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

David M. Fox

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.
The Differential Undercount: 
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DAVID M. FOX†

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

¹ J.D. Candidate, University of California, Davis School of Law, 2019. The author would like to thank Audrey Agot Fox for her constant support and encouragement. Thank you to Professors Carlton Larson and Aaron Tang for discussing the ideas underlying this Article, and to Elizabeth Key for her steadfast guidance during the research and writing process. Thank you to the editorial staff at the Connecticut Public Interest Law Journal for their comments and revisions. All mistakes or errors are my own.


³ 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.”).


⁵ Sylvester & Lohr, supra note 4.

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.


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.”).


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.\textsuperscript{17} To combat this downturn in response rates, the Census Office\textsuperscript{18} instructed that all information collected via the census be deemed confidential.\textsuperscript{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.\textsuperscript{20}

Despite promises of confidentiality, the federal government has abused American trust through its census data use.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{23} Aware that this history of abuse lowers census response rates,\textsuperscript{24} Congress introduced a handful of bills within the past decade to address

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\item \textsuperscript{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.”).
\item \textsuperscript{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. \textit{See generally, History, U.S. Census Bureau} (May 15, 2018), \url{https://www.census.gov/history/www/census_then_now/}.
\item \textsuperscript{19} Sylvester & Lohr, \textit{supra} note 4, at 157.
\item \textsuperscript{20} 13 U.S.C. § 214 (1954) (codifying privacy in the U.S. Census); \textit{see also} \textit{Title 13, U.S. Code, U.S. Census Bureau} (July 18, 2017), \url{https://www.census.gov/history/www/reference/privacy_confidentiality/title_13_us_code.html}.
\item \textsuperscript{22} Id.
\item \textsuperscript{24} \textit{See discussion infra} Part II.C. \textit{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).
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American census-related privacy concerns. None of these bills became law.

This Article analyzes the census “undercount” 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. Part III highlights how government disclosures of census data disproportionately harm minority groups. In addition, Part III presents a case study on the Hispanic Undercount to illustrate the implications of the “differential undercount” for the upcoming 2020 Census. 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. Part IV offers both judicial and legislative solutions to cure the constitutional harms caused by government census disclosures. 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, P E W R E S. C T R. (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.
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).
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 all the electoral safeguards for the representations system, the most critical was equality of representation).
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.\textsuperscript{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.\textsuperscript{43} The resulting balance between the malapportioned Senate\textsuperscript{44} and proportioned House was considered indispensable to the nation’s federal Republic.\textsuperscript{45}

\section*{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.\textsuperscript{46} Still, even though the First Congress called for a “perfect enumeration” in the 1790 Census Act,\textsuperscript{47} the practical difficulty of accurately counting the population was understood.\textsuperscript{48} To ensure optimal census responsiveness, Congress authorized $20 fines of those people refusing to answer the census in the 1790 Act.\textsuperscript{49} This practice of fining noncompliant individuals persists today.\textsuperscript{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.\textsuperscript{51} This door-to-door protocol appeared in the Census Act until 1950, when the Census Bureau (“Bureau”) replaced personal

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\item \textsuperscript{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.”).
\item \textsuperscript{43} U.S. CONST. art. I, § 2, cl. 3; see also Act of Mar. 1, 1790, ch. II, 1 Stat. 101 (amended 1800).
\item \textsuperscript{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.
\item \textsuperscript{45} Reynolds v. Sims, 377 U.S. 533, 573 (1963).
\item \textsuperscript{46} See, e.g., Sylvester & Lohr, supra note 4, at 155.
\item \textsuperscript{47} Act of Mar. 1, 1790; see also Lee, supra note 13, at 55.
\item \textsuperscript{49} Act of Mar. 1, 1790 (“[O]n pain of forfeiting twenty dollars . . .”); Sylvester & Lohr, supra note 4, at 155 n.32.
\item \textsuperscript{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).
\item \textsuperscript{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.
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visits with forms to be delivered and returned via postal service.\footnote{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.} 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.\footnote{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.}

With its primary focus on effectuating an “actual enumeration,” the federal government routinely underestimated the privacy concerns of residents in their personal data.\footnote{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).} For example, after Congress delegated census collection to the Executive Branch, President George Washington chose the State Department to oversee census administration.\footnote{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).} However, the State Department, led by Thomas Jefferson, was improperly staffed to handle the logistics and technical details of this undertaking.\footnote{56 See id. at 11.} U.S. Marshals received little oversight and earned the reputation of using census results for personal gain or for embarrassing respondents.\footnote{57 Sylvester & Lohr, supra note 4, at 156.} Consequently, the early Republic’s primitive administration of the census yielded decreases in response rates.\footnote{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).} 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.”\footnote{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).}

\section*{C. Nonresponse Rates: Undelivered Promises and Government Distrust}

The federal government understands how assurances of privacy may solve census non-responsiveness.\footnote{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).} Accordingly, government promises of
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,
Congress passed the USA PATRIOT Act in 2001, 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. 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. 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.

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." 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. Congress calculates the apportionment of representatives for each state based on the state’s total resident population, including both citizens and non-citizens. An accurate enumeration of all residents is thus necessary to fulfill the proportional

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

The U.S. Census extends the federal government’s reach into a person’s home and provides the government statistical information 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. In addition, the Bureau asks questions that classify residents based on their race, ethnicity, and citizenship status. 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. 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.” 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. The Bureau provided maps showing where Japanese Americans lived, which the

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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.


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.

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

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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).
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 II.C.
Within the larger differential undercount, the Hispanic undercount will especially impact Congressional apportionment during the upcoming 2020 Census. 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. In addition, Hispanic population totals have grown consistently since 1990, and currently comprise over 17 percent of the total U.S. population.

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

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<tr>
<th>Year</th>
<th>1990</th>
<th>2000</th>
<th>2010</th>
<th>2015</th>
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<tbody>
<tr>
<td>Total Population (Millions)</td>
<td>21.8</td>
<td>35.2</td>
<td>50.7</td>
<td>56.5</td>
</tr>
<tr>
<td>Percentage of U.S. Population</td>
<td>8.8%</td>
<td>12.5%</td>
<td>16.4%</td>
<td>17.6%</td>
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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

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According to a study by Pew Research Center, 61 percent of all Hispanics report that discrimination against them is a “major problem,” and nearly half of all Hispanics say that America is less accepting of immigrants than it was five years ago. Fifty-three percent of all Hispanic adults worry that they, a family member, or a close friend could be deported, and 67 percent of foreign-born Hispanic adults worry that they may be deported. 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. 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.

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

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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).


112 Id.


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. 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.

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

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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.\textsuperscript{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.\textsuperscript{119} Failure to register and carry documentation constitutes a federal misdemeanor.\textsuperscript{120} Similarly, state legislatures have imposed harsh laws on authorized and unauthorized immigrants alike.\textsuperscript{121} For instance, Arizona passed S.B. 1070 in 2010,\textsuperscript{122} which provided law enforcement the authority to ask Hispanics for their immigration identification during a routine stop.\textsuperscript{123} Texas passed Senate Bill 4 in May 2017, making it a crime for any state official to impede federal immigration enforcement policies.\textsuperscript{124} Other states have either passed, or attempted to pass, similar legislation imposing penalties on unauthorized immigration.\textsuperscript{125}

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

\textsuperscript{120} 8 U.S.C. § 1306(a)(2012).
\textsuperscript{121} Id.
\textsuperscript{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)).
\textsuperscript{126} 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—“angered” 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
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. 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. Six states account for 59 percent of the unauthorized Hispanic immigrants—California, Texas, Florida, New York, New Jersey, and Illinois. 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. 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.

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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.
139 Flores et al., supra note 107.
Figure 4. Hispanic Percentage of State Population [greater than 20 percent or less than 5 percent]

<table>
<thead>
<tr>
<th>Hispanic Percentage of Total Population</th>
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<tbody>
<tr>
<td>New Mexico</td>
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<td>Texas</td>
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<tr>
<td>California</td>
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<td>Arizona</td>
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<td>Maine</td>
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<td>West Virginia</td>
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</table>

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.*


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

Since the first U.S. Census of 1790, American residents have always expressed an “expectation of privacy” in their census data. 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. 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. For example, the Wiretap Act, Fair Credit Reporting Act, and Privacy Act 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

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> 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 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.").


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.").


notice before disclosing their private information, and to allow people the opportunity to correct any inaccurate information collected.\textsuperscript{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.\textsuperscript{156} According to the U.S. Department of Justice, the Privacy Act contains “imprecise language” and “outdated regulatory guidelines” that have rendered it meaningless.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,”\textsuperscript{161} it has yet to explicitly recognize a federally protected Fourth Amendment right in a person’s personally identifiable data.\textsuperscript{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.”\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{155} Schwartz, \textit{supra} note 142, at 908.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} \textit{See supra} Part II.C.
  \item \textsuperscript{160} This failure may be due to the lack of clarity in the modern legal definition of informational privacy. \textit{See generally} Solove, \textit{supra} note 156, at 477–478 (“Privacy is far too vague a concept to guide adjudication and lawmakers” and that it “suffers from an embarrassment of meanings”); \textit{see also} Chemerinsky, \textit{supra} note 142, at 650 (noting how courts are confused by the various and broad definitions of privacy).
  \item \textsuperscript{161} Whalen v. Roe, 429 U.S. 589, 605 (1977).
  \item \textsuperscript{162} Chemerinsky, \textit{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).
\end{itemize}
reasonably private. \footnote{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 \textit{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.} 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. \footnote{See Carpenter, 138 S. Ct. at 2215–16 (comparing United States \textit{v.} Knotts with United States \textit{v.} Jones to demonstrate the difference between information shared with the public and private information generally kept out from the public domain).}

The affirmative safeguards outlined in Title 13 endow American residents with this “reasonable expectation of privacy.”\footnote{See supra Part II.B.} Accordingly, when an Executive Branch department acquires personally identifiable data from the Bureau, it commits a “search” under current Fourth Amendment doctrine. \footnote{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 \textit{v.} Jones, 565 U.S. 400 (2012).}

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

Absent statutory provisions with teeth, the private data disclosed by residents in the census form requires court protection. \footnote{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”).}

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. \footnote{See Chemerinsky, supra note 142, at 650.} 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. \footnote{See Sobel, supra note 93, at 376; \textit{Counting on Confidentiality, supra note 7}, at 1057–59.}

The PATRIOT Act abrogated longstanding confidentiality guarantees under Title 13 and other informational privacy laws, \footnote{\textit{Counting on Confidentiality, supra note 7}, at 1057–59.} and according to the “notice theory,” would have given proper notice to American residents that they should not expect privacy of their census data. \footnote{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. 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. 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. The Supreme Court in United States v. Miller 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. 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. 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. 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.
178 Zimmeck, supra note 176, at 479.
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. Unlike a person who voluntarily uses a bank, people provide their private information to the Bureau under the threat of a monetary fine. There is no legal liability for abstaining from banking. Conversely, American residents do not truly “volunteer” their personal information to the Bureau. 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. This right to notice and a fair hearing requires transparency, accuracy, accountability, and participation. In NASA v. Nelson, 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. 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.

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

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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).


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).


185 Id.


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.\textsuperscript{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.\textsuperscript{190} Justice Scalia highlighted how the independent contractors in \textit{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.\textsuperscript{191} Consequently, they failed to state a legal claim for relief.\textsuperscript{192} Nevertheless, Justice Scalia pointed out that \textit{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.\textsuperscript{193}

Justice Scalia’s concurrence in \textit{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.\textsuperscript{194} And, for purposes of collected census data, Title 13 differs in important ways from the Privacy Act analyzed in \textit{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.\textsuperscript{195} Accordingly, following \textit{NASA}, courts might find that Title 13 does not even satisfy the minimum protections required by federal law.

In \textit{NASA}, the Court noted that while the Privacy Act’s procedural protections might be “porous,” at least they existed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{198} Without “requisite procedures” codified textually into Title 13,

\textsuperscript{189} Nelson, 562 U.S. at 159–69 (2011) (Scalia, J., concurring).
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 161.
\textsuperscript{192} Id. at 162, 169.
\textsuperscript{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.
\textsuperscript{194} See Nelson, 562 U.S. 134 (Scalia, J., concurring).
\textsuperscript{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”).
\textsuperscript{198} See Nelson, 562 U.S. at 162–69 (Scalia, J., concurring).
people are left unprotected by the statute. 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. Neither the Japanese Americans nor Arab Americans received notice or any other “procedures” before the Bureau disclosed their census data. Under NASA, it appears as though these disclosures violated the Fifth Amendment.

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. Yet, despite issuing promises of privacy through legislation and verbal proclamations, the federal government has time and again undermined its trust with the people. History indicates that the Bureau will continue to share statistical data with other Executive departments. Therefore, even if the Bureau affirms its promise that collected data is not used “for law enforcement,” minority groups remain at risk of federal census disclosures. 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. 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. Consequently, all minorities share equally in the fear of answering race, ethnicity, and citizenship questions on the census. 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, E.
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.
221 See supra Part II.C.
speculative at best. In fact, because the PATRIOT Act is still operational, it is debatable whether Title 13’s privacy sections are even currently operative. Passing a constitutional amendment to bar the use of census data for any purpose other than apportionment will immediately solve the differential undercount. No longer will the Hispanic community—or any minority group—be afraid of sharing their personal information with the Bureau. 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.

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

Of course, amendments to the U.S. Constitution are rare, 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. In these challenges, states have argued for courts to force the Bureau to adopt statistical sampling to account for the differential undercount. 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.

Courts are responsible for preventing unconstitutional practices and policies. 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. Courts may consider the research and evidence presented in this and other publications that demonstrate the

222 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 generally Pixler, supra note 4; Beydoun, supra note 23.
228 Id.
229 Id.
230 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.”).
231 See, e.g., Marbury, 5 U.S. 137.
constitutional harms caused by government disclosures of census data.\textsuperscript{233} Courts often hesitate to enter “the political thicket.”\textsuperscript{234} Therefore, rather than prescribing a political solution, federal courts may categorically eliminate census disclosures as a type of preventative measure.\textsuperscript{235} As evidenced in this Article, federal government disclosures present both individual and structural constitutional concerns.\textsuperscript{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.\textsuperscript{237}

V. CONCLUSION

The Framers drafted Article I, Section 2 of the Constitution to ensure that Congress would represent all U.S. residents.\textsuperscript{238} Inextricably connected to the malapportioned Senate, the House of Representatives provides an equal voice for all people in the federal government.\textsuperscript{239} However, intragovernmental sharing of census data since the nation’s founding has clouded the government’s ability to collect an “accurate enumeration.”\textsuperscript{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.\textsuperscript{241} As a result, people have consistently chosen to not respond to the census.\textsuperscript{242}

Minority groups are disproportionately undercounted in the census.\textsuperscript{243} This Article has outlined how census disclosures are the direct cause of this differential undercount.\textsuperscript{244} Census disclosures can, and did, target minority groups; those at risk of these disclosures are justifiably concerned about answering the census questionnaire.\textsuperscript{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.\textsuperscript{246} This

\textsuperscript{233} See supra Part II–III and accompanying text.
\textsuperscript{235} See supra Part III for a discussion of how government disclosures of census data violate the U.S. Constitution.
\textsuperscript{236} Id.
\textsuperscript{237} See supra Part II.A addressing the theory behind Article I, Section 2 to balance the malapportioned Senate.
\textsuperscript{238} Evenwel v. Abott, 136 S. Ct. 1120, 1129 (2016).
\textsuperscript{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.”).
\textsuperscript{240} U.S. CONST. art. I, § 2, cl. 3. See supra Part II.
\textsuperscript{241} See supra Part II.
\textsuperscript{242} Id.
\textsuperscript{243} See supra Part III.A.
\textsuperscript{244} See supra Part III–IV.
\textsuperscript{245} Id.
\textsuperscript{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.\textsuperscript{247} With minority groups answering the census more consistently and accurately, Congress could apportion the House of Representatives according to the states’ “respective Numbers.”\textsuperscript{248}

Today, government tracking of American residents begins when a child is born.\textsuperscript{249} The government’s capacity to collect and share data is sufficient to accomplish all federal funding or national security objectives.\textsuperscript{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.\textsuperscript{251} For example, the 104th Congress passed five laws\textsuperscript{252} that increased the government’s databank of American residents and collected data on over 280 million Americans.\textsuperscript{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.\textsuperscript{254} Consequently, the federal government can now collect information on a person’s address, family members, and ethnicity, independent of a decennial survey.\textsuperscript{255} The government therefore does not need the decennial census for its legislative purposes.\textsuperscript{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.\textsuperscript{257}

However, historical practice indicates that the government is not likely to cease its sharing of census data.\textsuperscript{258} In times of national security or other...
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.\(^{266}\)