIAL CENSUS MGMT. DIV., U.S. CENSUS BUREAU, 2020 CENSUS OPERATIONAL PLAN 6-7 (2015) <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan-exe-sum.pdf> [<https://perma.cc/6MZ7-NUTB>] [hereinafter DECENNIAL CENSUS MGMT. DIV., OPERATIONAL PLAN].

27. *Id.* at 2; GAO, ACTIONS NEEDED, *supra* note 23 at 4.

28. Proposed Information Collection, 83 Fed. Reg. 26,643, 26,645 (Oct. 2, 2018).

29. DECENNIAL CENSUS MGMT. DIV., OPERATIONAL PLAN, *supra* note 26.

30. Proposed Information Collection, 83 Fed. Reg. 26,643, 26,646-26,647 (Oct. 2, 2018); GAO, ACTIONS NEEDED, *supra* note 23 at 4-5.

characterized as “unstable” and designated for in-field canvassing.³¹

But the Bureau has found that more address canvassing than expected must take place in-field.³² In August 2017, the Census Bureau discontinued a second phase of the satellite image review process known as Active Block Resolution (ABR), which attempted to resolve the status of unstable blocks in-office.³³ The program was discontinued as a result of uncertainty about funding and limited productivity in its initial stages—a combination of factors that also hampered the roll-out of other new programs the Bureau had planned for 2020.³⁴ Discontinuing ABR increased the share of total addresses the Bureau would canvas in-field from 25% to 30% of total addresses.³⁵ And during the 2018 End-to-End Test in Providence, Rhode Island, the share of addresses that canvassers needed to verify in-field far exceeded even the increased estimate of 30%.³⁶ Instead, the average share for in-field canvassing was 37% to 76%.³⁷ The Bureau later determined that 38% of addresses needed to be canvassed in-field, likely adding significantly to the cost of the program.³⁸ Even with this increased share, however, the Bureau may still be underestimating the number of addresses that should be canvassed in-field,³⁹ and the census is likely to be less accurate as a result.

Other issues plague the 2020 address-canvassing operation. Canvassers in the field are experiencing software issues, and field supervisors cannot always receive updates about their work.⁴⁰ Address updates for certain hard-to-count communities have also suffered as a

31. Address Canvassing Operation Notice, 82 Fed. Reg. 37,424 (Aug. 10, 2017); GAO, ACTIONS NEEDED, *supra* note 23 at 4-5.

32. GAO, ACTIONS NEEDED, *supra* note 23 at 8-9.

33. *Id.* at 5.

34. *Id.*

35. Address Canvassing Operation Notice, 82 Fed. Reg. 37,424 (Aug. 10, 2017).

36. *Id.*

37. GAO, ACTIONS NEEDED, *supra* note 23.

38. *Id.*

39. The Office of Inspector General’s audit of the Census Bureau’s 2018 End-to-End Test in Providence, Rhode Island found that “[i]n-office address canvassing did not correctly identify blocks for in-field address canvassing.” In 61% of the 433 passive blocks in the 2018 End-to-End Test, the results from in-field and in-office analysis differed. Within those blocks, 1,287 housing units were deleted in-field and 1,087 were added. U.S. DEP’T OF COMMERCE, SEMIANNUAL REPORT TO CONGRESS 9 (2019), <https://www.oig.doc.gov/OIGPublications/SAR-2019-03.pdf> [<https://perma.cc/M4K3-2ECX>].

40. GAO, ACTIONS NEEDED, *supra* note 23, at 14.

result of the Bureau's budget woes.⁴¹ In 2017, for example, the Census Bureau "cancelled plans to update its address list in the Indian lands and surrounding areas" in North and South Dakota and Washington State.⁴² And scholars suggest that the move towards in-office canvassing may cause the Bureau to miss a higher number of "low visibility" households, including squatters and people living in basements, attics, and sheds—residents who are disproportionately likely to be People of Color.⁴³

Address canvassing offers an important entry point for civil rights groups and local organizations to engage with the census. Tribal, state, and local governments can review and offer feedback on the Bureau's address list as part of the Local Update of Census Addresses (LUCA) Operation.⁴⁴ In preparation for 2020, for example, the New York City Department of City Planning's Population Division identified an estimated 100,000 housing units that didn't appear on the Bureau's lists and submitted them to the government to ensure that occupants of those housing units would be counted.⁴⁵ Such efforts to improve address lists at the local level can be especially beneficial for cities that have experienced high levels of movement, or where many homes have been razed.⁴⁶ There are also opportunities for feedback on the Census Bureau's plans through the administrative notice-and-comment process. The Department of Commerce submits changes to the addressing canvassing program to the Federal Register, and individuals and groups can then respond during a 30-day comment period.⁴⁷

41. GAO, PROGRESS, *supra* note 23, at 225.

42. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-157SP, HIGH RISK SERIES, SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS (2019), <https://www.gao.gov/assets/700/697245.pdf> [<https://perma.cc/BJ9P-MSPY>].

43. Kissam, *supra* note 20, at 802.

44. Ron Jarmin, *Counting Everyone Once, Only Once and in the Right Place*, U.S. CENSUS BUREAU (Nov. 5, 2018), https://www.census.gov/newsroom/blogs/director/2018/11/counting_everyoneon.html [<https://perma.cc/LK4K-F3P4>].

45. Gabe Voorhis Allen, *2020 Census: A Tech Revolution or Risk?*, NEW AMERICA (July 16, 2018), <https://www.newamerica.org/nyc/our-blog/2020-census-tech-revolution-or-risk/> [<https://perma.cc/UJW6-LYRR>].

46. *Id.*

47. 2020 Census, 83 Fed. Reg. 49535 (Oct. 2, 2018).

B. *Nonresponse Follow Up*

After address canvassing identifies households that should receive census materials, nonresponse follow-up (NRFU) ensures that they are actually counted.⁴⁸ The census initially seeks to gain information based on a household's voluntary response (typically called "self-response") to a decennial census questionnaire sent by mail,⁴⁹ but many households do not respond. NRFU fills in the gaps. NRFU is particularly important for hard-to-count communities, who may self-respond at lower rates. Anything that undermines NRFU's effectiveness is therefore likely to have a disproportionate impact on those communities.

The Bureau conducts NRFU operations over the course of roughly four months between mid-May and mid-August of the census year.⁵⁰ NRFU is the most expensive operation of the census.⁵¹ After the initial self-response period, the Census Bureau creates a NRFU workload based on the housing units that have not self-responded or have responded but cannot be matched with the address the Bureau has on file.⁵² Historically, the core component of NRFU has been sending enumerators to follow up with non-responding households. These enumerators have traditionally attempted to contact each housing unit up to six times over the course of six separate days either by phone or in person.⁵³

Traditionally, the lower the initial self-response rate, the more resources the Bureau must devote to NRFU to try to achieve an accurate count.⁵⁴ In 2010, the self-response rate was between 63.5% and 65.5%, meaning that 63.5% to 65.5% of the population responded to an initial mailing without any additional prompting from the Bureau.⁵⁵ In April

48. DECENNIAL CENSUS MGMT. DIV., U.S. CENSUS BUREAU, 2020 CENSUS DETAILED OPERATIONAL PLAN FOR NONRESPONSE FOLLOWUP OPERATION (NRFU) 6 (2018), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan.pdf> [<https://perma.cc/2R9K-4RPJ>] [hereinafter DECENNIAL CENSUS MGMT. DIV., NONRESPONSE FOLLOWUP OPERATION].

49. In 2020, households will receive a postcard and be encouraged to complete the census online.

50. Some NRFU operations begin in April in towns with a large number of university students who might otherwise be absent by mid-May. *Id.* at 5, 31, 73.

51. *Id.* at 2, 6.

52. *Id.* at 2-4.

53. *Id.* at 6.

54. *Id.* at 2.

55. DECENNIAL CENSUS MGMT. DIV., U.S. CENSUS BUREAU, 2010 CENSUS MAIL RESPONSE/RETURN RATES ASSESSMENT REPORT 14-15 (2012), <https://www.census.gov/2010>

2018, the Bureau estimated that only 60.5% of households would initially self-respond.⁵⁶ This means that the Bureau will need to conduct more NRFU than originally planned and expend more funds to do so.

To address funding uncertainty and reduce the need for in-person follow up, the Bureau plans to use novel methods in 2020 to enumerate certain households, even though these methods are likely to produce lower quality data than in-person enumeration. In 2020, for the first time, the Bureau proposes to use administrative records—including data from the U.S. Postal Service, Internal Revenue Service, and Medicare and Medicaid—to fill in the gaps if an enumerator is unable to reach a household after one visit.⁵⁷ If the household cannot be enumerated using administrative data, the Bureau will continue to try to reach it.⁵⁸ After three failed contact attempts, the Bureau may opt to use a proxy interview to enumerate a household by interviewing individuals such as a neighbor or a landlord.⁵⁹ If all six attempts to contact a household fail and a proxy interview cannot be conducted, the Bureau will close the case.⁶⁰ It will then attempt to fill in information for the household through imputation, which fills in the characteristics of that household based on the data of those similarly situated.⁶¹

The first-time use of administrative records for NRFU in 2020 raises particular concerns for hard-to-count communities. According to a Federal Register notice, the Bureau plans to use federal administrative records, but not state administrative records, to enumerate certain households,⁶² even though African Americans are disproportionately likely to be excluded from certain federal databases, such as the Internal

census/pdf/2010_Census_Mail_Response_Return_Rates_Assessment.pdf [https://perma.cc/NU6D-GN23].

56. DECENNIAL CENSUS MGMT. DIV., NONRESPONSE FOLLOWUP OPERATION, *supra* note 48, at 2.

57. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-664, BUREAU IS TAKING STEPS TO ADDRESS ADMINISTRATIVE LIMITATIONS 3 (2017), <https://www.gao.gov/assets/690/686099.pdf> [https://perma.cc/QP2Q-K2X9] [hereinafter GAO, BUREAU IS TAKING STEPS].

58. DECENNIAL CENSUS MGMT. DIV., NONRESPONSE FOLLOWUP OPERATION, *supra* note 48, at 4.

59. *Id.* This represents a reduction in outreach from 2010, when six contact attempts were required before a proxy interview.

60. *Id.* at 18.

61. *Id.*

62. Proposed Information Collection, 83 Fed. Reg. 26,643, 26,646 (Oct. 2, 2018).

Revenue Service tax pool.⁶³ Administrative records also tend to lack information on young children and undocumented individuals, who are already disproportionately likely to be undercounted.⁶⁴ What's more, these records often lack data on race and ethnicity, which are needed to draw redistricting plans and enforce voting rights laws.⁶⁵ And despite assurances by the Census Bureau about the high quality of its data, even the best data from administrative records may not fully cover the categories typically included in the census questionnaire, such as certain types of family relationships.⁶⁶

For the 2020 Census, the Bureau is also introducing a number of other changes. While past NRFU operations have been entirely paper-based, this cycle, for the first time, enumerators will travel door-to-door armed with smartphones or other digital devices.⁶⁷ As a result, they will be able to receive assignments, log hours, and send the information gathered back to the Census Bureau in real time.⁶⁸ The Census Bureau argues that this will reduce costs because fewer local census offices will be required.⁶⁹ Yet even if such systems are cheaper, they are not flawless. A January 2017 GAO report noted that the automated systems reduced enumerators' flexibility to follow up with a given household because "decisions on when re-attempts will be made—and by whom—are automated and not designed to be responsive to the immediate circumstances on the ground."⁷⁰ In the new system, if an enumerator fails to reach a household on a given day, the electronic system will automatically close the case for the day.⁷¹ If an enumerator is in the same area and later notices that a

63. GAO, BUREAU IS TAKING STEPS, *supra* note 57, at 5; PEW RESEARCH CTR., ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART 18-29 (2017).

64. GAO, BUREAU IS TAKING STEPS, *supra* note 57, at 5, 8.

65. NAT'L ADVISORY COMMITTEE ON RACIAL, ETHNIC & OTHER POPULATIONS, *supra* note 8, at 7-12.

66. *Id.* at 11.

67. See ALEX JONES & BRIAN EGAN, NAT'L LEAGUE OF CITIES, MUNICIPAL ACTION GUIDE: PREPARING FOR THE 2020 CENSUS, 8 (2018), https://www.nlc.org/sites/default/files/2018-10/Census%202020%20MAG_0.pdf [<https://perma.cc/Z7H3-5ET9>].

68. *Id.*

69. *Id.*

70. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-191, 2020 CENSUS: ADDITIONAL ACTIONS COULD STRENGTHEN FIELD DATA COLLECTION EFFORTS 7 (2017), <https://www.gao.gov/assets/690/682308.pdf> [<https://perma.cc/KT44-5T57>].

71. *Id.*

member of the household has returned, the enumerator will not be able to contact the resident.⁷²

The Census Bureau is introducing these relatively untested changes to NRFU operations during a census for which NRFU will take on additional importance thanks to the controversy surrounding the inclusion of a citizenship question. Although the 2020 Census will no longer include a citizenship question,⁷³ fear and confusion in the undocumented community is likely to depress self-response.⁷⁴

C. *Census Coverage Measurement*

Finally, the method by which the Census Bureau evaluates the count—the Census Coverage Measurement (CCM)—also has implications for accuracy. This phase of the census, which has been conducted in some form since at least 1940,⁷⁵ allows the Bureau to determine the net undercount—the number of omissions off-set by the number of people who were double-counted or counted in error—for each state and for the nation as a whole.⁷⁶ This evaluation is crucial for two reasons. First, it provides essential information to voters, civil rights organizations, and states and localities, who may use undercount data as evidence in litigation or highlight the undercount as part of their advocacy for better censuses in the future. Second, the Census Bureau uses the results of the CCM to inform its design decisions for the next census.⁷⁷ The consequences of getting the CCM wrong can therefore be devastating. If those who are most affected by an inadequate count cannot tell that they

72. *Id.*

73. *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2573-74, 2576 (2019); *Remarks by President Trump on Citizenship and the Census*, WHITE HOUSE (July 11, 2019, 5:37 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/> [<https://perma.cc/B7GS-86RL>]; Exec. Order No. 13880, 84 Fed. Reg. 33,821, 33,821-22 (July 11, 2019).

74. DIANA ELLIOTT ET AL., *supra* note 18.

75. WILLIAM P. O'HARE, *THE UNDERCOUNT OF YOUNG CHILDREN IN THE U.S. DECENNIAL CENSUS 11* (2015). Census Coverage Measurement has gone by other names in prior censuses. In 2000, the Bureau referred to it as the "Accuracy and Coverage Evaluation," and in 1990 simply the "Post-Enumeration Survey."

76. Robert Groves, *How do we Conduct a Post-Enumeration Survey?*, CENSUS BLOGS (May 17, 2012), <https://www.census.gov/newsroom/blogs/director/2012/05/how-do-we-conduct-a-post-enumeration-survey.html> [<https://perma.cc/9W27-SXC8>].

77. NAT'L RESEARCH COUNCIL, *RESEARCH AND PLANS FOR COVERAGE MEASUREMENT IN THE 2010 CENSUS: INTERIM ASSESSMENT 29* (Robert Bell & Michael L. Cohen, eds., 2007).

have been overlooked, then they are powerless to remedy that injury.⁷⁸ If the Bureau is unable to accurately assess the success of its own methodologies, then in census after census it will continue to undercount those who are already least likely to be counted. Knowing how wrong the count *was* is essential if the Bureau ever hopes to get it right.

CCM comprises two stages. The first stage, the post-enumeration survey, is conducted using the dual system estimation method (also known as “capture recapture”).⁷⁹ The Census Bureau conducts a separate survey of a statistically relevant number of households after the completion of the census count (called the “P Sample”) and then compares it to a sample of people counted in the census itself (the “E Sample”).⁸⁰ The Bureau then compares those two samples to see how many people were counted in both, how many were included only in the census count (E Sample), and how many were counted only in the post-enumeration survey (P Sample), which allows them to estimate who was missed by both surveys.⁸¹ This information, if collected properly, allows the Bureau to determine “how many people [they] counted correctly, how many [they] may have missed, and how many [they] may have duplicated or counted in error.”⁸²

The ability of the dual estimation system to yield accurate information about the undercount depends on two essential assumptions. The first of these assumptions is the independence of the post-enumeration survey from the census enumeration.⁸³ Obviously, if the Census Bureau simply selects a sample of households off the same MAF that they used to conduct the official census count, then it is not going to capture those households that it missed in address canvassing.⁸⁴ The more dependent or interrelated the processes of collecting the P Samples and E Samples

78. It is essentially impossible for any entity other than the Census Bureau to evaluate the undercount. Any evaluator would need access to information whose confidentiality is protected by Title 13 of the U.S. Code.

79. Groves, *supra* note 76.

80. *Id.*

81. *Id.*

82. *Id.* Counted in error could mean born after census day, died before census day, or counted in the wrong place (e.g. 3-month winter residence as opposed to 9-month regular residence).

83. NAT'L RESEARCH COUNCIL, *supra* note 77, at 23 (stating this independence is “crucial”).

84. *Id.* at 33.

are, the less helpful the information.⁸⁵ This phenomenon is known as “correlation bias.”⁸⁶ To a certain extent, such bias will always be present. The people who are easier to enumerate overall will be easier to enumerate in whatever type of survey the Bureau administers. In addition, having been enumerated during the official census count may make people more willing or able to participate in the post-enumeration survey as they gain familiarity with the process.

But scholars have noted more worrisome patterns in how the Census Bureau formulates the P Sample that make it more likely that the Bureau will underestimate the undercount of some of the most vulnerable populations.⁸⁷ For example, the Census Bureau does not appear to have a method for collecting the P Sample that is any better at capturing “low-visibility” housing than it has for conducting the official census.⁸⁸ This is particularly distressing in the context of a census that seems designed to suppress the response rates of immigrant communities, since low-income immigrants (and especially undocumented immigrants) disproportionately live in “low-visibility” housing, such as “living space above a commercial establishment, a basement . . . a garage or backyard shed, a barn, camper, or trailer” as well as “multiple families or social units living in housing classified as a single housing unit.”⁸⁹ The lack of any strategy to approach low-visibility housing differently for the P Sample and the E Sample makes it likely not only that those living in these conditions will be omitted from the count, but also that the Bureau—and the affected voters and local governments—will never even know that they were missed.⁹⁰ When combined with the Bureau’s problematic new method of assembling the Master Address File, this issue becomes especially alarming.

85. *Id.* at 23.

86. *Id.* at 17.

87. Note that they recognize correlation bias and make some adjustments for it but not others. See O’HARE, *supra* note 75, at 19.

88. 2020 Census Program Management Review, U.S. CENSUS BUREAU (Oct. 19, 2018), <https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/program-briefings/2018-10-19-pmr.html> [<https://perma.cc/HUA2-EXN9>] [hereinafter U.S. CENSUS BUREAU, *Management Review*]. The Census Bureau explained that it is planning to use the same field infrastructure as other, non-census household surveys; this seems to be primarily a money-saving decision. They are planning to use the same process as 2010 CCM.

89. Kissam, *supra* note 20, at 802.

90. An additional problem is that group quarters (including prisons) and remote Alaska are excluded from the PES.

The second essential assumption underlying the accuracy of the dual-system estimation method is that the Bureau must actually be able to match enumerations in the P Sample to those in the E Sample.⁹¹ The probability of erroneous matches and non-matches increases as the quality of the census data decreases. Given the near certainty of a “dramatically increased non-response,”⁹² especially given that a large number of people will either refuse to fill out the census questionnaire or will fill it out falsely out of fear,⁹³ the Census Bureau should be particularly worried about its ability to accurately match census and post-enumeration survey responses. Given the Bureau’s increased reliance on methods that are known to provide lower quality data for the 2020 Census—proxy interviews and use of administrative records—the Bureau should be actively innovating its CCM methodology to account for these new, self-imposed challenges. But there is little evidence that the Bureau is updating its methods. In fact, the Bureau has announced that it will deploy largely the same method that it used in 2010, due primarily to budgetary concerns.⁹⁴ To make matters worse, the Bureau also cancelled its test of CCM in its sole end-to-end test prior to the 2020 Census.⁹⁵ This means that the Bureau will be using a method to evaluate the accuracy of the count that has never been tested in conjunction with the first-ever internet-first census.

The second stage of CCM is referred to as “Demographic Analysis” (DA), whereby the Bureau estimates the population by comparing births to deaths and immigration to emigration.⁹⁶ This process is supposed to paint a more accurate picture of the differential undercount, but scholars have expressed a number of concerns with the process. First, there is no

91. O’HARE, *supra* note 75, at 19.

92. Edward Kissam, Comment on Information Collection Plans and Proposed Procedures for Census 2020, at 21 (July 31, 2018), <https://www.regulations.gov/document?D=USBC-2018-0005-14099> [<https://perma.cc/CE62-3GCC>].

93. *See, e.g.*, Memorandum on the Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire from Sec’y Wilbur Ross, U.S. Dep’t of Commerce, to Under Sec’y for Econ. Affairs Karen Dunn Kelley, U.S. Dep’t of Commerce (Mar. 26, 2018), <https://assets.documentcloud.org/documents/4426785/commerce2018-03-26-2.pdf> [<https://perma.cc/L7FB-LNT2>]; Exec. Order No. 13880, 84 Fed. Reg. 33,821, 33,821-22 (July 11, 2019).

94. U.S. CENSUS BUREAU, *Management Review*, *supra* note 88.

95. *Id.*

96. *Coverage Measurement: Demographic Analysis*, U.S. CENSUS BUREAU, https://www.census.gov/coverage_measurement/demographic_analysis/ [<https://perma.cc/8NJS-P78Q>].

highly reliable source of data to compare immigration and emigration. Not only does undocumented migration complicate the picture, but documenting emigration can be especially difficult as the Bureau often has to rely on records of varying quality from foreign nations.⁹⁷ In addition, differences in how demographic information is collected in these records can erode the quality of the data. For example, the Bureau often uses death certificates to determine the race of the decedent—but that data is unreliable, given that the undertaker often fills out the certificates with his or her best guesses. Similarly, practices for recording race at birth vary by hospital.⁹⁸ Absent uniform procedures for recording race, it can be exceedingly difficult to produce an accurate account of the differential undercount. Racial minority respondents are even less likely than normal to respond to questions about race accurately—out of fear that the government will use that information to target them—there is special reason to worry about the efficacy of this method in the upcoming census.⁹⁹

CONCLUSION

The three census procedures outlined here may seem like highly technical decisions significant only to statisticians, but their consequences are anything but obscure. If address canvassing goes wrong, households are omitted from the census before it even begins. If NRFU is insufficient, communities that are hesitant to respond to an initial questionnaire, or that miss it altogether, may be left out of the count. If the CCM is inaccurate, the Census Bureau will never have the opportunity to fix its mistakes.

The resulting inaccuracies in census data have serious, tangible consequences. Much of the federal funding that is distributed using census data goes to social safety net programs such as the Medical Assistance Program, the Supplemental Nutrition Assistance Program, the National School Lunch Program, and Section 8 housing

97. O'HARE, *supra* note 75, at 15.

98. David A. Freedman & Kevin W. Wachter, *Census Adjustment: Statistical Promise or Illusion?*, 39 SOC'Y 26, 27 (2001).

99. KYLEY MCGEENEY ET AL., U.S. CENSUS BUREAU, 2020 CENSUS BARRIERS, ATTITUDES, AND MOTIVATORS STUDY SURVEY REPORT 41-43 (2019), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-study-survey.pdf> [<https://perma.cc/Q4U9-S2CA>].

vouchers.¹⁰⁰ Census undercounts mean that communities that depend on such programs may be deprived of the services they need.

Undercounts can also spell a loss of representation. In 2000, for example, a congressional seat went to North Carolina, rather than Utah, based on a population difference of only 856 people.¹⁰¹ The government also utilizes census data for other important voting-related decisions, like deciding which localities must provide assistance to voters in languages other than English.¹⁰² Based on 2010 census data, the government required many counties across the country to grant assistance to voters in Spanish, Chinese, Tagalog, Vietnamese, and other languages.¹⁰³ But jurisdictions whose language minority population fell below the designated threshold provided materials in English only.

It is clear that census data matters. When the census is inaccurate, communities suffer. Democracy suffers. Civil rights lawyers and activists have an important role to play in promoting census accuracy, but for most of each decade, the census receives noticeably less attention than comparably important priorities, such as redistricting.

The time for treating census methodology as a boring pastime for math nerds is over. During the decade leading up to the next census, advocates can educate themselves about the technicalities of the census, and use that knowledge to push for needed changes in Census Bureau policy. The courts have set out a clear legal standard: census procedures must bear “a reasonable relationship”¹⁰⁴ to the accomplishment of an accurate census. But bereft of technical knowledge about how the census operates, advocates will be unable to effectively articulate why any particular census procedure fails to meet this standard. An informed census advocate is an effective one.

100. In fiscal year 2015, the government relied on census data to distribute almost \$312 billion for the Medical Assistance Program, \$71 billion for the Supplemental Nutrition Assistance Program, \$19 billion for the National School Lunch Program, and \$15 billion for Section 8 vouchers. HOTCHKISS & PHELAN, *supra* note 10.

101. Michael Janofsky, *Utah, in Census War, Fights North Carolina for House Seat*, N.Y. TIMES (Feb. 8, 2001), <http://www.nytimes.com/2001/02/08/us/utah-in-census-war-fights-north-carolina-for-house-seat.html> [<https://perma.cc/8CFE-9GHP>].

102. JENNIFER KIM & JONATHAN ZAPATA, U.S. CENSUS BUREAU, 2010 CENSUS LANGUAGE PROGRAM ASSESSMENT REPORT 1 (2012), https://www.census.gov/content/dam/Census/library/publications/2012/dec/2010_cpex_204.pdf [<https://perma.cc/A5BL-5WCS>].

103. *Id.* at 5-6.

104. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).