

## COMMENT

### NOT JUST ANY PRETEXT: THE 2020 CENSUS AND THE VOTING RIGHTS ACT

#### INTRODUCTION

It was something out of a Dan Brown novel. Parked outside of a convenience store, the estranged daughter of Dr. Thomas Hofeller, the “Michelangelo of gerrymandering,” Googles her father’s name and stumbles upon his weeks-old obituary.<sup>1</sup> She visits her mother’s retirement home where, on a shelf in her father’s old room, she spots a plastic bag full of thumb drives that she hopes might have some old photographs on them.<sup>2</sup> Happily, they do.<sup>3</sup> They also contain something else: work product from her father’s days as a redistricting consultant, including a 2015 secret plan for Republicans to add a citizenship question to the 2020 Census—and asserting that to do so would be “advantageous to Republicans and Non-Hispanic Whites in redistricting.”<sup>4</sup>

Conspicuously, mere weeks before Hofeller’s archives made headlines, the Trump administration had appeared in front of the U.S. Supreme Court defending its decision to do exactly that.<sup>5</sup> Its justification, however, was quite different. It claimed the citizenship question was added in response to a Department of Justice (DOJ) request to aid its Voting Rights Act of 1965<sup>6</sup> (VRA) enforcement efforts.<sup>7</sup> It had neglected to disclose Hofeller’s “significant role” both in devising the strategy and crafting the VRA rationale

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1. Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [<https://perma.cc/L93W-TA3R>].

2. See Plaintiffs’ Motion for the Court to Issue Direction to Legislative Defendants at Exh. A at 6, *Common Cause v. Lewis* (N.C. Super. Ct. June 6, 2019) (No. 18-CVS014001).

3. *Id.* at Exh. A at 8.

4. NYIC Plaintiffs’ Motion for an Order to Show Cause at 1, *New York v. Dep’t of Com.*, 351 F. Supp. 3d 502, 546 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom.* *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-cv-02921).

5. See *generally* Transcript of Oral Argument, *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966).

6. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.)

7. Memorandum from Wilbur Ross, Sec’y of Com., U.S. Dep’t of Com. to Karen Dunn Kelley, Under Sec’y for Econ. Affs., U.S. Dep’t of Com. 1 (Mar. 26, 2018), [https://www.commerce.gov/sites/default/files/2018-03-26\\_2.pdf](https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf) [<https://perma.cc/7AYY-C6B7>].

in a draft paragraph that DOJ had lifted *verbatim* into its request letter to Commerce Secretary Wilbur Ross.<sup>8</sup>

Naturally, the Hofeller revelation was news to many—including, reportedly, the Chief Justice.<sup>9</sup> After initially voting to uphold the question, Chief Justice Roberts subsequently defected to join the Court’s liberal wing on the narrow (but determinative) question of whether the VRA rationale was pretextual.<sup>10</sup> Thus, while the challengers’ substantive claims failed, they eked out a procedural victory for one simple reason: the VRA rationale was a lie.<sup>11</sup>

For many, this “smoking gun” seemed rather quaint. They had smelled smoke all along. At the time, the Trump administration had yet to attempt to enforce the VRA; the suggestion that it “suddenly viewed minority voting rights as a priority” rang somewhat hollow.<sup>12</sup> Further, the claim that adding the question would aid VRA enforcement was “both dubious as a policy proposition and indefensible as a practical matter.”<sup>13</sup> Each of the civil rights groups “most fiercely advocating” for VRA enforcement loudly opposed adding the question.<sup>14</sup> Finally, the administrative record revealed that the request had not originated at DOJ at all. Despite sworn testimony that he had acted “solely” in response to DOJ’s request, Ross had actually scoured the executive branch for anyone willing to ask him to ask about citizenship,<sup>15</sup> eventually cajoling the DOJ to reflect his own request back to him.<sup>16</sup>

But this was not just *any* pretext—it was a truly perverse one. As this Comment argues, the Trump administration’s meddling in the 2020 Census is poised to have a dire impact on the very interests the VRA was designed to protect and the mechanisms by which it protects them. Part I introduces the points of intersection between the census and the VRA. Part II then details the Trump administration’s actions and their ongoing corrosive effect on the VRA’s foundational values. Finally, Part III proposes steps that may soften the blow.

## I. THE CENSUS AND THE VRA

Importantly, it did not *have* to be a lie. As discussed in this Part, in some parallel universe, it could have been plausible to suggest that collecting more

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8. NYC Plaintiffs’ Motion for an Order to Show Cause, *supra* note 4, at 3.

9. See Joan Biskupic, *Exclusive: How John Roberts Killed the Census Citizenship Question*, CNN (Sept. 12, 2019, 1:33PM), <https://www.cnn.com/2019/09/12/politics/john-roberts-census-citizenship-supreme-court/index.html> [<https://perma.cc/K78V-CH26>].

10. *See id.*

11. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019).

12. See Adriel I. Cepeda Derieux et al., “*Contrived*”: *The Voting Rights Act Pretext for the Trump Administration’s Failed Attempt to Add a Citizenship Question to the 2020 Census*, 38 YALE L. & POL’Y REV. 322, 323 (2020).

13. Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1403–04 (2019).

14. Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1375–76 (2019).

15. *New York v. Dep’t of Com.*, 351 F. Supp. 3d 502, 546 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

16. *See Cepeda Derieux et al.*, *supra* note 12, at 333.

granular citizenship data would aid VRA enforcement. First, Part I.A introduces the census; Part I.B then delves into its relationship with the VRA.

### A. The Census

Congress has delegated to the Department of Commerce the responsibility to conduct an “actual enumeration” every ten years, beginning on April 1, and to produce a tabulation of the number of persons residing in each state by the end of the year.<sup>17</sup>

#### 1. How it Works

The tabulation is used for many things, including the apportionment of congressional seats;<sup>18</sup> redistricting;<sup>19</sup> allocation of federal funding;<sup>20</sup> and, yes, VRA enforcement.<sup>21</sup> For apportionment, state populations are funneled through a convoluted formula that calculates states’ representative counts, which are then delivered to each governor.<sup>22</sup> For redistricting, the U.S. Census Bureau (the “Bureau”) typically publishes block-level population data a few months into the following year, allowing states to expediently redraw their districts.<sup>23</sup>

While the goal of each decennial census is simple—to count everyone residing in the country “once, only once and in the right place”<sup>24</sup>—executing that goal is trickier.<sup>25</sup> Typically, gathering data takes about five months,<sup>26</sup> including (a) soliciting self-responses<sup>27</sup> and (b) “Nonresponse Followup” (NRFU), which itself is comprised of several steps to correct for a missing

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17. 13 U.S.C. §§ 2, 4, 21, 141(a).

18. *See id.* § 141(b).

19. *See* Levitt, *supra* note 14, at 1372.

20. *See id.* at 1357.

21. *See infra* Part I.B.2.

22. *About Congressional Apportionment*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/public-sector/congressional-apportionment/about.html> [<https://perma.cc/YN56-4C7X>] (last visited Mar. 25, 2021).

23. *See* Yurij Rudensky et al., *How Changes to the 2020 Census Timeline Will Impact Redistricting*, BRENNAN CTR. FOR JUST. (May 4, 2020), <https://www.brennancenter.org/our-work/research-reports/how-changes-2020-census-timeline-will-impact-redistricting> [<https://perma.cc/Y9JE-M9MQ>].

24. 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://www.census.gov/newsroom/blogs/director/2018/11/counting_everyoneon.html) [<https://perma.cc/B99Z-PYDW>].

25. *See generally Operational Design Integration Models: Supplement to the 2020 Census Operational Plan*, U.S. CENSUS BUREAU (Dec. 18, 2018), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-design-model.pdf> [<https://perma.cc/HS2N-C5AR>].

26. *See generally 2020 Census Operational Timeline*, U.S. CENSUS BUREAU, <https://2020census.gov/content/dam/2020census/materials/partners/2020-03/2020-census-operational-timeline.pdf> [<https://perma.cc/W7EM-CMKA>] (last visited Apr. 16, 2021).

27. *See Questions Asked on the Form*, U.S. CENSUS BUREAU, <https://2020census.gov/en/about-questions.html> [<https://perma.cc/A2YL-AAR8>] (last visited Mar. 25, 2021).

self-response.<sup>28</sup> Self-responses are preferable—more accurate, more complete, and less onerous to obtain than NRFU data.<sup>29</sup> After NRFU ends, the Bureau typically takes several months to process the data.<sup>30</sup>

The Bureau also separately conducts the American Community Survey (ACS) on an annual basis, sampling only a small fraction of American households and covering a more extensive set of topics—including citizenship.<sup>31</sup>

## 2. Where It Fails: Differential Undercount

Given the enormity of these tasks, it is perhaps unsurprising that the decennial census and the ACS remain chronically imperfect. Their most significant flaw is the “differential undercount,” or disproportionate erasure, of racial and ethnic minorities.<sup>32</sup> From 1940 to 1990, only one decennial census missed less than 5 percent of the Black population.<sup>33</sup> The 2010 Census (“one of the most accurate Censuses to date”) undercounted 2.1 percent of the Black population, 1.5 percent of the Latinx population, and 4.9 percent of the American Indian and Alaskan Native populations, while *overcounting* non-Hispanic whites by 0.8 percent.<sup>34</sup>

To their credit, Bureau career experts are diligently transparent about this.<sup>35</sup> Undercounts occur even absent “nefarious” interference, due, for example, to minority groups concentrating in high-density areas and being more transient, among other reasons.<sup>36</sup> “Nefarious” forces matter too, such as fear of census responses being used against respondents.<sup>37</sup> And naturally, many of the non-“nefarious” realities are themselves products of a broader

28. See *New York v. Dep’t of Com.*, 351 F. Supp. 3d 502, 521 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

29. *Id.*

30. See Ron Jarmin, *Update on 2020 Census Data Processing and Quality*, U.S. CENSUS BUREAU (Nov. 5, 2020), <https://www.census.gov/newsroom/blogs/random-samplings/2020/11/update-2020-census-data-processing-and-quality.html> [<https://perma.cc/BFK7-4KNQ>].

31. See U.S. CENSUS BUREAU, UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT RESEARCHERS NEED TO KNOW 1–2 (2020), [https://www.census.gov/content/dam/Census/library/publications/2020/acs/acs\\_researchers\\_handbook\\_2020.pdf](https://www.census.gov/content/dam/Census/library/publications/2020/acs/acs_researchers_handbook_2020.pdf) [<https://perma.cc/S3LW-M2F6>].

32. Nelson, *supra* note 13, at 1409–11.

33. Margo Anderson & Stephen E. Fienberg, *The 2000 Census: Litigation, Results, and Implications*, 77 N.D. L. REV. 665, 669 (2001).

34. Nelson, *supra* note 13, at 1426.

35. See generally *Counting the Hard to Count in a Census*, U.S. CENSUS BUREAU (July 2019), <https://www.census.gov/content/dam/Census/library/working-papers/2019/demo/Hard-to-Count-Populations-Brief.pdf> [<https://perma.cc/L3RV-V7B8>].

36. See Molly Danahy & Danielle Lang, *Distortion in the Census: America’s Oldest Gerrymander?*, 49 U. MEM. L. REV. 1065, 1072–73 (2019).

37. See U.S. CENSUS BUREAU, 2020 CENSUS BARRIERS, ATTITUDES, AND MOTIVATORS STUDY (CBAMS) SURVEY AND FOCUS GROUPS, 96–98 (2018), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/pmr-materials/2019-02-01/5-cbams-survey-report-findings.pdf>? [<https://perma.cc/6XT4-AX23>]; Levitt, *supra* note 14, at 1363; *Counting the Hard to Count in a Census*, *supra* note 35, at 4.

history of racism simultaneously outside the Bureau's control while also inside its data.<sup>38</sup>

### B. The VRA

While the census remains inextricably mired in symptoms of discrimination, the VRA represents one of the most “successful pieces of civil rights legislation” ever taken to combat them.<sup>39</sup> Designed to “banish the blight of racial discrimination in voting,”<sup>40</sup> the VRA proscribes both overt electoral discrimination—e.g., literacy tests—as well as some of the “less blatant” tactics that “innovat[ive]” jurisdictions have honed in response to being robbed of their blunter instruments.<sup>41</sup>

#### 1. Section 2 Vote Dilution Claims

Among the more complex methods used by post-VRA redistricting authorities is to dilute the voting power of minority groups.<sup>42</sup> Generally, this can be accomplished either by “cracking” the group among many districts in order to render it powerless within any one district, or “packing” it into as few districts as possible in order to cabin its influence.<sup>43</sup>

Importantly, since the Supreme Court's decision in *Shelby County v. Holder*<sup>44</sup> to neuter Section 5 of the VRA's effective<sup>45</sup> prophylactic protections, which required problematic jurisdictions to preclear potentially discriminatory electoral actions, retroactive claims under Section 2 are now “almost all that is left of the” VRA.<sup>46</sup> Thus, because, as Part I.B.2 explains, these claims live and die on census data, the *only* operative check on discriminatory redistricting is susceptible to the precise kinds of census meddling discussed in Part II.

#### 2. The Census and Section 2

Section 2 claimants must prove, under “the totality of circumstances,” that a protected class has “less opportunity than other members of the electorate to . . . elect representatives of their choice.”<sup>47</sup> The Supreme Court has read

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38. See Danahy & Lang, *supra* note 36, at 1072–73.

39. See AM. C.L. UNION, THE CASE FOR RESTORING AND UPDATING THE VOTING RIGHTS ACT 11 (2019), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_2019\\_report\\_to\\_congress\\_on\\_the\\_voting\\_rights\\_act\\_final\\_for\\_submission.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_2019_report_to_congress_on_the_voting_rights_act_final_for_submission.pdf) [<https://perma.cc/77QP-PKP4>].

40. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

41. See AM. C.L. UNION, *supra* note 39, at 8.

42. See *id.* at 4.

43. See Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 766 (2011).

44. 570 U.S. 529 (2013).

45. See AM. C.L. UNION, *supra* note 39, at 14.

46. Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1332 (2016).

47. 52 U.S.C. § 10301(b).

three conditions—the *Gingles* factors—into this language.<sup>48</sup> The group must be (1) “sufficiently large and geographically compact”; (2) “politically cohesive”; and (3) subject to drowning out by another politically cohesive voting bloc.<sup>49</sup>

These inquiries—particularly *Gingles* 1—hinge on census data. To satisfy *Gingles* 1, a group must “show that they could constitute more than half of the electorate in a district-sized population.”<sup>50</sup> Such a claim typically relies<sup>51</sup> on block-level “citizen voting-age population” (CVAP) data that the Bureau calculates by scaling sampled ACS citizenship data across total population data derived from the decennial census.<sup>52</sup> If a claimant cannot establish a sufficient minority population through this census data, the claim cannot proceed.<sup>53</sup>

Because the ACS only surveys a few million Americans at a time, CVAP data is, at the *best* of times, imperfect estimates.<sup>54</sup> And when the census is subject to the kind of manipulation chronicled in Part II, the likelihood increases that *Gingles*-sufficient minority populations that do, in fact, exist, are nonetheless absent from the data—thwarting those groups’ only path to proportional electoral representation.

## II. DISENFRANCHISEMENT: 2020

Enter Trump. His administration’s 2020 Census meddling can be neatly dissected into discrete vignettes, which, as Part II.A illustrates, fit neatly Dr. Hofeller’s vision of advantaging non-Hispanic, white Republicans.<sup>55</sup> And as Part II.B demonstrates, despite the VRA pretext that accompanied it, the 2020 Census saga has instead undercut the VRA’s foundational values.

### A. The 2020 Census

That saga unfolded in three acts: (1) the citizenship question; (2) the order to erase “illegal aliens” from the apportionment count; and (3) the Trump administration’s COVID-19 response.

#### 1. Citizenship Question

Secretary Ross’s directive to add the citizenship question circumvented the Bureau’s “robust” process for vetting prospective questions, disregarded

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48. See Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 660 (2006).

49. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

50. Levitt, *supra* note 14, at 1376–77 (cataloguing the ways in which census data informs all three *Gingles* steps).

51. *See id.*

52. *See* U.S. CENSUS BUREAU, *supra* note 31, at 17.

53. *See* Persily, *supra* note 43, at 778 (noting that Section 2 plaintiffs have occasionally satisfied *Gingles* 1 using total population instead of CVAP data).

54. *See* U.S. CENSUS BUREAU, *supra* note 31, at 1.

55. *See supra* notes 1–8 and accompanying text.

Bureau and other administrative “guidelines and standards,”<sup>56</sup> and flouted the Bureau’s forceful recommendation that the question not be added because it was, among other things, “likely to depress self-response rates.”<sup>57</sup> Although self-response is just the first step in decennial data collection, the record showed that NRFU was “at least as likely” to suffer from the same underlying problem as self-response:<sup>58</sup> widespread fear that, amid aggressive anti-immigrant enforcement, census citizenship responses might be used against noncitizen respondents or noncitizen members of the respondent’s household or community.<sup>59</sup>

Importantly, the resulting undercount would extend beyond noncitizens. “[B]oth citizens and non-citizens” would be undercounted, particularly citizens living with noncitizens.<sup>60</sup> The question would be particularly sensitive for the 10 percent of households estimated to contain at least one noncitizen.<sup>61</sup> This hammer “would fall most heavily on minority communities.”<sup>62</sup>

Despite these concerns, a majority of the Supreme Court held that Secretary Ross had the substantive authority to add the question—if only his rationale had been truthful.<sup>63</sup> Chief Justice Roberts joined the Court’s liberal wing to affirm the district court’s injunction on the narrow pretext issue *only*.<sup>64</sup> After considering the Court’s invitation to proffer a fresh rationale, President Donald J. Trump instead issued an Executive Order (EO) for the Bureau to begin culling citizenship data from administrative records.<sup>65</sup>

## 2. Presidential Memorandum

If the abundant evidence of pretext had left any doubt as to the true intent behind the citizenship question, the president’s July 2020 Presidential Memorandum (PM) summarily eliminated it.<sup>66</sup> Having already directed Bureau officials to begin assembling citizenship data, the president was now ordering them to erase, for apportionment purposes, any “illegal aliens” it found.<sup>67</sup>

While the COVID-19 pandemic ultimately delayed the Bureau’s apportionment calculation beyond the Trump presidency, and while

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56. *New York v. Dep’t of Com.*, 351 F. Supp. 3d 502, 526 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom.* *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019).

57. *Id.* at 532.

58. *Id.* at 585.

59. See Matthew M. Welch, *Privacy Law Concerns Associated with the Reintroduction of the Citizenship Question to the 2020 National Census*, 10 COLUM. J. RACE & L. 1, 11–12 (2020) (documenting past weaponization of census data).

60. *New York v. Dep’t of Com.*, 351 F. Supp. 3d at 579, 584.

61. *Id.* (citation omitted).

62. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2584 (2019) (Breyer, J., concurring).

63. *Id.* at 2571–73 (majority opinion).

64. *Id.* at 2575.

65. Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019).

66. Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 21, 2020).

67. *Id.*

President Joseph R. Biden, Jr. has subsequently revoked the PM,<sup>68</sup> nothing can undo the “widespread confusion” that the PM—published months before the self-response deadline—created among affected communities “as to whether they should participate in the census,” further buoying differential undercount risks.<sup>69</sup>

### 3. COVID-19 Flip-Flop

Perhaps the PM’s largest impact was to evaporate the Trump administration’s support for the Bureau’s COVID-19 extension requests.<sup>70</sup> The pandemic imposed “significant operational disruptions” on the 2020 Census.<sup>71</sup> The Bureau was “unable to hire and train enumerators,” faced with households “unwilling to answer their doors” for NRFU,<sup>72</sup> and forced to grapple with mass relocation.<sup>73</sup> While the Trump administration initially supported legislative efforts to extend the apportionment deadline, in July 2020 it made an abrupt “about-face.”<sup>74</sup> Immediately after the PM was issued, “there was suddenly a ‘push to complete NRFU asap,’” amid “drastically cut” deadlines from the Commerce Department.<sup>75</sup>

This provoked near-universal derision from independent experts and agencies,<sup>76</sup> former Bureau directors,<sup>77</sup> the Inspector General,<sup>78</sup> and civil rights groups,<sup>79</sup> among others. Nonetheless, unruffled by the prospect of

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68. Hansi Lo Wang, *Biden Ends Trump Census Policy, Ensuring All Persons Living in U.S. Are Counted*, NPR (Jan. 20, 2021, 10:31 AM), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958376223/biden-to-end-trump-census-policy-ensuring-all-persons-living-in-u-s-are-counted> [https://perma.cc/4SZ9-Q8Q7]. For analysis of the harm the PM would have caused, see *Trump v. New York*, 141 S. Ct. 530, 538 (2020) (Breyer, J., dissenting).

69. *New York v. Trump*, 485 F. Supp. 3d 422, 449 (S.D.N.Y. 2020), *vacated and remanded*, 141 S. Ct. 530 (2020).

70. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF COM., NO. OIG-20-050-M, *THE ACCELERATION OF THE CENSUS SCHEDULE INCREASES THE RISKS TO A COMPLETE AND ACCURATE 2020 CENSUS 7* (2020), <https://www.oig.doc.gov/OIGPublications/OIG-20-050-M.pdf> [https://perma.cc/W58Z-QW6S].

71. *Ross v. Nat’l Urb. League*, 141 S. Ct. 18, 19 (2020) (Sotomayor, J., dissenting).

72. Response to Application for a Stay Pending Appeal at 8, *Ross*, 141 S. Ct. 18 (No. 20A62).

73. See, e.g., D’Vera Cohn, *It’s Clear Where College Students Are Counted in the 2020 Census, but Not Others Who Moved Due to COVID-19*, PEW RSCH. CTR. (Apr. 17, 2020), <https://www.pewresearch.org/fact-tank/2020/04/17/its-clear-where-college-students-are-counted-in-the-2020-census-but-not-others-who-moved-due-to-covid-19/> [https://perma.cc/VYX6-ULKQ].

74. See *id.*; Hansi Lo Wang, *Census ‘Anomalies’ Could Thwart Trump’s Bid to Alter Next Electoral College*, NPR (Nov. 19, 2020, 5:33 PM), <https://www.npr.org/2020/11/19/936561664/anomalies-found-in-census-could-thwart-trumps-bid-to-alter-electoral-college> [https://perma.cc/EQA6-CYZD].

75. Response to Application for a Stay Pending Appeal, *supra* note 72, at 10, 12.

76. *Id.* at 12.

77. See Press Release, Vincent Barabba et al., Statement by Former U.S. Census Bureau Directors (Aug. 4, 2020), <https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html> [https://perma.cc/AP27-KX8Q].

78. OFF. OF INSPECTOR GEN., *supra* note 70, at 5.

79. Response to Application for a Stay Pending Appeal, *supra* note 72, at 33.

“materially larger” differential undercounts than even the 1990 Census,<sup>80</sup> the Court sided with the Trump administration.<sup>81</sup>

*B. Harm to Electoral Representation for Communities of Color*

And so the pattern of disadvantaging minority populations was allowed to continue. As Part II.B explores, a cohesive strategy “to bolster white political power at the expense of communities of color” that began with a tall tale about VRA enforcement will instead subvert the VRA’s central mission: safeguarding minority electoral power.<sup>82</sup>

1. Differential Undercount

The Trump administration’s interference is likely to beget a “huge undercount” in the 2020 Census.<sup>83</sup> This undercount will likely be unevenly distributed<sup>84</sup>—there will, as always, be a *differential* undercount.<sup>85</sup> Indeed, although the citizenship question is gone, its legacy survives; many of the concerns it aggravated predate the question itself, including persistent, virulent anti-immigrant sentiment.<sup>86</sup> There also remain widespread misconceptions that the citizenship question did, in fact, appear on the 2020 Census.<sup>87</sup>

Accordingly, much of the projected differential undercount from the citizenship question is also likely to have survived, affecting both immigrants<sup>88</sup> and citizens,<sup>89</sup> particularly those within immigrant and “immigrant-adjacent communities”—“predominantly communities of color.”<sup>90</sup> This will disproportionately affect Black residents, millions of whom “live in or near hard-to-count immigrant and noncitizen communities,”<sup>91</sup> as well as Asian and Latinx residents, the two “largest group[s] of immigrating persons” in the United States.<sup>92</sup> Even after the demise of both the citizenship question and the PM, the Bureau cannot go back in time and unchill self-responses from these groups.

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80. *Id.*

81. *See generally* Ross v. Nat’l Urb. League, 141 S. Ct. 18 (2020).

82. Cepeda Derieux et al., *supra* note 12, at 324–25.

83. *See* Sharon Driscoll-Stanford, *How COVID-19 Makes the US Census Even More Challenging*, FUTURITY (Sept. 4, 2020), <https://www.futurity.org/covid-19-us-census-united-states-2433182-2/> [<https://perma.cc/9KKP-HSEU>].

84. *See* Cepeda Derieux et al., *supra* note 12, at 357.

85. *See* Danahy & Lang, *supra* note 36, at 1071–72; Hansi Lo Wang, *2020 Census Could Lead to Worst Undercount of Black, Latinx People in 30 Years*, NPR (June 4, 2019, 3:26 AM), <https://www.npr.org/2019/06/04/728034176/2020-census-could-lead-to-worst-undercount-of-black-latinx-people-in-30-years> [<https://perma.cc/8Q6X-84ZL>].

86. *See* Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 261–62.

87. *See id.* at 262 n.138.

88. *See* Nelson, *supra* note 13, at 1427–28.

89. *See* Chacón, *supra* note 86, at 259–61; Levitt, *supra* note 14, at 1364–65.

90. Nelson, *supra* note 13, at 1408.

91. *Id.* at 1425.

92. *Id.*; *see also* Chacón, *supra* note 86, at 237–38.

Nor can it undo the pandemic. Projections rivaling 1990's 4.6 percent Black undercount and 5 percent Hispanic undercount<sup>93</sup> are consistent with the reality that minority groups are “disproportionately impacted by natural disasters and economic downturns, both of which fuel displacement and alter population growth patterns . . . which may result in the omission of their households in Census enumeration.”<sup>94</sup>

## 2. Resulting Representation Harms to Minority Groups

The resulting harms to minority electoral power will manifest in at least three separate buckets: apportionment, redistricting, and VRA enforcement.

*Apportionment.* The roots of the citizenship question extend back not just to Hofeller, but also to conversations between Secretary Ross and Trump ally Kris Kobach bemoaning the “problem” that “illegal aliens . . . are still counted for . . . apportionment.”<sup>95</sup> While it remains too early “to quantify the precise impact on apportionment that the anticipated undercount” will have, there is broad consensus that it will wreak significant harm upon communities of color.<sup>96</sup> The citizenship question was projected to “cause several jurisdictions to lose seats in . . . apportionment.”<sup>97</sup> Even without the question, if its legacy proves as resilient as experts predict, the resulting Latinx undercount will fall most heavily on the states with the largest populations of undocumented immigrants, including California and New York.<sup>98</sup> Thus, “[d]espite fueling the nation’s growth from 2000 to 2010,” Latinx communities are now poised for a representation *decrease* in many areas.<sup>99</sup>

They will not be alone. About 10 percent of Black U.S. residents are immigrants; 42 percent of that group are noncitizens, while 15 percent are undocumented.<sup>100</sup> California and New York—both at risk of losing seats—are among the states with the largest Black populations.<sup>101</sup> California is also home to nearly one-third of all Asian Americans.<sup>102</sup> Accordingly, even without the PM, these populations are likely to suffer apportionment harm stemming from the differential undercount.

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93. See Response to Application for a Stay Pending Appeal, *supra* note 72, at 33.

94. Nelson, *supra* note 13, at 1435–36; see also Persily, *supra* note 43, at 769.

95. Cepeda Derieux et al., *supra* note 12, at 334–35.

96. Nelson, *supra* note 13, at 1417.

97. Danahy & Lang, *supra* note 36, at 1074–75.

98. Cepeda Derieux et al., *supra* note 12, at 331.

99. Nelson, *supra* note 13, at 1415–16.

100. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Appellees at 16, *Trump v. New York*, 141 S. Ct. 530 (2020) (No. 20-366), 2020 WL 6876024.

101. *Id.* at 25. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 8 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/M53Q-ZG8Q>].

102. Gustavo López et al., *Key Facts about Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Sept. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/> [<https://perma.cc/Q45P-JSS2>].

*Redistricting.* These undercounts will also affect *intrastate* electoral power. Because decennial population data guides redistricting efforts, “an inaccurate census could create [intrastate districts] that have nonuniform populations.”<sup>103</sup> In particular, immigrant and immigrant-adjacent<sup>104</sup> communities—disproportionately of color<sup>105</sup>—stand to “drastically lose political power in intrastate redistricting” under a differential undercount.<sup>106</sup>

Crucially, though, this is not *just* about undercounts. As Hofeller emphasized, a “second, less well-known or covered but perhaps more central” goal is to pave a path for states to flout the “historic norm” of redistricting using total population and instead redistrict using CVAP data<sup>107</sup>—a novel practice<sup>108</sup> of questionable constitutionality.<sup>109</sup> Allowing districts to be drawn using only eligible voter counts would strip representation from the “urban and suburban areas where most Americans live”—particularly communities of color—and “boost representation in more sparsely populated regions.”<sup>110</sup> The net effect: to “recreate the disparities” that birthed the VRA in the first place.<sup>111</sup> While the VRA’s protections only extend to eligible voters, the Trump administration’s decision to cloak this “cynical” attempt to dilute the representation of minority groups in VRA concerns still rings false.<sup>112</sup>

Additionally, concerns about the EO do place this issue squarely within the VRA’s ambit. The EO directed the Bureau to use administrative records to synthesize block-level CVAP data.<sup>113</sup> Critics have worried that this data is “less accurate than [the Bureau’s] block-level total-population counts”—with some citizens “erroneously treated as likely non-U.S. citizens.”<sup>114</sup> If true, this would again disproportionately harm communities of color, who tend to have “higher concentrations of foreign-born residents” and greater numbers of citizens “vulnerable to being mischaracterized as likely non-U.S. citizens.”<sup>115</sup> Thus, the electoral power of *eligible voters* of color would suffer relative to that of non-Hispanic white voters, particularly if the erosion in public trust stemming from this practice further exacerbates future self-response inequities.

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103. Welch, *supra* note 59, at 26–27.

104. See Levitt, *supra* note 14, at 1373.

105. Nelson, *supra* note 13, at 1411.

106. Cepeda Derieux et al., *supra* note 12, at 331.

107. Levitt, *supra* note 14, at 1394; see also Persily, *supra* note 43, at 774–75.

108. See Jeff Zalesin, *Beyond the Adjustment Wars: Dealing with Uncertainty and Bias in Redistricting Data*, 130 YALE L.J.F. 186, 207 (2020).

109. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (declining to reach the issue).

110. Michael Li, *America’s Historic Fight over Who Deserves Representation*, BRENNAN CTR. FOR JUST. (July 18, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/americas-historic-fight-over-who-deserves-representation> [https://perma.cc/AL2Z-CMYC].

111. *Id.*

112. *Id.*

113. Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019).

114. Zalesin, *supra* note 108, at 211.

115. *Id.* at 211.

For now, President Biden has rescinded the EO.<sup>116</sup> At the time of this publication, his administration has yet to clarify its stance on the Bureau's collection of citizenship data through administrative records.<sup>117</sup> There are legitimate arguments in favor of continuing to do so. Career experts at the Bureau contend that, purely as a matter of statistical methodology, "combining multiple data sources, including administrative records and surveys, [could] produce better estimates than could be produced solely from ACS data."<sup>118</sup> But as a political matter, it may prove impossible to distill good-faith scientific discussions from the EO's partisan poisoning of otherwise legitimate methodologies.<sup>119</sup>

*VRA Enforcement.* As a result, beyond its effect on the interests the VRA was enacted to protect, the Trump administration's census meddling also risks harming VRA enforcement itself. Section 2 claims were already becoming tougher to substantiate as U.S. cities diversify beyond the binary racial construct envisioned by the VRA,<sup>120</sup> and as increasingly complex racial polarization in voting patterns have erected *Gingles* 2 and 3 hurdles.<sup>121</sup>

The Trump administration has made things harder. Section 2 claims rely on CVAP data deriving from the decennial census *and* the ACS, both of which have been impaired by the administration's mischief.<sup>122</sup> Citizenship ACS responses were already fickle: almost one-third of ACS respondents whom administrative records reveal to be noncitizens represent themselves to be citizens on the ACS.<sup>123</sup> And because the ACS is vulnerable to the same "systematic undercoverage" of hard-to-count groups as the decennial census, the decennial-differential undercount flames the Trump administration has fanned will spread to the ACS too.<sup>124</sup> The upshot for cracked and packed communities: many potential districts that should warrant VRA protection will nonetheless be absent from the data that Section 2 claimants need to satisfy the *Gingles* factors.<sup>125</sup>

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116. Wang, *supra* note 68.

117. *Id.*

118. John M. Abowd et al., Ctr. for Econ. Stud., U.S. Census Bureau, Determination of the 2020 U.S. Citizen Voting Age Population (CVAP) Using Administrative Records and Statistical Methodology Technical Report 7 (Ctr. for Econ. Stud. Research Paper, CES 20-33, 2020), <https://www2.census.gov/ces/wp/2020/CES-WP-20-33.pdf> [<https://perma.cc/5FHV-K4PX>].

119. See, e.g., Memorandum from Peggy E. Gustafson, Inspector Gen., U.S. Dep't of Com. to Steven Dillingham, Dir., U.S. Census Bureau 1 (Jan. 12, 2021), <https://www.oig.doc.gov/OIGPublications/OIG-21-019-M.pdf> [<https://perma.cc/J3EF-A82Z>].

120. See Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion*, 3 U.C. IRVINE L. REV. 359, 380 (2013).

121. See Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 411, 415 (2015); Katz et al., *supra* note 48, at 661–62.

122. See *supra* notes 52–54 and accompanying text.

123. See Levitt, *supra* note 14, at 1371.

124. See *American Community Survey: Accuracy of the Data*, U.S. CENSUS BUREAU 20 (2018), [https://www2.census.gov/programs-surveys/acs/tech\\_docs/accuracy/ACS\\_Accuracy\\_of\\_Data\\_2018.pdf](https://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/ACS_Accuracy_of_Data_2018.pdf) [<https://perma.cc/6ZBY-58BX>].

125. See *supra* notes 49–52 and accompanying text.

### III. MITIGATION

So what can be done? The 2020 Census is over. The inevitable differential undercount will skew apportionment and filter into redistricting and Section 2 enforcement—all at the expense of communities of color.<sup>126</sup> Still, there remain opportunities to mitigate the damage. Part III proposes three such steps that can be taken in varying degrees of immediacy over the coming years.

#### A. Immediate: Voting Rights Legislation

While, as Part III.C discusses, the apportionment harms stemming from the 2020 Census are now irreversible, the redistricting and VRA enforcement harms are not. To start, even if the 2020 Census cannot be undone, its redistricting and VRA harms can still be curtailed. The Section 2 risks posed by the census all stem from one alterable premise: we are asking too much of Section 2.<sup>127</sup> Indeed, this was true even *before* the Supreme Court, on the eve of the first post-*Shelby County* redistricting cycle,<sup>128</sup> took a case that may further defang Section 2.<sup>129</sup>

Robust voting rights legislation can help. Much has been written about the ongoing assault against ballot access and the valiant legislative attempts to parry these efforts.<sup>130</sup> However, perhaps equally as impactful would be these bills' checks on redistricting abuse. Prior to *Shelby County*, sixteen states were required to preclear their redistricting plans.<sup>131</sup> While this was by no means comprehensive, the chasm its absence creates—deepened by the Court's holding, on the same day it struck down the citizenship question, that partisan gerrymandering is not justiciable<sup>132</sup>—cannot be fully measured until post-2020-Census redistricting has occurred. The proposed Voting Rights Advancement Act<sup>133</sup> (which passed the House of Representatives in 2019), if reintroduced and passed, would restore and strengthen VRA preclearance, taking pressure off of Section 2.<sup>134</sup> The For The People Act of 2021,<sup>135</sup> which passed the House in March 2021, would go further by “ban[ning]

126. *See supra* Part II.B.

127. *See supra* Part I.B.2.

128. *See supra* notes 44–46 and accompanying text.

129. *See* Christopher Kieser, *Section 2 of the Voting Rights Act: Equal Opportunity vs. Disparate Impact*, SCOTUSBLOG (Feb. 17, 2021, 11:00 AM), <https://www.scotusblog.com/2021/02/section-2-of-the-voting-rights-act-equal-opportunity-vs-disparate-impact/> [<https://perma.cc/N8X2-VPCM>].

130. Ronald Brownstein, *Democrats' Only Chance to Stop the GOP Assault on Voting Rights*, ATLANTIC (Mar. 3, 2020), <https://www.theatlantic.com/politics/archive/2021/03/democrats-need-hr-1-and-new-vra-protect-voting-rights/618171/> [<https://perma.cc/4QF5-YYX6>].

131. *See What Is Preclearance?*, ROSE INST. (Feb. 8, 2012), <https://roseinstitute.org/what-is-preclearance/> [<https://perma.cc/KT6H-6DAU>].

132. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019).

133. H.R. 4, 116th Cong. (2019).

134. *See* Michael Waldman, *Democracy's Next Battleground*, BRENNAN CTR. FOR JUST. (Feb. 17, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/democracys-next-battleground> [<https://perma.cc/2RGH-SGLN>].

135. H.R. 1, 117th Cong. (2021).

partisan gerrymandering,” establishing uniform “enhanced protections to make sure the political effectiveness of communities of color is not diluted,” and creating an “expedited” right of redress that would effectively replace Section 2 as the frontier for redistricting challenges.<sup>136</sup>

If these bills pass, the barriers for Section 2 plaintiffs to satisfy the *Gingles* factors using suspect CVAP data will immediately become less important. While minority populations will still suffer from differential undercounts, those harms will not be compounded by districts methodically calibrated to pack or crack them into oblivion.<sup>137</sup> Or at least their hopes to counter such attempts will not rest solely on imperfect CVAP data.<sup>138</sup>

### B. Intermediate: Privacy Protections

Still, even if these bills become law, census data is likely to play some role under the new standards. And that data will continue to be skewed by privacy concerns.

A unifying theme throughout the 2020 Census saga has been the drain on self-responses attributable to fear that those responses will be used against respondents.<sup>139</sup> These fears feast upon skepticism that confidential census data will in fact remain confidential.<sup>140</sup> While there are stringent confidentiality assurances that make it a federal crime to release identifiable census data about respondents,<sup>141</sup> such restrictions have not always prevented the Bureau from lawfully disclosing data in ways that have perpetuated public misgivings.<sup>142</sup> At the very least, these breaches of public trust cannot be allowed to recur.

But the more immediate risks to respondent privacy are actually aboveboard. The ability to cross-reference public census data against public non-census data to reidentify individual census respondents is something that large-scale data operators (including the Bureau itself) have been able to accomplish in tests using 2010 decennial data.<sup>143</sup> The Bureau must be empowered, and funded, to mobilize technical protections such as “differential privacy,” which provides functionally accurate data while preserving respondent confidentiality by injecting localized noise into census

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136. *Annotated Guide to the For the People Act of 2021*, BRENNAN CTR. FOR JUST. (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021#t2-sa> [<https://perma.cc/GGZ8-HXSK>].

137. See *supra* notes 120–125 and accompanying text.

138. See *supra* notes 120–125 and accompanying text.

139. See *supra* notes 75–78 and accompanying text.

140. See *supra* notes 75–78 and accompanying text.

141. See *How the Census Bureau Protects Your Data*, U.S. CENSUS BUREAU, <https://2020census.gov/en/data-protection.html> [<https://perma.cc/544X-2VJM>] (last visited Mar. 25, 2021).

142. See Welch, *supra* note 59.

143. See Ron Jarmin, *Census Bureau Adopts Cutting Edge Privacy Protections for 2020 Census*, U.S. CENSUS BUREAU, (Feb. 15, 2019), [https://www.census.gov/newsroom/blogs/random-samplings/2019/02/census\\_bureau\\_adopts.html](https://www.census.gov/newsroom/blogs/random-samplings/2019/02/census_bureau_adopts.html) [<https://perma.cc/P76J-XSAV>].

products that smooths out at higher levels of generality.<sup>144</sup> And—perhaps the tallest order of all—these efforts must be effectively communicated to a diffuse and distrustful public.<sup>145</sup> Such steps are vital to avoid further eroding public trust, particularly among already hard-to-count populations, exacerbating self-response inequities and, as a result, differential undercount risks for communities of color.<sup>146</sup> Crucially, although 2030 is years away, because these risks also apply to the ACS, they pose a perpetual CVAP threat.

### C. *Ultimate: Reduce Reliance on Headcounts*

These issues also raise a larger question: how much should the Bureau rely upon a traditional “census” at all? For apportionment purposes, this question is currently settled, at least as a statutory matter—the apportionment count must flow from enumeration, rather than from any kind of “sampling” or statistical modeling, even if incorporating such practices can unlock greater accuracy than a naked enumeration attempt (including correcting for differential undercounts).<sup>147</sup> Importantly, these restrictions apply *only* to apportionment; there is no statutory requirement tethering CVAP and redistricting data products to either the decennial count or the ACS.<sup>148</sup>

This matters. The 2020 Census cast an unflattering light on a problem it did not invent: the challenges inherent to an actual headcount. Those challenges lead to differential undercounts.<sup>149</sup> Under current practices, despite the lack of a statutory mandate, those differential undercounts are permitted to permeate the Bureau’s data products—disproportionately erasing communities of color in block-level redistricting data and in the CVAP data that Section 2 plaintiffs rely on to secure electoral representation.<sup>150</sup>

As counterintuitive as it may seem to those justifiably leery of the Trump administration’s motives for leveraging administrative records, communities of color could be better served by the Bureau relying *more* on other data sources and smart statistical modeling rather than on respondent-reliant headcounts inevitably hampered by differential undercount concerns. Among experts, there is significant optimism surrounding the prospect of

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144. See generally JASON, *Formal Privacy Methods for the 2020 Census*, U.S. CENSUS BUREAU (Mar. 29, 2020), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/privacy-methods-2020-census.pdf> [<https://perma.cc/2QSS-7XH7>] (examining on behalf of the U.S. Census Bureau vulnerability discovered in the Bureau’s methods of protecting respondent data).

145. See *2020 Census Operation Updates for the Detailed Operational Plan for: 11. Integrated Partnership and Communications Operation (IPC)*, U.S. CENSUS BUREAU 8, 27 (2020), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/IPC-detailed-operational-plan-v1.pdf> [<https://perma.cc/B27Q-9C23>].

146. See *supra* notes 75–78 and accompanying text.

147. See Levitt, *supra* note 14, at 1368.

148. See 13 U.S.C. § 195.

149. See *supra* notes 122–125 and accompanying text.

150. See *supra* notes 103–112 and accompanying text.

empowering Bureau experts to use more data, more intelligently,<sup>151</sup> particularly in light of the demonstrable differential undercount risks inherent to more traditional methods.<sup>152</sup> Of course, as the reasonable concerns surrounding the EO demonstrate, such steps must be taken prudently—driven by expertise and insulated from the stench of politics.<sup>153</sup>

#### CONCLUSION

It is imperative to evaluate such reforms not only against perfection, but against a status quo that is widely accepted as flawed—flawed at the expense of Black, Latinx, Asian, Native, and other vulnerable populations.<sup>154</sup> Reform is unlikely to be perfect, but paralysis in the face of predictable injustice is far more destructive.

Meanwhile, for Americans of color, the representation harms—hefty as they are—are only part of the story. Billions of dollars are allocated based on census data: Medicaid, FEMA relief, and (of particular importance today) public health preparedness, among other things.<sup>155</sup> To be erased from the census is to be discounted from these initiatives *for an entire decade*.

And of course, without electoral power, it only gets harder to right these wrongs.

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151. *See, e.g.*, INNOVATIONS IN FEDERAL STATISTICS 31–37 (Robert M. Groves & Brian A. Harris-Kojetin eds., 2017) (ebook).

152. *See supra* Part I.A.2.

153. *See supra* notes 113–119 and accompanying text.

154. *See supra* Parts II.A–B.

155. *See* Welch, *supra* note 59, at 15–16.