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## **Erasure and Recognition: The Census, Race and the National Imagination**

Naomi Mezey

*Georgetown University Law Center*, mezeyn@law.georgetown.edu

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Naomi Mezey  
Professor of Law  
Georgetown University Law Center  
[mezeyn@law.georgetown.edu](mailto:mezeyn@law.georgetown.edu)

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## ERASURE AND RECOGNITION: THE CENSUS, RACE AND THE NATIONAL IMAGINATION

*Naomi Mezey\**

*The census is one of our relatively few national, secular ceremonies. It provides a sense of social cohesion, and a kind of non-religious communion: we enter the census apparatus as individual identities with a handful of characteristics; then later we receive from the census a group snapshot of ourselves at the ceremony date.<sup>1</sup>*

— William Kruskal

*When you can't measure that which is important, you make important that which you can measure.<sup>2</sup>*

— Harold Koh

### I. INTRODUCTION

The law, as many have recognized, calls people into being.<sup>3</sup> Out of the distribution as well as the absence of rights and regulatory devices emerge statuses and identities.<sup>4</sup> The census, as a legal institution, is no different. In

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<sup>1</sup> William Kruskal, *quoted in PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY AND THE EVASION OF POLITICS* 5 (2000).

<sup>2</sup> Harold Koh, Remarks at Yale Law School (May 31, 2002).

<sup>3</sup> Marxist philosopher Louis Althusser called this process interpellation. It is the process by which authority "hails" people as subjects, subjects who recognize themselves as such. Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 162–63 (Ben Brewster trans., 1977).

<sup>4</sup> Probably the most infamous example of this is the property right in people which created masters and slaves. See, e.g., Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 48–51 (2001) (discussing the realist and critical legal insight that "legal rules structure the very baseline from which we negotiate our lives and form our identities"). A less obvious example is the role of the law in "making"

the language of social constructivism, the census helps to construct recognizable identities at a number of different levels: national identity, group identity and individual identity. These identities can be at once mythic and deeply meaningful. The census, for example, had a strong hand in creating the 1990s soccer mom. We know from the 1990 census that the average American was a 32.7-year-old white woman who lived in a three-bedroom house in the suburbs. She was married and had 1.8 children.<sup>5</sup> She was a high school graduate and worked in a clerical job.<sup>6</sup> She is a familiar figure, but as Sam Roberts notes, “[s]he is also a myth.”<sup>7</sup> Less obviously and yet more directly, the census has helped to create a number of other mythic Americans: the Starbucks junkie; the college student who eats and dresses for a better world; and the blue-collar woman who smokes menthol cigarettes and loves hot rod shows.<sup>8</sup> Likewise, the census played a role in creating the Asian American, a pan-ethnic identity that encompasses numerous, distinctive, and sometimes historically antagonistic nationalities.<sup>9</sup> The racial categories of the census have made and unmade racial identity as the boundaries of those categories have shifted over time, making, for example, fair people black, and dark people white.<sup>10</sup>

and enforcing heterosexuality less as an identity than as a normative project. JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 1-17 (1999).

<sup>5</sup> Bureau of the Census, *New Census Bureau Report Provides Analysis of Fertility of American Women*, at <http://www.census.gov/Press-Release/cb96-182.html> (Oct. 31, 1996).

<sup>6</sup> SAM ROBERTS, WHO WE ARE: A PORTRAIT OF AMERICA BASED ON THE LATEST U.S. CENSUS 3-4 (1994).

<sup>7</sup> *Id.* at 4. She is a myth because she is a mean and a statistic. She is also a myth to the extent that the idea of her tends to disguise the fact that at the same time in the mid-1990s, married couples with their own children under the age of 18 made up only 25% of American households. In contrast, 32% of all families with children were single parent families. Bureau of the Census, *Three in Ten Households Were Maintained by Women in 1996*, at <http://www.census.gov/Press-Release/cb97-110.html> (July 1, 1997).

<sup>8</sup> Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853 (2002). Kysar makes a powerful argument that we are what we buy because of the census. He details how marketers use census data not just to target consumers based on their lifestyles but also to help people fashion lifestyle identities through their consumption choices, organizing “consumption communities,” modern tribes melded not by blood or tradition, but by common patterns of consumption.” *Id.* at 895 (quoting DON SLATER, CONSUMER CULTURE AND MODERNITY 88 (1997)). The Census Bureau not only blesses this use of the data but facilitates it. *Id.* at 863-64.

<sup>9</sup> Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890-1990*, 16 RACIAL & ETHNIC STUD. 75, 85 (1993).

<sup>10</sup> The one drop rule, by defining a person with even one drop of “black blood” as black, made the category of “black” expansive enough to include people who looked indistinguishable from “other” whites and in doing so forged a particular group identity. See, e.g., Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1166 (1997) (noting that while the African American race “has its origins in the peoples of three continents and its members can look very different from one another, over the centuries the Devil’s one drop rule united this race as a people”). See generally F. JAMES DAVIS, WHO IS BLACK? ONE NATION’S DEFINITION (1991). The category of “white” is also elastic, having absorbed, at various times, Mexicans, Arabs, and many dark European immigrants. However, one important and significant difference between the two categories is that “ethnic whites” have much greater freedom to opt out. *Id.* at 12. De-

This Article is concerned with the constitutive power of the census with respect to race. It is an examination of the U.S. Census as an aspect of what Angela Harris calls race law, "law pertaining to the formation, recognition, and maintenance of racial groups, as well as the law regulating the relationships among these groups."<sup>11</sup> While others have noted and explored the epistemological and constitutive functions of the census race categories,<sup>12</sup> my aim is to unpack this insight in the context of two specific examples of categorical change and contest: the addition of a Chinese racial category in 1870 and the debate over a multiracial category in 2000. In addition, I analyze the differing sites of categorical reimaging in each instance, further exploring how the census has been deeply influential in two different directions: informing, defining and naming the racial identity of specific groups, and informing an imagined racial identity of "the nation." The census is a kind of mass public performance of nationality; it is both a legal and cultural mechanism for imagining the American nation, a nation that has always represented itself with racial specificity. Over 200 years the content and significance of its racial categories have varied considerably, but the census appears to consistently play a crucial role in both constructing and reinventing a national identity and influencing the self-definition and identity of a number of subnational groups. In short, this paper is about how census classifications have contributed to our understanding of race, to the grammar and logic of identity discourse, and to a particular way of imagining the nation. Its primary aim is to explore some of the dynamics between official racial counting, popular conceptions of race, and racialized views of the nation. In doing so, it will address a series of questions. When do census or other legal categories seem to drive popular notions of race? When do popular understandings of race seem to drive official categorization? When and how are the politics of racial classification mobilized toward national inclusion or exclusion? A secondary aim of this Article is to aid in enlarging our sense of what "law" is by investigating alternate legal forms; in this case, by pursuing how a state apparatus like the census is not just legal by virtue of its constitutional and statutory origins, but in the way it generates and enforces cultural norms, race-based rights and disabilities, and the boundaries of identity.

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spite this asymmetry, however, the one drop rule was never as stable or uniformly applied as some scholars suggest. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 178–79 (1998); Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1, 25–26, 32–34 (1991); DAVID THEO GOLDBERG, THE RACIAL STATE 184–85 (2002).

<sup>11</sup> Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1928 (2000).

<sup>12</sup> David Theo Goldberg, for example, has deftly analyzed the census as "an exercise in social naming," a governmental technology that gives not only name but also content and meaning to the identities that it helps to fabricate, enforce, and formalize. DAVID THEO GOLDBERG, RACIAL SUBJECTS: WRITING ON RACE IN AMERICA 29–32 (1997). See also MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS (2000); CLARA E. RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES (2000).

Race categories have inhered in the United States census since its conception in Article 1 of the Constitution:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons. 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.<sup>13</sup>

What is particularly interesting about this provision is that it describes a rather technical mechanism for determining how to apportion representatives and taxes,<sup>14</sup> yet it does so in a way that implicitly conveys a color picture of the nation. There are free persons, Indians, and others. The partly-spoken distinction is racial and distinguishes among whites (free persons), Indians, and blacks (others).<sup>15</sup> The Constitution is decidedly not color blind.<sup>16</sup> It did not create the racial distinctions inherent in slavery, but it rearticulated and promoted them in the nation's most important legal document, deepening the legal inflection of racial classification.<sup>17</sup>

What was implicit in the Constitution was made explicit by statute. The first census, conducted in 1790 according to the enumeration bill passed by Congress,<sup>18</sup> went beyond the bare requirements of the Constitution and included five categories that were more explicitly racial but still did not name blacks as such: free white males aged sixteen years and older, free white males under sixteen, free white females, all other free persons and slaves.<sup>19</sup> There is no mention of Indians, who were not counted at all if

<sup>13</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>14</sup> Making both representation and taxes dependent on the census was a mark of political ingenuity and in keeping with a general preference for checks and balances as a way to minimize the effects of self-interest. The temptation to undercount for tax purposes was checked by the temptation to overcount for representation purposes. The result, James Madison hoped, would be the "requisite impartiality." THE FEDERALIST No. 54, at 308–09 (James Madison) (Clinton Rossiter ed., 1999). Tax assessment was subsequently decoupled from the census by the passage of the Sixteenth Amendment to the Constitution.

<sup>15</sup> The differential valuation by race in the three-fifths clause was modified by the Fourteenth Amendment, which mandated that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2.

<sup>16</sup> See generally Gotanda, *supra* note 10 (exploring color-blind constitutionalism as a legal ideology which legitimates racial inequality).

<sup>17</sup> See GOLDBERG, *supra* note 10, at 188 ("Racial classification has informed the law of racial division and rule, even as such classification schemas were shaped by the commands of legal logic.").

<sup>18</sup> Enumeration Act, ch. 2, § 1, 1 Stat. 101 (1790).

<sup>19</sup> The enumeration bill provided that marshals were to number the inhabitants, "omitting in such enumeration Indians not taxed, and distinguishing free persons, including those bound to service for a term of years, from all others; distinguishing also the sexes and colours of free persons, and the free males of sixteen years and upwards from those under that age . . ." *Id.*

they were not taxed.<sup>20</sup> The densely suggestive “all other free persons” is barely clarified in the enumeration bill, which instructs the marshals who conduct the headcount to “distinguish[] also the sexes and colours of free persons.”<sup>21</sup> Thus, we have from the inception of this nation and in its design a set of identity categories that have been embedded in the Constitution and more fully elaborated in a decennial census. According to its constitutional mandate, the census does more than facilitate a body count; it also tells us whose body counts, and for how much.

This Article compares the census of the late nineteenth century with that of the late twentieth century in order to investigate the differences and some consistencies in the uses to which the census has been put and the changes it has helped to engender. I conclude that the census is both subject to cultural changes in the discourse of race as well as an inspiration for such changes, and that it has played at least two simultaneous and contradictory roles with respect to defining communities of identity as well as the body politic. It has been thought of as a mechanism of surveillance and discipline of groups that were incompatible with the national self-image; and it has also been used in an aspirational way by groups seeking recognition of a group identity and inclusion in the national community. But these seemingly contradictory impulses of the census are always entangled as part of the project and power of enumeration. Identity recognition is also identity production and discipline in the sense that every act of recognition entails other categorical erasures, elisions, and enforcements. And ironically, even counting for the purposes of erasure requires recognition. Thought of

<sup>20</sup> “Indians not taxed were those who held tribal relations, and therefore were not subject to the authority of any State, and were subject only to the authority of the United States, under the power conferred upon Congress in reference to Indian tribes in this country. The same provision is preserved in the Fourteenth Amendment; for, now, as at the adoption of the Constitution, Indians in the several States, who are taxed by their laws, are counted in establishing the basis of representation in Congress.” *Elk v. Wilkins*, 112 U.S. 94, 112 (1884) (Harlan, J. dissenting). In *Elk*, the Court concluded that the Fourteenth Amendment did not confer citizenship on an Indian who, though born a member of an Indian tribe, had renounced his tribal affiliation and was subject to the laws (and taxation) of a state. In his dissent, Harlan quotes from the debate on the 1866 Civil Rights Act, which, like the Fourteenth Amendment, excluded “Indians not taxed.” The floor debate in the Senate on whether to add this limiting phrase makes clear that the phrase was synonymous with the more vernacular expression, “wild Indians,” and was meant to exclude these Indians from the polity, only partly because they were considered to be already subject to a different authority.

Mr. Trumbull said, ‘Does the senator from Indiana want the wild roaming Indians, not taxed, not subject to our authority, to be citizens of the United States—persons that are not to be counted, in our government? If he does not, let him not object to this amendment that brings in even [only] the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen.’

*Id.* at 114 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess., 528). The Report of the Superintendent for the 1870 Census (the first census in which untaxed Indians were specifically counted) is more succinct. He says that absent legal definition of the phrase “Indians not taxed,” it means for census purposes “to apply only to Indians maintaining their tribal relations and living upon Government reservations.” A COMPENDIUM OF THE NINTH CENSUS 19 (1872).

<sup>21</sup> Enumeration Act, ch. 2, § 1, 1 Stat. 101 (1790).

another way, the census has been a source of simultaneous erasure and recognition in the battle over national and group identity. It is in this sense that the census is a legal mechanism of cultural production—a constitutionally-mandated, legally-significant official statistics of a people that has defined and redefined communities of identity and become both the screen and projector for the national imagination.

Part II lays the groundwork for the two narratives of the census that follow by exploring the rise and power of official enumerations. In this Part, I briefly take up three related topics. The first is the role of the census in imagining the nation; how social statistics function much like cartography and monuments by representing an image of the nation to those it seeks to encompass. Second, in part because social statistics play such an important role in nation-building and constructing racial categories, I briefly explore the rise of the social phenomenon of statistics. It takes nineteenth century demography to fully realize and make salient the identity classifications implicit in the census clause of the Constitution. Finally, in order to help show how the census has been used to discipline groups, I provide some theoretical basis for understanding the census as a technology of affirmative and disciplinary power employed by the bureaucratic state. I find that the census, as a ritual of state documentation, lines up with Foucault's description of disciplinary power in that it is a form of surveillance, normalization, and examination.

Part III explores the census in its disciplinary role specifically with respect to the Chinese, finding retribution and erasure to be the principal motivation for the addition of a Chinese racial category in the nineteenth century. In 1870, the Chinese were the first group enumerated under "color and condition" that had not been contemplated in any way by the Constitution. By placing this change in historical context, I detail how the census—along with the labor and immigration anxieties occasioned by the arrival of the Chinese, and scientific racism—helped to make a "race" out of what had previously been thought of mainly as a nationality.

Part IV uses the push for a multiracial category in the 2000 Census as an example of the census in its overtly aspirational role. Those who sought to be counted on the census as "multiracial" stood to gain nothing that they could not otherwise get from being counted as a minority race; theirs was a campaign for recognition as a group and inclusion in the nation on their terms. Those who opposed the addition of a multiracial category argued against what they believed was the symbolism of recognition and on behalf of the politics of race. This political debate was itself evidence of the powerful aspirational role of the census in the production of race and the recognition of emergent identities.

Though very different in feel and effect, these aspirational and disciplinary roles of the census share a salient characteristic: they mark the modern census as a primary participant in the construction of racial meaning and the identity formation of aspiring communities and of the nation as

a whole. Part V draws some conclusions about what we can glean from a historical investigation of census change and influence. These, I should warn, are not primarily policy conclusions; rather, I urge greater recognition of the ways in which the census makes and unmakes the boundaries of identity and how its aspirational and disciplinary potential cannot be balanced, weighed or severed, for every recognition entails erasure and every erasure recognition.

## II. NATION, NUMBERS, AND POWER

*What is the lesson of the Census Bureau's promotion campaign? The crystal-clear message is that to control us political elites must know us.<sup>22</sup>*

— Dr. Edward Hudgins

### A. Imagining the Nation

To posit the census as a form of social and national imagination is to directly extrapolate from Benedict Anderson's influential formulation of the nation as an imagined political community.<sup>23</sup> This sovereign community conceives of itself as a deep horizontal fraternity but distinguishes itself from other nations by the style in which it is imagined.<sup>24</sup> According to Anderson, the idea of "nation" was made possible in the eighteenth century by the demise of religious and dynastic empires and the rise of vernacular languages and print capitalism.<sup>25</sup> This historical convergence allowed people, for the first time, to imagine themselves connected to others unknown to them living simultaneously in a defined territory. Print capitalism made national consciousness possible by bringing together the nascent technology of book publishing with "capitalism's restless search for markets" and in doing so began a publishing boom in vernacular languages.<sup>26</sup> Print capitalism transformed particular vernaculars into print-languages, and eventually into languages-of-power. This allowed people who otherwise did not speak

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<sup>22</sup> *The American Community Survey (A.C.S.)—A Replacement for the Census Long Form?: Hearing Before the Subcomm. on the Census of the House Comm. on Government Reform*, 106th Cong. 74 (2000) (testimony of Dr. Edward Hudgins, Director, Regulatory Studies, Cato Institute).

<sup>23</sup> BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM 6–7 (rev. ed. 1991).

<sup>24</sup> *Id.*

<sup>25</sup> The religious community and the dynastic realm, the "two relevant cultural systems" to precede the nation, were in their time "taken-for-granted frames of reference, very much as nationality is today." *Id.* at 12. Anderson attributes the decline of the religious community to exploration and the demise of absolute truth that contact with other cultures entailed as well as the demotion of the sacred language. *Id.* at 16–18. The dynastic realm, for its part, was subject to the slow decline of monarchical legitimacy. *Id.* at 21.

<sup>26</sup> *Id.* at 37–46.

the same vernacular to nonetheless read the same newspapers and novels.<sup>27</sup> The rise of print-languages meant that people

gradually became aware of the hundreds of thousands, even millions, of people in their particular language-field, and at the same time that *only those* hundreds of thousands, or millions, so belonged. These fellow-readers, to whom they were connected through print, formed, in their secular, particular, visible invisibility, the embryo of the nationally imagined community.<sup>28</sup>

Print capitalism, then, made possible “community in anonymity” which was previously unimaginable.<sup>29</sup> Anderson himself identified the census, the map, and the museum as three institutions used by the state to provide a common imagination for its subjects, by rendering tangible the kind of human beings over which it rules, its geography, and its common history.<sup>30</sup> The census serves such a purpose by helping many people spread over a huge territory imagine themselves as a collective political and social body.<sup>31</sup>

While Anderson is not without his critics, most persuasively from the postcolonial perspective,<sup>32</sup> few dispute the basic insight that nations,<sup>33</sup> as

<sup>27</sup> The newspaper and the novel are two important forms of modern national imagining because they are means by which the nation is represented to itself; they convey common content and a sense of simultaneity. The newspaper exemplifies the dual function of simultaneity: it is a kind of daily bestseller which is consumed in a simultaneous morning ritual of reading about events which happen more or less simultaneously. Anderson also elaborates on the concept of simultaneity made possible by other literary forms, arguing that the novel is “a complex gloss upon the word ‘meanwhile.’” *Id.* at 25.

<sup>28</sup> *Id.* at 44.

<sup>29</sup> *Id.* at 36.

<sup>30</sup> *Id.* at 163–64. Anderson discusses these institutions in the context of colonial states, and in particular with regard to Southeast Asia, but his general conceptualization of them as means of imagining and representing the nation is applicable more broadly.

<sup>31</sup> Cf. MARY POOVEY, MAKING A SOCIAL BODY: BRITISH CULTURAL FORMATION, 1830–1864 (1995).

<sup>32</sup> Partha Chatterjee, for example, disputes that African and Asian postcolonial nationalisms have been wholly modeled on European and American forms. Rather, he argues that anticolonial nationalisms are distinctive in that they divide the institutions and practices of a society into two domains: the “material” domain of politics, economics, and science, in which Western forms are replicated; and the “spiritual” domain of language, art, and family, which has resisted colonial intervention. PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES 6–11 (1993). Arjun Appadurai has argued against Anderson’s conclusions from another direction, stressing the decreasing importance of the geographically bounded state and the more salient translocal nationalisms across borders. ARJUN APPADURAI, MODERNITY AT LARGE 21–23 (1996). The postcolonial critiques of Anderson have also been applied to the role of the census in classifying the local populations according to the imaginations of the colonizers. BERNARD COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA 8 (1996); BERNARD COHN, AN ANTHROPOLOGIST AMONG THE HISTORIANS AND OTHER ESSAYS 224–54 (1987); see also APPADURAI, *supra*, at 114–35. Another line of critique, relevant here, is that Anderson fails to see the mutual dependence of nationalism and racism. See, e.g., ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *Racism and Nationalism*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 37 (Chris Turner trans., 1991); see also Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1595 n.79 (2002) (discussing this line of critique).

<sup>33</sup> Nation is used here to mean something like a self-conscious community built on a shared identity or shared cultural practices.

opposed to states,<sup>34</sup> are fundamentally “imagined” into existence.<sup>35</sup> I distinguish between nations and states because I am interested in how states lay claim to the emotional bonds of national identity by portraying themselves as nations. Although conjured in part by numerous state laws, technologies, and policies, nations are always discursive and imagined, and their variable boundaries and self-representations are never exactly coterminous with those of the state. Nations, as Arjun Appadurai says, are “fragile abstractions,” and “especially in multi-ethnic settings, are tenuous collective projects, not eternal natural facts.”<sup>36</sup> My focus is specifically on the imagined nation in the American context and, more precisely still, on the way in which the “racial state,” to borrow Goldberg’s apt phrase,<sup>37</sup> has used the technology of the census to refine and circulate the racial distinctions that mark the ever-moving boundaries of the collectively imagined–nation. However, the power of the census to portray a racialized nation depends in large part on another modern phenomenon, the rise of social statistics.

### B. Coloring by Numbers: Social Statistics & the Nation<sup>38</sup>

The seventeenth-century English mathematician John Arbuthnot said:

Arithmetic is not only the great instrument of private commerce, but by it are (or ought to be) kept the public accounts of a nation; I mean those that regard the whole state of a commonwealth, as to the number, fructification of its people, increase in stock, improvement of lands and manufacturers, balance of trade, public revenues, coinage, military power by sea and land, etc. Those that would judge or reason truly about the state of any nation must go that way to work, sub-

<sup>34</sup> I use state in the geopolitical sense: Mexico, Morocco, India, Spain, etc.

<sup>35</sup> This is clear in Chatterjee’s lament about the colonization of the imagination:

If nationalisms in the rest of the world have to choose their imagined community from certain ‘modular’ forms already made available to them by Europe and the Americas, what do they have left to imagine? . . . Europe and the Americas, the only true subjects of history, have thought out on our behalf not only the script of colonial enlightenment and exploitation, but also that of our anticolonial resistance and postcolonial misery. Even our imaginations must remain forever colonized.

CHATTERJEE, *supra* note 32, at 5.

<sup>36</sup> Arjun Appadurai, *The Heart of Whiteness*, 16 CALLALOO 796, 799 (1993).

<sup>37</sup> GOLDBERG, *supra* note 10. Goldberg argues that “race is integral to the emergence, development, and transformations (conceptually, philosophically, materially) of the modern nation-state.” *Id.* at 4. While I think conflating states with nations tends to obscure rather than illuminate his complex project of exposing the ways in which states homogenize, the basic insight is important and persuasive.

<sup>38</sup> See generally JAMES H. CASSEDY, DEMOGRAPHY IN EARLY AMERICA (1969); IAN HACKING, THE EMERGENCE OF PROBABILITY (1975); DAVID V. GLASS, NUMBERING THE PEOPLE: THE EIGHTEENTH-CENTURY POPULATION CONTROVERSY AND THE DEVELOPMENT OF CENSUS AND VITAL STATISTICS IN BRITAIN (1973); STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981); THEODORE M. PORTER, THE RISE OF STATISTICAL THINKING, 1820–1900 (1986); PATRICIA CLINE COHEN, A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA (1982); Paul Starr, *The Sociology of Official Statistics, in THE POLITICS OF NUMBERS* 7, 10, 15 (William Alonso & Paul Starr eds., 1987); RICHMOND MAYO-SMITH, SCIENCE OF STATISTICS (1895–99).

jecting all the forementioned particulars to calculation. *This is the true political knowledge.*<sup>39</sup>

It is hard for the modern mind to appreciate the novelty of conceiving of the nation in quantitative terms or the innocence of the conviction that facts were true and true facts unproblematically equaled political power. Such calculations were brand new in the seventeenth century. It was not until the latter half of the sixteenth century that Arabic numerals and basic arithmetic replaced Roman numerals in Europe.<sup>40</sup> Sir William Petty “coined the phrase ‘political arithmetic’ to describe what was then considered an unorthodox conjunction between matters of state, a lofty sphere, and the ‘vulgar art’ of arithmetic, with its strong commercial association.”<sup>41</sup> Political arithmetic evolved into statistics in the late eighteenth century and dealt not with analyzing data but simply with compiling facts on civil life that would show the progress of the republican experiment.<sup>42</sup> From the same root as “state,” the word “statistic” meant simply facts bearing on the condition of a state.<sup>43</sup> The word came into usage in America around 1800 and grew out of a general craze for quantification in the eighteenth century, as evidenced by the boom in almanacs and gazettes.<sup>44</sup> The broad enthusiasm for facts and figures about the new country was part of a growing belief in the power of facts.<sup>45</sup> Many believed that concrete data about the population could end political disagreements about how to attain the common good for a heterogeneous nation; that quantifying the dimension of heterogeneity would offset the lack of homogeneity and form the foundation of sound politics.<sup>46</sup>

Regardless of how we might characterize its purpose and effect, the census played an integral part in the emergence of statistics and helped define and popularize the categories by which Americans would assess and judge both the emerging nation and themselves.

<sup>39</sup> John Arbuthnot, *quoted in COHEN, supra* note 38, at 28–29 (emphasis added).

<sup>40</sup> *Id.* at 18–19. Roman numerals could express quantity, but they could not be used for calculating as Arabic numbers could.

<sup>41</sup> *Id.* at 30.

<sup>42</sup> *Id.* at 150.

<sup>43</sup> *Id.* at 150 n.1; Paul Starr, *supra* note 38, at 10, 15.

<sup>44</sup> COHEN, *supra* note 38, at 151–52. An enduring example of political arithmetic is Thomas Jefferson’s Notes on the State of Virginia, which evinces the same fascination with and faith in quantitative accounts of a place.

<sup>45</sup> *Id.* at 173 (“Inventories of descriptive facts about society were touted as providing an authentic, objective basis for ascertaining the common good.”).

<sup>46</sup> *Id.* at 154–55, 173. A vivid example of the relationship between statistical knowledge and political power was an 1806 child’s board game in which players moved from state to state answering factual questions about their population, commerce, and governance (a rudimentary form of Jeopardy). The game was accompanied by a 43-page booklet of answers; correct answers earned a player electoral votes, and the winner became President. *Id.* at 166.

In short, in the early nineteenth century, Americans began to realize that they were living in one of the most demographically dynamic nations in human history. We know now that the remarkable rates of population growth (30 to 35 percent per decade) continued until the Civil War. We also know that the United States has consistently displayed rapid settlement patterns, sharp demographic transitions, and major migrations, all in the context of a racially and ethnically diverse population. Accordingly, the census and the apportionments derived from the census data play a crucial role in American political and social life. It is the census that triggers increased (or decreased) power of resources for a geographic region, and thus it is the census that has been used to illustrate the virtues or vices of particular regions, peoples, or ways of life in America.<sup>47</sup>

Yet it was not obvious at its inception that the census should have such a role. Nothing in the Constitution suggested an expansive accounting of the civil life of the nation, nor was that the practice of other countries.<sup>48</sup> As the Congress debated the details of the first census in 1790, it was Madison who advocated a broad inquiry, and it was at his insistence that the identity categories built into the Constitution became explicit and more distinctly racial.<sup>49</sup> While more racial than the Constitution, the census categories were not as minutely articulated as they would become (for example, in 1890 the census forms included Black, Mulatto, Quadroon, and Octoroon as distinct racial categories).<sup>50</sup> These nascent demographic categories, defined by the political and cultural debates of their time, would have a profound impact on the social discourse and national imagination in the future. Census statisticians, "sometimes in consultation with, sometimes in opposition to, the nation's leaders, have determined the categories and classifications used to interpret population change. In turn, they have created and shaped the very concepts we use to understand social change. They have provided the . . . categories we think in."<sup>51</sup>

The census became a much larger, more elaborate enterprise in the late nineteenth century as "professional" statisticians took control and innovations in statistics gave the numbers more interpretive power. The data they generated created new audiences (both political and popular) and a demand

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<sup>47</sup> MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 22 (1988). Anderson's book is the authoritative history of the census, and for good reason, but the scope of the work is such that often she does not elaborate on some of her more provocative insights.

<sup>48</sup> GLASS, *supra* note 38, at 13, 17; Starr, *supra* note 38, at 12–13.

<sup>49</sup> COHEN, *supra* note 38, at 159.

<sup>50</sup> In a sense, these were the first multiracial categories. Although this was the first time such distinctions appeared on the form itself, in 1870, special instructions to census takers cautioned them to be "particularly careful in reporting the class Mulatto. The word is here generic, and includes quadroons, octoroos and all persons having any perceptible trace of African blood. Important scientific results depend upon the correct determination of this class . . ." 200 YEARS OF CENSUS TAKING: POPULATION AND HOUSING QUESTIONS, 1790–1990 26 (1989) [hereinafter 200 YEARS OF CENSUS TAKING].

<sup>51</sup> ANDERSON, *supra* note 47, at 4–5.

for more and newer data.<sup>52</sup> The census documented not just people, but industry, transportation, agriculture; it even kept records on “defective, dependent, and delinquent classes.”<sup>53</sup> The changes in American society during the Gilded Age were astounding and the census was the instrument that documented this transformation. It was Francis Walker, Superintendent of the Census Office in 1870 and 1880 and an enthusiastic statistician, who was the first to give the picture of the changing nation literal rather than metaphoric form. He was also the first to make that picture accessible to the general public. Not only did he write essays on census results for both popular and scholarly journals,<sup>54</sup> but he translated the raw data into a statistical atlas for the public.<sup>55</sup> Published with colored maps and charts showing demographic trends, including the first population density maps, the statistical atlas was geared to excite the national imagination.<sup>56</sup> “The atlas allowed the general public to see at a glance demographic characteristics that only the statistically trained could easily glean from the dry compilations of numbers in the tables themselves.”<sup>57</sup> Thus, it was during the late nineteenth century, when social statistics grew dramatically and were popularized, that the census came to play an important role in documenting and defining the form and content of the nation. From a multitude of detailed data, the census purported to convey a vivid composite picture of the country as a whole, portraying what it looked like, what it produced, where it worked; in short, how it lived.<sup>58</sup>

The emerging field of statistics ushered in new relationships between people and the facts, data, and classification schemes that described them. In one sense, categories are creative: by naming they “nominat[e] into existence.”<sup>59</sup> But categories do more than just give name and existence to certain communities of identity at certain times. They also have continuing

<sup>52</sup> *Id.* at 85.

By the late nineteenth century, business associations, reformers, and the new university men also lobbied for data that would fit their needs. As interest in the new initiatives grew, the traditional role of the census as a mechanism to apportion political representation faded in importance. The statisticians began to think of apportionment as merely a necessary but relatively routine and unimportant footnote in the whole census effort.

*Id.*

<sup>53</sup> *Id.*

<sup>54</sup> During the late nineteenth century, Walker wrote articles about census data for several extremely popular magazines, including the *Atlantic Monthly*, which had a circulation of over 300,000 two years after it was founded in 1857. Cullen Murphy, *A History of the Atlantic Monthly*, THE ATLANTIC ONLINE (2001), at <http://www.theatlantic.com/about/atlhistf.htm>. Walker also published articles in *Century Illustrated Monthly Magazine*, the successor to *Scribner's Magazine*, and *Forum*, which was the successor to *Century*, all quite popular in their time. See generally JAMES PHINNEY MUNROE, A LIFE OF FRANCIS AMASA WALKER 420–39 (1923).

<sup>55</sup> ANDERSON, *supra* note 47, at 92.

<sup>56</sup> *Id.* at 92–98.

<sup>57</sup> *Id.* at 92.

<sup>58</sup> *Id.* at 86.

<sup>59</sup> GOLDBERG, *supra* note 12, at 29–30.

epistemological significance. This is Ian Hacking's point with respect to the rise of classification and enumeration generally:

The printing of numbers was a surface effect. Behind it lay new technologies for classifying and enumerating, and new bureaucracies with the authority and continuity to deploy the technology. There is a sense in which many of the facts presented by the bureaucracies did not even exist ahead of time. Categories had to be invented into which people could conveniently fall in order to be counted. The systematic collection of data about people has affected not only the ways in which we conceive of a society, but also the ways in which we describe our neighbor. It has profoundly transformed what we choose to do, who we try to be, and what we think of ourselves.<sup>60</sup>

It is to this epistemologically transformational power of census categories that I now turn.

### C. The Power of Enumeration

It is important to note the paradoxical nature of the census: it presents a portrait of the whole nation and yet it does so by emphasizing the discrete units and different identities that make up (or do not make up) the whole. There is tension in its objectives, and there is tension in the power of its effects. The power of classifying and counting can be aspirational, harnessed for inclusion and recognition, and it can be disciplinary, applied in ways that exclude and erase.

1. *The Power to Recognize.*—From the beginning there were those who saw the census as a way to bind the nation together, to display an inventory of American greatness,<sup>61</sup> and this is certainly an aspect of the power of public counting. Statistics could be used to document the success of the unique American experiment to those outside it and help forge a common identity and source of pride for those within.<sup>62</sup> Steven Kelman notes that the use of data to "display the grandeur of American society" became one of the primary themes in congressional debates over expanding the 1870 and 1880 censuses.<sup>63</sup> As one representative put it,

Let us know what our institutions are doing, and the record will soon be such that we can point to it with pride. . . . Gather all these things, garner them up in one capacious storehouse of knowledge, and invite not merely our own people, but those of other countries, to learn what we really are.<sup>64</sup>

<sup>60</sup> IAN HACKING, THE TAMING OF CHANCE 3 (1990).

<sup>61</sup> Starr, *supra* note 38, at 19.

<sup>62</sup> Steven Kelman, *The Political Foundations of American Statistical Policy*, in THE POLITICS OF NUMBERS, *supra* note 38, at 275, 286.

<sup>63</sup> *Id.* at 287.

<sup>64</sup> *Id.* at 288 (quoting CONG. REC., 45th Cong., 3rd Sess., 1543 (Feb. 18, 1879)).

Such sentiments won the day. The census expanded exponentially during these years in order to vindicate the American experiment by documenting the boom of a newly industrialized and newly urban society.<sup>65</sup> It documented the increasing forms of labor and production, the rise of banks and insurance companies, railroads and canals, libraries and churches, private property and presses, and ever more intricate variations on population growth and mortality.<sup>66</sup> Joseph C. G. Kennedy, Superintendent of the 1860 Census, attested to the confidence many felt in the power of specific statistics about the new industries to provide affirmative and grand generalizations about the country. "The statistics of looms, spindles, and factories, of furnaces and forges, of steam-engines and sewing-machines, and of a thousand other instruments of creative industry, become the representatives of almost every form of national and individual happiness, exertion, aspiration and *power*."<sup>67</sup> The power of enumeration is indeed both national and individual in the sense that the census functions as both an aspect of state power and administration as well as a mechanism for distributing political power among individuals according to its accounting.

In a limited preview of things to come, the aspirational power of counting was evident in early requests to gather information about particular groups in order to "dignify[y] the group and its pursuits."<sup>68</sup> Kelman makes evident that, even in the nineteenth century, inclusion in the census functioned as a sign of social recognition, although in a very different form than it would become. For example, the two surviving petitions from that time for census inclusion by private groups were from the New York Chamber of Commerce and the National Electrical Light Association.<sup>69</sup> The Chamber of Commerce sought statistics on domestic trade to demonstrate its important role in generating wealth, and the Electrical Light Association wanted a special census that would detail the miraculous accomplishments of electrical light to counter public perception that it was mainly an accident-prone monopoly. In addition to the obvious uses to which the data could be put by these organizations, Kelman claims that both petitions "appeared to be requesting the statement of social approval of their endeavors that the collection of government statistics would imply."<sup>70</sup> Through census recognition they sought legitimacy and power as licensed by the state.

<sup>65</sup> ANDERSON, *supra* note 47, at 84–85. The size of the Washington staff tripled between 1860 and 1870 and tripled again by 1880. The number of published volumes of data went from five in 1860 to 23 in 1880. *Id.* at 84; see also, A. ROSS ECKLER, THE BUREAU OF THE CENSUS 24 tbl.II (1972).

<sup>66</sup> U.S. CENSUS OFF., STATISTICS OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS AND BEING THE FINAL EXHIBIT OF THE EIGHTH CENSUS (1866).

<sup>67</sup> ANN HERBERT SCOTT, CENSUS, U.S.A.: FACT FINDING FOR THE AMERICAN PEOPLE, 1790-1970, at 31–32 (1968) (quoting Kennedy without attribution) (emphasis added).

<sup>68</sup> Kelman, *supra* note 62, at 288.

<sup>69</sup> *Id.* at 290.

<sup>70</sup> *Id.*

2. *The Power to Discipline.*—But power, needless to say, is at once affirmative and repressive, and the power of enumeration is no exception. Even to the extent it fulfilled its purpose of documenting American exceptionalism and fueling the national imagination, the census did so partly by implicit and explicit reference to outsiders and others, by identifying and exercising authority over the more undesirable and unproductive citizens and non-citizens.

Official statistics (and most social and economic statistics are official in the sense that they are gathered by the state) are generally compiled by means of a census, and early census-taking began as a method of surveillance, conscription, tax assessment, manners control, and exclusion of unwanted elements.<sup>71</sup> The pre-modern census was, as Paul Starr contends, “unambiguously an instrument of state power and social control.”<sup>72</sup> While Starr maintains that modern censuses have replaced coercion with cooperation, I suggest that even in the heady days of nineteenth century America, where statistics and state-building made a giddy pair, there remained an aspect of social control to the enterprise of numbering the people, and indeed, there remains such an aspect today.<sup>73</sup> This was especially evident when it came to naming and numbering by race. How the modern census functions as an exercise of state disciplinary power and social control requires explanation.

One subtle aspect of social control made possible by statistics was the creation of the idea of “the average person” and its corollary, the deviant. Thus, statistics introduced two mutually dependant and thoroughly modern concepts: the norm and deviance. Ian Hacking, in his remarkable book, *The Taming of Chance*, argues that statistics gave rise to more than new concepts; they ushered in epistemological change as well.<sup>74</sup> Hacking identifies what he calls the “avalanche of numbers” at the beginning of the nineteenth century as the beginning of a profound change in the way Americans and Europeans thought about people, an epistemological shift away from the prevailing belief in determinism and causality to the modern idea of probability and the laws of chance.<sup>75</sup> The laws of chance, unlike the preceding laws of nature, emerged from the gathering of statistics of large populations. “The imperialism of probabilities could occur only as the world itself became numerical.”<sup>76</sup> But this new kind of information, in addition to pro-

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<sup>71</sup> Starr, *supra* note 38, at 10–11; see also HYMAN ALTERMAN, COUNTING PEOPLE: THE CENSUS IN HISTORY 17–35 (1969) (detailing early censuses by the ancient Babylonians, Egyptians, Israelites, Chinese, Greeks and Romans); CASSEY, *supra* note 38, at 3 (describing the Inca system for collecting myriad demographic data and counting the population).

<sup>72</sup> Starr, *supra* note 38, at 11.

<sup>73</sup> See *infra* note 100.

<sup>74</sup> HACKING, *supra* note 60, *passim*.

<sup>75</sup> *Id.* at 1–10.

<sup>76</sup> *Id.* at 5.

viding sound bites for a growing empire, also occasioned a new kind of social control.<sup>77</sup>

Society became statistical. A new type of law came into being, analogous to the laws of nature, but pertaining to people. These new laws were expressed in terms of probability. They carried with them the connotations of normalcy and of deviations from the norm. The cardinal concept of the psychology of the Enlightenment had been, simply, human nature. By the end of the nineteenth century, it was being replaced by something different: normal people.<sup>78</sup>

Paul Starr similarly argues that official statistics powerfully influence social norms: "An average is not just a number; it often becomes a standard."<sup>79</sup>

Michel Foucault has famously discussed the dramatic changes wrought by the avalanche of numbers and what they meant for relations of power. Power in Foucault's work is epistemological, disciplinary, and fundamentally regulatory. In fact, he marks the "avalanche of numbers" as the point at which the state no longer exercises its power through the threat of death but through the regulation of life.<sup>80</sup> Like Hacking, Foucault suggests that this regulation takes place through the normalization of a population.<sup>81</sup> Foucault also explicitly accounts for the role that law plays in the increasingly regulatory, normalizing functions of the state.<sup>82</sup>

The law always refers to the sword. But a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility. Such a power has to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendor; it does not have to draw the line that separates the enemies of the sovereign from his obedient subjects; it effects distributions around the norm. I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory. A normalizing society is the historical outcome of a technology of power centered on life.<sup>83</sup>

Thus, Foucault locates one of the new disciplinary functions of the state in its power, through the use of numbers and classification schemes, to regulate life by publicizing the norm around which the population should

<sup>77</sup> *Id.* at 5–6, 115.

<sup>78</sup> *Id.* at 1.

<sup>79</sup> Starr, *supra* note 38, at 54.

<sup>80</sup> 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 142–43 (Robert Hurley trans., 1978) [hereinafter HISTORY OF SEXUALITY].

<sup>81</sup> *Id.* at 144.

<sup>82</sup> See Francois Ewald, *Norms, Discipline, and the Law, in* LAW AND THE ORDER OF CULTURE 138 (Robert Post ed., 1991).

<sup>83</sup> HISTORY OF SEXUALITY, *supra* note 80, at 144.

fall. In this sense, the state is the primary source of the normative. Foucault designates this change in the function of the state and its legal machinery as the beginning of the era of "bio-power," an era marked by "an explosion of numerous and diverse techniques" for regulating and controlling the population through the physical administration of bodies.<sup>84</sup> The diverse techniques to which Foucault refers seem to relate to the evaluation, classification, and calculated management of people made possible by statistics and demography; these disciplining techniques are applied by state and quasi-state institutions (such as the army, schools, medicine, etc.) on the social body as well as on individual bodies. According to Foucault, to order human beings at all is to exercise a particular kind of power over them.

The first of the great operations of discipline is, therefore, the constitution of '*tableaux vivants*', which transform the confused, useless or dangerous multitudes into ordered multiplicities. The drawing up of 'tables' was one of the great problems of the scientific, political and economic technology of the eighteenth century: how one was to arrange botanical and zoological gardens, and construct at the same time rational classifications of living beings; how one was to observe, supervise, regularize the circulation of commodities and money and thus build up an economic table that might serve as the principle of the increase of wealth; how one was to inspect men, observe their presence and absence and constitute a general and permanent register of the armed forces; how one was to distribute patients, separate them from one another, divide up the hospital space and make a systematic classification of diseases: these were all twin operations in which the two elements—distribution and analysis, supervision and intelligibility—are inextricably bound up. In the eighteenth century, the table was both a technique of power and a procedure of knowledge. It was a question of organizing the multiple, of providing oneself with an instrument to cover it and to master it; it was a question of imposing upon it an 'order'.<sup>85</sup>

And not only in the eighteenth century, but also in every century since, the table, as epitomized by census classifications, has been a "technique of power and a procedure of knowledge," an instrument of mastery and order.

It is important to make clear the forms of disciplinary power that I am referencing here. They are neither the specific and concrete forms of discipline and punishment meted out on social and sexual deviants, nor the more general and "majestic rituals of sovereignty," whose simple mechanisms have invaded the grander institutions of law and the state.<sup>86</sup> I am primarily concerned with the subtle and modest forms of discipline exercised broadly

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<sup>84</sup> *Id.* at 140.

<sup>85</sup> MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 148 (Alan Sheridan trans., 1977) [hereinafter DISCIPLINE & PUNISH].

<sup>86</sup> *Id.* at 170.

by a legal-regulatory regime.<sup>87</sup> In articulating how this sort of disciplinary power works, Foucault identifies three related components of this new kind of power: surveillance, normalization, and examination. The first is hierarchical observation, which coerces by making it clear to the observed that they are objects of surveillance, although they are seen by invisible observers.<sup>88</sup> The second mechanism of disciplinary power is that of normalizing judgment, which transforms punishment into a sense of learned obligation to conform to the standards set by the group. When non-conformity is potentially punishable, one is taught to normalize one's judgment. The penalties exacted by disciplinary power normalize not through repression but through differentiating individuals from one another with respect to the average or the optimal.<sup>89</sup> Foucault calls surveillance and normalization "the great instruments of power at the end of the classical age."<sup>90</sup> These two mechanisms of disciplinary power come together in the third, which is the examination. The examination encompasses many different sorts of rituals: the examination of patients by doctors, of students by teachers, the inspection of troops by generals, all the ceremonies of power in which power itself is invisible while it "imposes on those whom it subjects a principle of compulsory visibility. . . . In this space of domination, disciplinary power manifests its potency, essentially, by arranging objects. The examination is, as it were, the ceremony of this objectification."<sup>91</sup> In other words, the examination focuses the spotlight on the person who is examined and at the same time demonstrates the power of the unseen examiner. One sees in the examination the ultimate ritualized incorporation of surveillance and normalization.

In modern America, the census epitomizes the examination as an instrument of power. In a sense the examination is for Foucault any ritualized form of documenting the individual, and the census is a national rite of mass individual documentation. It is a regularly administered, probing questionnaire, to which the state requires a response, inquiring into myriad

<sup>87</sup> Foucault speaks in the plural of "disciplinary methods" to refer to numerous ways in which power was exercised over bodies and groups through regulatory techniques, from the minute regulation of physical gestures in the army (marching, lifting the rifle) and schools (correct posture for handwriting) to the discrete regulation of time and the distribution of space and function in both of those institutions, as well as others. *Id.* at 149–62.

<sup>88</sup> *Id.* at 170–77. This is one of the fundamental elements of the Panopticon, to induce in the observed the sense that one is constantly visible while being unable to see others. *Id.* at 200–02. Foucault derives the basic idea from Bentham and elaborates on it as a specific mode and performance of power. See JEREMY BENTHAM, WORKS (Bowring ed., 1843).

<sup>89</sup> DISCIPLINE & PUNISH, *supra* note 85, at 177–84. "The perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchizes, homogenizes, excludes. In short, it normalizes." *Id.* at 183. Paradoxically, the effect of disciplinary punishment is both to individualize and to homogenize.

<sup>90</sup> *Id.* at 184.

<sup>91</sup> *Id.* at 187.

details of life which are at once mundane and intimate.<sup>92</sup> The census makes each person seen and known by an invisible bureaucracy; each person becomes an object of observation, a subject of surveillance.<sup>93</sup> Where once the documentation of a life was saved for nobles and heroes, in the modern age it has been democratized, and “it functions as a procedure of objectification and subjection.”<sup>94</sup> And yet the census as examination also obscures the individuality of people by incorporating them into a bewildering mass of statistics, into a comparative system of collective facts that sets and adjusts our sense of the normal.<sup>95</sup> It takes individuals and turns them into “statistical people.”<sup>96</sup>

David Theo Goldberg has analyzed the racial categories of the census from a Foucaultian perspective, focusing perceptively on the ways in which the literal bureaucratic forms, used by the Census Bureau and now countless other agencies and organizations, reflect, reproduce, and distribute racial identity.<sup>97</sup> He locates the bureaucratic form as part and product of the epistemic shift that both Foucault and Hacking detail, noting that statistics and forms emerge around the same time and as part of the same process: forms give structure, order, and logic to data, allowing it to be “formalized,” to be turned into “information.”<sup>98</sup> The ordering of knowledge in this fashion is intertwined with the creation and regulatory control of identity. “Formal identity is identity conceived, manufactured, and fabricated in and through

<sup>92</sup> 13 U.S.C.A. § 221 (2001) authorizes a fine of \$100 for refusing to answer any question on a census schedule and a fine of \$500 for providing false answers.

<sup>93</sup> This is the gist of Edward Hudgins testimony before the House Subcommittee on the Census, which is partially quoted at the beginning of the paper. The idea is that before we can be controlled we must be known. That statement of libertarian paranoia is also an excellent articulation of the Foucaultian insight about the connection between visibility, knowledge, and control.

<sup>94</sup> DISCIPLINE & PUNISH, *supra* note 85, at 192. Foucault goes so far as to mark the substitution of the calculable man for the memorable man the moment of the inauguration of a new technology of power. *Id.* at 193.

<sup>95</sup> *Id.* at 189 (“The examination that places individuals in a field of surveillance also situates them in a network of writing; it engages them in a whole mass of documents that capture and fix them.”). The irony in the collection and classification of so much personal information actually dehumanizing the individual and serving to facilitate a dehumanized bureaucracy is also evident in the work of Max Weber. He argued that bureaucracy’s distinctive characteristics

are developed all the more completely the more it ‘dehumanizes’ itself: that is to say, the more perfectly it succeeds in realising the distinctive characteristic which is regarded as its chief virtue, the exclusion from the conduct of official business of all love, all hatred, all elements of purely personal sentiment—in general, everything which is irrational and resists calculation.

MAX WEBER, SELECTIONS IN TRANSLATION 351 (W.G. Runciman ed. & Eric Matthews trans., 1978) (emphasis added).

<sup>96</sup> This mysterious species was discovered by Lisa Heinzerling in the context of accounting for the use of cost-benefit analysis to assess regulatory programs that prevent death. Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189, 189 (2000) (“A primary feature of the statistical person . . . is that she is unidentified; she is no one’s sister, or daughter, or mother. Indeed, in one conception, the statistical person is not a person at all, but rather only a collection of risks.”).

<sup>97</sup> GOLDBERG, *supra* note 12, at 30.

<sup>98</sup> *Id.* at 31.

forms. . . . The form, and the identity prompted and promoted by the form, is regulatory and regulative. The form furnishes *uniformity* . . . to identity, rendering it accordingly accessible to administration. . . . The form is the technology of scientific management par excellence.”<sup>99</sup>

Thus the census and its attendant standardized forms can be seen as a Foucaultian examination, a primary instrument by which the state exercises disciplinary power on individuals. It is evident in the way it creates, counts, and arranges objects; in its classifying and ordering of living beings; in its plotting of people into tables and forms in order to best observe the most intimate details of their lives: their living arrangements, the number of televisions and toilets in their home, their commute times, their wealth, their skin color. This power to make and arrange objects of inquiry is particularly evident with respect to racial classification because race has been one of the main axes of state disciplinary power in this country.

This view of the census, as examination and disciplinary instrument, is not limited to high theorists. In fact, currently this position is most ardently espoused by some conservatives and civil libertarians, who argue that the census should be scaled back to fulfill only the minimum requirement of “actual enumeration” set by the Constitution. In particular, these opponents of the census regard the questions about income, race, and standards and style of living as overly intrusive, an invasion of privacy, and irrelevant to the Constitutional purpose of the census.<sup>100</sup> While civil libertarian concerns

<sup>99</sup> *Id.*

<sup>100</sup> By “opponents,” I mean those who oppose any significant data gathering by the Census Bureau and who think the census should be nothing more than a headcount. This view is characterized by Edward Hudgins of the Cato Institute: “I report to you today a sentiment that I believe is shared by millions of Americans [regarding the census]. An accurate summary of that sentiment, of which I have heard many variations, would be: ‘Most of the census questions are none of your damned business. We hire you to protect our lives, liberties and property, not, I repeat, not to butt into our affairs. Stop your meddling and stick to your jobs.’” *The American Community Survey (A.C.S.) A Replacement for the Long Form?: Hearing on the Census, Before the Subcomm. on the Census, House Comm. on Government Reform*, 106th Cong. (2000) (testimony of Dr. Edward Hudgins, Director, Regulatory Studies, Cato Institute). Privacy objections to the census are not a new phenomenon. Various questions have sparked protests based on privacy when they were introduced. ANDERSON, *supra* note 47, at 211 (noting objections to the income question in 1940 and to the question about bathroom facilities in 1960). In response to complaints by constituents about the 2000 census, more mainstream conservatives took the unprecedented move of suggesting that people not answer those questions on the long form that they felt invaded their privacy. D’Vera Cohen, *Census Too Nosy? Don’t Answer Invasive Questions, GOP Suggests*, WASH. POST, Mar. 30, 2000, at A1, A11 (citing suggestions by Senate Majority Leader Trent Lott, Sen. Chuck Hagel, Rep. Tom Coburn and Rep. Nick Smith that people should not have to answer questions that they are uncomfortable with despite the law requiring compliance). Republican resistance led to a small partisan battle over whether the Republicans were trying to undermine an accurate count for political purposes. D’Vera Cohen, *Census Flap Intensifies; Director Pleads For Compliance*, WASH. POST, Mar. 31, 2000, at A1, A16 (also noting then-presidential candidate George W. Bush’s uncertainty about whether he would fill out the long form if sent to him); see also D’Vera Cohen, *Census to Start Hardest Job: Opening 42 Million Doors; GOP Letter Adds to Concern About Resistance*, WASH. POST, Apr. 26, 2000, at A1, A23.

Finally, there has been at least one federal lawsuit filed that challenges the race questions, among

about the census are aimed primarily at the way the routine business of government regulation and redistribution invade citizens' privacy,<sup>101</sup> they also focus on the issue of racial documentation and surveillance. To substantiate their fears of government misuse of census data, civil libertarians remind us that the federal government used racial identifiers taken from census data to help round up Japanese Americans for internment in camps during World War II,<sup>102</sup> despite a strict policy of confidentiality.<sup>103</sup> Taken to its most extreme, the disciplinary power exercised through the census does more than

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others, on the short and long forms of the 2000 Census as unconstitutional invasions of privacy. *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000), *aff'd sub nom.* *Morales v. Evans*, No. 00-20693, 2001 U.S. App. LEXIS 23316 (5th Cir. Oct. 10, 2001). In *Morales*, plaintiffs generally contended that the government could lawfully ask only those questions necessary for the constitutionally-mandated enumeration and specifically objected to questions about race, ethnicity, marital status, educational background, relation to other members of the household, language ability, occupation, income, as well as a number of others on constitutional grounds. *Id.* at 809. The Court found that Congress has never authorized a mere headcount alone, that the legitimate governmental interest in gathering the information is significant, and that given the methods used to collect the data and the statutory assurance of confidentiality, the privacy intrusion of the questions was limited and could not be said to violate the First, Fourth, or Fifth Amendments to the Constitution. *Id.* at 820.

<sup>101</sup> See, e.g., Charlotte Twilight, *Watching You, Systematic Federal Surveillance of Ordinary Americans*, 4 INDEP. REV. 165, 169 (1999) (criticizing the vast array of federal laws that gather information about private citizens); William F. Buckley, *Snoochie 2000*, NAT'L REV., May 1, 2000, at 67 (recounting an historical opposition to the census based on privacy grounds); DAVE KOPEL, CATO INSTITUTE, THE FEDERAL LEVIATHAN IS COUNTING ON YOU, available at <http://www.cato.org/dailys/04-04-00.html> (Apr. 4, 2000) (urging the public to question the information collected by the census); SOLVEIG SINGLETON, HOW BIG BROTHER BEGAN, CATO INSTITUTE, available at <http://www.cato.org/dailys/11-25-97.html> (Nov. 25, 1997) (arguing that the government's collection of information about private citizens through a wide array of programs poses troubling issues about privacy).

<sup>102</sup> Twilight, *supra* note 101, at 169; see ANDERSON, *supra* note 47, at 194 (noting that the Census Bureau provided hand tabulations of the Japanese population to facilitate internment and sent the head of the Bureau's Statistical Research Division to California to supervise the effort). Use of census data "led to the internment of almost 110,000 Japanese-Americans on the West Coast, two-thirds of whom were U.S. citizens." Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 349 (2002).

<sup>103</sup> For what it is worth, which should not be much, the Census Bureau did not disclose individual names and addresses of Japanese-Americans but instead provided information about concentrations of Japanese-Americans in the population. L. NYE STEVENS, U.S. GEN. ACCOUNTING OFF., DECENNIAL CENSUS: OVERVIEW OF HISTORICAL CENSUS ISSUES 36 (1998). The Bureau has had a confidentiality policy since 1850, but originally it was a policy insuring that returns were exclusively for government use; little consolation if you are a civil libertarian. *Id.* at 35. Currently, the Census Act provides for confidentiality by limiting the disclosure of information by particular respondents and providing for fines and imprisonment for officials who release information by which an individual can be identified. 13 U.S.C. §§ 8–9 (2000). The Bureau also affirmatively attempts to prevent correlation of published data with specific individuals through "complex data blurring techniques . . . designed to protect the integrity of the aggregated data while heightening the security of individual-level information." Kysar, *supra* note 8, at 874 n.124 (citing RICHARD A. MOORE, JR., U.S. BUREAU OF THE CENSUS, ANALYSIS OF THE KIM-WINKLER ALGORITHM FOR MASKING MICRODATA FILES (1996)). Kysar, pointing to the internment experience, rightfully concludes that the privacy controversy is misplaced. It should not focus on individual-level disclosures about which the Bureau has been scrupulous, but instead on "the manner in which the aggregated information can be (and has been) used to achieve the functional equivalent to individual disclosure." *Id.* at 874.

just see us, know us, and tell us what is normal. It makes us who we are and situates us with respect to others. It also makes evident that the power to discipline and the power to recognize are an indivisible power. As Foucault himself acknowledged, the disciplinary power that operates through the documentation of the individual is not just repressive and censoring, it is also, as I have argued above, creative and aspirational. “[I]t produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.”<sup>104</sup>

### III. ENUMERATION AS DISCIPLINE: COUNTING THE CHINESE

*[T]he figure of the Asian immigrant has served as a “screen,” a phantasmatic site, on which the nation projects a series of condensed, complicated anxieties regarding external and internal threats to the mutable coherence of the national body . . . .*<sup>105</sup>

— Lisa Lowe

#### A. The Making of a Chinese Race

Between 1840 and 1870, over six and a half million European immigrants arrived in the United States, most of them living in identifiable ethnic communities within cities.<sup>106</sup> Many of these immigrants were regarded with racial skepticism and nativist hostility,<sup>107</sup> and many were of dubious whiteness.<sup>108</sup> None of them inspired a separate race category on the census. During the same time period, only 60,000 Chinese immigrants arrived in the United States.<sup>109</sup> It was not clear that they constituted a separate race, yet they inspired the addition of the first arguably racial classification not im-

<sup>104</sup> DISCIPLINE & PUNISH, *supra* note 85, at 194.

<sup>105</sup> LISA LOWE, IMMIGRANT ACTS 18 (1996); *see also* Leti Volpp, ‘Obnoxious to Their Very Nature’: Asian Americans and Constitutional Citizenship, 5 CITIZENSHIP STUD. 57, 57 (2001).

<sup>106</sup> ANDERSON, *supra* note 47, at 90–92.

<sup>107</sup> JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 3–4, 9–11 (1978).

<sup>108</sup> This was especially true of Eastern and Southern Europeans, who were seen and treated as “a ‘race’ apart” by many. MARY C. WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 2 (1990). But other regional and religious groups, such as Italians, Irish-Catholics, and Jews, were also racialized. HIGHAM, *supra* note 107, at 66–67, 77–87, 92–94. *See, e.g.*, NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995). Matthew Jacobson points out that many of these immigrants, the Celts, Slavs, Hebrews, Mediterraneans, Iberics, etc. “were both white *and* racially distinct from other whites.” MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRATION AND THE ALCHEMY OF RACE 6 (1998).

<sup>109</sup> Although the Chinese began arriving in Hawaii earlier, their appearance in California coincided with the early years of the gold rush. *See, e.g.*, SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 28 (1991). Virtually all of the Chinese to immigrate came from the Fujian and Guangdong provinces, with the vast majority of these coming from only a few regions of the Guangdong province. *Id.* at 5. For a description of the structure and dynamics of early Chinese communities in the United States, see STANFORD M. LYMAN, CHINESE AMERICANS 8–53 (1974).

plied in the Constitution.<sup>110</sup> Needless to say, against this backdrop, the fact that a color category for “Chinese” was added to the census in 1870 is a bit of a curiosity.<sup>111</sup> It was added at a time when the Chinese made up a minuscule percentage of the population,<sup>112</sup> yet there is virtually no explanation in the congressional debates or the historical accounts of that time. There is but one cryptic, though ominous, comment in the legislative record. A committee report offers “that [the question] relating to color has been made to include distinctively the Chinese, so as to throw some light on the grave questions which the arrival of the Celestials among us has raised.”<sup>113</sup>

I am not making a claim that the Chinese were considered raceless before 1870, or even that they were considered white. Rather, I find it significant that in 1870 “Chinese” formally became, in census nomenclature, a “color” rather than a nationality. That the census helped form and formalize a Chinese race at a time when legal and popular views of the racial status of the Chinese were more ambiguous requires some explanation. The appearance of a Chinese race category on the 1870 Census can be seen as responding to a number of events, trends, and dislocations of the 1850s and 1860s including census data itself, the politics of Chinese labor and immigration, scientific racism, and, following the Civil War, racial reconfiguration of the national identity.

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<sup>110</sup> Mulattos were added to the census in 1850, but as they were treated “as a subset of Negro” and their addition was part of the debate over scientific justifications for slavery, I consider it a category at least implied in the constitution. See NOBLES, *supra* note 12, at 36–43, 131. In addition, the Chinese might well be seen as a nativity classification rather than a racial one, particularly because Chinese had been listed with the rest of the foreign born population prior to 1870. But given the popular view at the time of the Chinese as a non-white race, as well as the explicit categorization in 1870 of Chinese as a “color,” I think it makes most sense to think of it as a racial classification.

<sup>111</sup> I do not want to be understood as suggesting that the movement into whiteness of the European immigrants was unrelated to the classification of the Chinese as a race; indeed, it seems clear that the racialization towards white of the former was partly dependent on the racialization away from white of the latter. “The racialization of Asian immigrants as ‘Mongolians’ unfit for various privileges and that of various European immigrants as Whites entitled to those privileges were mutually constitutive processes.” Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC’Y. 105, 132 n.24 (1999) (citing ALEXANDER SAXTON, THE INDISPENSABLE ENEMY (1971)).

<sup>112</sup> The Chinese population in 1870 was a little over 63,000 compared with a total population of the United States which stood at 38 and a half million, making the Chinese 0.16 percent of the total population. FRANCIS A. WALKER, SUPERINTENDENT OF THE CENSUS, U.S. DEP’T OF THE INTERIOR, A COMPENDIUM OF THE NINTH CENSUS 8 tbl.I (1872) [hereinafter NINTH CENSUS] (table titled “Aggregate Population at each Census”); *id.* at 18 tbl.VI (table titled “Chinese, Japanese, and Civilized Indian Population at each Census”).

<sup>113</sup> REPORT OF THE NINTH CENSUS, U.S. HOUSE OF REPRESENTATIVES, 41ST CONG., 51 (2d Sess. Jan. 18, 1870) (cited in NOBLES, *supra* note 12, at 51). The enumeration bill for the 1870 census was never passed, partly because it “required an automatic reduction in representation to those states that refused blacks the right to vote.” ANDERSON, *supra* note 47, at 77. In the end, the 1870 Census was conducted under the law governing the census of 1850. *Id.* at 78.

1. *Documentation and Anxiety.*—It may be that the Chinese were added to the census partly because of the census: both because of the problems they presented in census categorizing as well as a result of early census data itself. While there had been no formal category in the national census for the Chinese, they were reported by federal enumerators in both 1850 and 1860, mainly because California was attempting to quantify their presence and was having some trouble deciding how to classify them.<sup>114</sup> In the 1853 publication of the *The Seventh Census of the United States: 1850*, California's own state census, conducted in 1852, is appended following that state's statistical tables.<sup>115</sup> The first table lists California's population, by county, under four main categories: Whites, Colored (Black and Mulatto), Indians Domesticated, and Foreign Residents. Each category is further broken down by sex and age.<sup>116</sup> For four California counties there are notations next to their total populations indicating that thousands of Chinese were included in the aggregate but not listed in any of the main categories.<sup>117</sup> In fact, the annotation for Nevada County explicitly notes almost 4,000 "foreign residents over 21 years" who are Chinese who have not been listed as "Foreign Residents."<sup>118</sup> In all, 9,809 Chinese were effectively unclassifiable by color,<sup>119</sup> and not included as foreign residents.<sup>120</sup> On the other hand, their presence was noteworthy enough that they were the only

<sup>114</sup> The federal officials were having some trouble of their own in 1850: in the Nativity tables for the foreign born population, "China" and "Asia" appear as separate options. J.D. B. DEBOW, SUPERINTENDENT OF THE CENSUS, U.S. DEPT' OF INTERIOR, THE SEVENTH CENSUS OF THE UNITED STATES: 1850, at xxxvii tbl.XV (1853) [hereinafter SEVENTH CENSUS] (table titled "Nativities of the Population of the United States, Place of Birth—Foreign"). Moreover, of the countries that are considered part of Asia, under any definition, China is the only one separated out. *Id.*

<sup>115</sup> *Id.* at 981.

<sup>116</sup> *Id.* at 982 tbl.I (table titled "Population—Whites, Colored, Indians domesticated, and Foreigners—1852").

<sup>117</sup> Nevada County included in its aggregate 3,886 Chinese, Placer County included 3,019 Chinese in its aggregate, Sacramento County counted 804 Chinese not counted elsewhere, and Yuba County included 2,100 Chinese in its aggregate. *Id.*

<sup>118</sup> *Id.* The final notation for the total aggregate population of the state reads in part: "There are many inconsistencies in the aggregates, and it has been almost impossible to frame a table from them. The best, however, has been done; and great labor and pains have been expended upon the work." *Id.*

<sup>119</sup> Numerically, compare this with 758 Chinese counted nationally two years earlier in the federal Census of 1850. The difference in the national and state counts could be the result of counting discrepancies or immigration in the intervening two years, or both.

<sup>120</sup> The Secretary of State's report accompanying the abstracts of the 1852 California census suggests that the counties that did not separate out the Chinese counted them as foreign residents and that therefore the number of Chinese was much higher than the official enumeration. "The counties of Nevada, Placer, and Yuba have reported nine thousand eight hundred and nine Chinese. The other counties have enumerated them without discrimination under the general head of foreign residents, the number of Chinese is believed to approximate twenty-five thousand." GOVERNOR'S MESSAGE AND REPORT OF THE SECRETARY OF STATE ON THE CENSUS OF 1852, OF THE STATE OF CALIFORNIA 7 S. DOC. NO. 14 (Ca. 1853). The state abstracts make clear that almost every county in California counted foreign residents as a separate category among the color categories, so that one cannot tell whether the Chinese were separated out as a nationality or a color.

nationality that merited separate mention in the general population figures.<sup>121</sup> It strikes me that the most obvious explanation for the failure of California state enumerators to classify the Chinese under their existing categories was their own inability to decide *how* to classify them using those categories. The decision not to include them as either white or foreign residents might suggest they were considered closer to “colored” and yet not listed there because they were considered neither black nor mulatto, which were the only options for the “colored” population.

This explanation is supported by subsequent category changes. While unclassifiable in 1850, the Chinese were partially recognized as a color in 1860. In 1860 federal census officials created the first *racial* category for those who would later be called Chinese when they formally counted “Asiatics” within California and classified them as a color in that state’s tables.<sup>122</sup> Prior to 1860, in California and elsewhere, Chinese were generally classified, when they were classified at all, as foreign born by nativity. However, in the 1860 census, the data for California alone listed Asiatic along with White, Free Colored, and Indian in its tabulation of the “population by color and condition.”<sup>123</sup> Moreover, based on census figures for the foreign-born population in California at the time, it appears that despite the possible breadth of the term, all those reported as Asiatic were of Chinese origin.<sup>124</sup> That “Asiatic” effectively meant “Chinese” is further supported by the fact that “China” and “Asia” are listed as separate options on the nativity table, and the numbers make clear that the 346 residents of California who were from “Asia” are not included under “Asiatic” in the table classifying the population by color and condition.<sup>125</sup>

With the introduction of an “Asiatic” category in the reporting on California’s population in the federal census of 1860, the Chinese began the shift from being classified by nativity to being classified by color. However, it was not a categorical or epistemological shift that had solidified. There was still abundant confusion in 1860 about whether and how to un-

<sup>121</sup> The actual schedules for the California census of 1852 support this account of categorical confusion. Although existing records are transcriptions of the original, it appears that the Chinese were separated out and noted as Chinese but not classified by color. CALIFORNIA CENSUS OF 1852 (Sierra County, Francis Anderson enumerator) 5, 9, 10, 13, 22, 24–25, 62 (transcribed by Daughters of the American Revolution 1935) (1852) (noting “34 Chinese” or “10 Chinamen” interspersed among lists of names).

<sup>122</sup> CENSUS OFF., U.S. DEP’T OF INTERIOR, POPULATION OF THE UNITED STATES IN 1860, at 28 (1864) [hereinafter EIGHTH CENSUS]. I am indebted to Margo Anderson for bringing this to my attention.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* Although the category “Asiatic” appears in the final 1860 census report, it must have been added after the actual enumeration. The schedules for California are the same as those used elsewhere, with the choices for color being white, black, and mulatto. On the returned schedules, however, the Chinese are evident from the “Place of Birth” column and are generally noted in the “Color” column as “Mon.” for Mongolian or “Chi.” for Chinese. CENSUS OFF., U.S. DEP’T OF INTERIOR, EIGHTH CENSUS, 1860, CALIFORNIA, Nevada County 227, Sacramento County 385 (1860).

<sup>125</sup> *Id.* at 34 tbl.5 (table titled “Nativities of Population”).

derstand the Chinese as a distinct race. For example, although formally listed under "color and condition" for California, in other figures for the state, Asiatics were tabulated, along with Indians and "half-breeds," as part of the white population.<sup>126</sup> Similarly, even in a later publication of statistics from 1860, compiled for the Paris Exposition of 1867, the racial breakdown of the foreign and native populations in the United States notes that whites include Indians and Chinese.<sup>127</sup> Thus, these categorical ambiguities suggest that through much of the 1860s the Chinese remained racially ambiguous within the color cosmology of the census and the nation.

It was not only the classification quandary the Chinese posed, but also the number of them counted and the panic that attended their increase, that may explain their formal recognition as a race in the federal census of 1870. Although the absolute increase in Chinese was minuscule, the relative increase between 1850 and 1870 was dramatic. Census takers officially counted 758 Chinese in 1850,<sup>128</sup> compared with 35,565 in 1860.<sup>129</sup> That number almost doubled by 1870.<sup>130</sup> The rapid expansion of their numbers was likely a cause for further documentation, particularly because newly arrived Chinese were geographically concentrated in California, and hence more visible.<sup>131</sup> Indeed, of all the foreign born in California, the Chinese

<sup>126</sup> *Id.* at 33 tbl.4 (table titled "Free Population, Native and Foreign, by Counties"). Oddly, in a preliminary report on the 1860 census, the entire population of California is classified as either white, free colored, Indian, half-breed, or Chinese. However, Indians, half-breeds, and Chinese are only separated out for half of California's counties. For the other 20 counties in the state, these groups are included in the white population, although the total numbers for each group are noted. CENSUS OFF., PRELIMINARY REPORT ON THE EIGHTH CENSUS: 1860 247 tbl.41 (1862) (table titled "Population of the United States by Counties: State of California").

<sup>127</sup> ALEXANDER DELMAR, DIR. OF THE U.S. BUREAU OF STATISTICS, STATISTICS OF THE UNITED STATES 14, 17 (1867). Moreover, in the actual returns for 1860, although the Chinese are usually noted as Chinese or Mongolian in the "Color" column, they are often, though not always, counted among the total number of white males at the bottom of each page. See, e.g., CENSUS OFF., U.S. DEP'T OF INTERIOR, EIGHTH CENSUS, 1860, CALIFORNIA, Nevada County 339, San Francisco County 925, Yuba County 759 (1860). How the Chinese were classified seemed to depend on the individual enumerator because it varied within counties. Sometimes the racial confusion of the individual enumerator is evident. In one case, for example, "5 Chinamen" is written at the bottom of the page, crossed out, and that number is added to the total number of white males. *Id.* at Amador County 287.

<sup>128</sup> SEVENTH CENSUS, *supra* note 114, at xxxvi tbl.XV (table titled "Nativities of the Population of the United States, Place of Birth—Foreign").

<sup>129</sup> FRANCIS WALKER, SUPERINTENDENT OF THE CENSUS, U.S. DEP'T OF THE INTERIOR, VITAL STATISTICS OF THE UNITED STATES 670 tbl.XXX (1872) (table titled "Ages, with sex at each period of life, of the Chinese and the Civilized Indian Population of the United States, at the Censuses of 1870 and 1860").

<sup>130</sup> The 1870 Census counted 64,254 Chinese. NINTH CENSUS, *supra* note 112, at 20 tbl.VII (table titled "True Population of the United States—1870"); see also LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 8 (1995). On the early Chinese experience in California, see generally STUART CREIGHTON MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE 1785–1882 (1969); LYMAN, *supra* note 109; SHIN-SHAN HENRY TSAI, THE CHINESE EXPERIENCE IN AMERICA (1986); CHAN, *supra* note 109.

<sup>131</sup> The geographic concentration was rather stark. In 1860, the 34,933 Chinese in California were

represented the highest percentage from any one country.<sup>132</sup> By 1870, the Chinese were 8.6 percent of the population of California, constituted 25 percent of the wage-earning force of the state,<sup>133</sup> and made up 46 percent of the labor force in San Francisco's four main industries.<sup>134</sup> Furthermore, the late 1860s saw a dramatic spike in Chinese immigration as the Central Pacific Railroad's need for labor grew; Chinese arrivals into San Francisco doubled between 1867 and 1868 and stayed between 10,000 and 15,000 a year until 1870.<sup>135</sup> During this period, 90 percent of the workers on the railroad were Chinese.<sup>136</sup> Despite their pivotal role in California's economic boom, the Chinese were nonetheless a source of deep anxiety and the census proved an effective means of quantifying and perhaps controlling the social peril and racial ambiguity they appeared to present.<sup>137</sup>

2. *Labor Anxieties.*—Chinese visibility was heightened by their geographic and employment concentrations. The anxiety that their increasing presence engendered was partly anxiety over changes in the labor market. Of course, in nineteenth-century California, labor anxiety was, as it has been in countless other times and places, inextricably bound up with race anxiety,<sup>138</sup> which may help explain why the Chinese were counted and racialized at the same time. The widespread anti-Chinese sentiment in California at the time "was powerfully mediated by short- and long-term class interests of the white population."<sup>139</sup> Indeed, historians charge organized labor as being the "backbone of the anti-Chinese movement on a national level."<sup>140</sup> This was due in part to a larger national fear, fed by the "myth of Chinese coolies,"<sup>141</sup> that on the heels of the abolition of slavery, the Chinese

98% of the 35,565 nationwide. *STATISTICS OF THE UNITED STATES IN 1860*, at liii (1866). They also made up a little over nine percent of the total population of the state. *EIGHTH CENSUS*, *supra* note 122, at xxviii, 28, 34.

<sup>132</sup> They were followed closely by Irish with 33,147. *Id.* at 34. The third largest segment of foreign-born in California were Germans, who totaled 21,646. *Id.* By 1870 California's population of Chinese was more than ten times that of any other state or territory in the U.S. *NINTH CENSUS*, *supra* note 112, at 20 *tbl.VII* (table titled "True Population of the United States—1870").

<sup>133</sup> RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA* 216 (1990).

<sup>134</sup> *Id.* at 232.

<sup>135</sup> *Id.* at 237 (citing statistics provided in MARY COOLIDGE, *CHINESE IMMIGRATION* 498 (1909)).

<sup>136</sup> *Id.* at 230.

<sup>137</sup> In using the word anxiety, I am trying to capture the mass social manifestation of a whole range of negative feelings toward the Chinese, but in doing so I do not mean to gloss over the legal obstacles, overt hostility, hatred, and violence the Chinese consistently suffered during this period. See CHAN, *supra* note 109, at 48–52; LYMAN, *supra* note 109 at 58–62; TSAI, *supra* note 130, at 67–72.

<sup>138</sup> DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 179 (1991).

<sup>139</sup> TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 164 (1994).

<sup>140</sup> MILLER, *supra* note 130, at 195; ALMAGUER, *supra* note 139, at 179.

<sup>141</sup> TSAI, *supra* note 130, at 3–7. "Because of American involvement in the coolie traffic between China and Latin America, the term "coolie," which carried with it connotations of servitude, slavery, or

would become a new feudal class, driving down wages and undermining workers' rights.<sup>142</sup> Organized labor also exploited the prevailing anxiety over the Chinese for its own purposes, "as a major unifying force for the organization of white skilled labor in California."<sup>143</sup> Thus, white workers in the 1850s and 1860s, threatened by what they perceived to be the threat of Chinese labor in mining, farming, and manufacturing,<sup>144</sup> drew upon abundant negative images of the Chinese in the popular press to racialize their antipathies.<sup>145</sup> While the merchants and railroad men who profited handsomely from Chinese labor found the Chinese worker to be peaceable, industrious, and efficient,<sup>146</sup> the new penny press prolifically spread contrary accounts of the filth, vice, deceit, despotism, idolatry, polygamy, and infanticide said to be common among the Chinese.<sup>147</sup> Thus, both because of and in spite of the significant role of Chinese labor in the industrial development of California and the country, Chinese suffered overtly racial hostility from those who saw them as a racial, cultural, and economic threat,<sup>148</sup> as well as implicit degradation from those who welcomed them as the "yellow proletariat."<sup>149</sup>

peonage, came to be used loosely in the United States to designate all Chinese immigrants. But however restricted the rights of early Chinese immigrants in the United States may have been, the term coolie is an inaccurate name for them." *Id.* at 6.

<sup>142</sup> MILLER, *supra* note 130, at 191–92, 195.

<sup>143</sup> ALMAGUER, *supra* note 139, at 179. The significant Irish involvement in the anti-Chinese movement can be seen as part of a larger effort on the part of a white group that was denigrated by other whites to better their own treatment through appeals to a "pan-white supremacy." JACOBSON, *supra* note 108, at 159. Jacobson notes that it is one of the ironic circumstances of U.S. cultural history "that an Irish immigrant in 1877 could be a despised Celt in Boston—a threat to the republic—and yet a solid member of The Order of Caucasians for the Extermination of the Chinaman in San Francisco, gallantly defending U.S. shores from an invasion of 'Mongolians.'" *Id.* at 5.

<sup>144</sup> ALMAGUER, *supra* note 139, at 164–74.

<sup>145</sup> As discussed by Miller:

The greatly increased attention afforded by the newly established mass media to events in China between 1850 and 1870 brought the question of Chinese civilization to the notice of millions of Americans who had previously ignored its existence. In the process, the unfavorable stereotype of the Chinese initially shaped by traders, missionaries, and diplomats was marketed more widely.

MILLER, *supra* note 130, at 139. This was certainly not the first or the last time that labor disputes would be bound up with race anxiety and racism. See JACOBSON, *supra* note 108, at 152–54 (describing the New York City draft riots of 1863). Nor was the reaction only one in which image was at stake. Boycotts of goods produced by Chinese labor led to the "white label" which identified goods produced by "White Men." SAXTON, *supra* note 111, at 74.

<sup>146</sup> TSAI, *supra* note 130, at 17 (quoting Leland Stanford, president of the Central Pacific Railroad in Erle Heath, *Trail to Rail*, Southern Pacific Bulletin, XV at 12 (1927)).

<sup>147</sup> MILLER, *supra* note 130, at 147, 197, 201; see also NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN* *passim* (2001). As Shah notes, "Nineteenth-century San Francisco health officials and politicians conceived of Chinatown as the preeminent site of urban sickness, vice, crime, poverty, and depravity." *Id.* at 1.

<sup>148</sup> SALYER, *supra* note 130, at 10.

<sup>149</sup> TAKAKI, *supra* note 133, at 236–40 ("Whites would be the mind and the Chinese the body; the 'inventive genius of Americans' would utilize 'Asiatic skill and muscle.'"). Not surprisingly, support for Chinese immigration came from industrialists hungry for workers. ROGER DANIELS, *NOT LIKE US:*

3. *Immigration Anxieties.*—Another related explanation for the addition of this new and newly racialized category in 1870 is that the anxiety over proliferating Chinese labor was exacerbated in 1868 when China and the United States signed the Burlingame Treaty, which allowed for unrestricted immigration between the two countries.<sup>150</sup> While the goal of the treaty was to increase commerce and trade,<sup>151</sup> the means for achieving that goal was a broad endorsement of open migration. The Treaty declared that citizens of the United States visiting or residing in China and Chinese subjects visiting or residing in the United States “shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.”<sup>152</sup>

Needless to say, in an atmosphere in which few distinguished between coolie labor and free Chinese immigration,<sup>153</sup> and at a time when the concentration of Chinese in California was exaggerating an imagined problem into hysterical proportions, disillusionment with the Burlingame Treaty was almost immediate.<sup>154</sup> The ink was barely dry on the Treaty when lobbying began on amendments to allow immigration restrictions.<sup>155</sup> The next year Congress tried unsuccessfully to pass legislation restricting Chinese immigration.<sup>156</sup> And there were jobless Chinese coming from another direction as well. It was also in 1869 that the transcontinental railroad was completed at Promontory Point, Utah. Built largely with Chinese labor, technical ingenuity, and blood,<sup>157</sup> once it was complete nearly 10,000 unemployed Chinese began making their way back to California to look for work.<sup>158</sup> Within a very short time of these events, a Chinese category was added to the census form.

The “Chinese question” or “Chinese problem,” as the mass hatred was euphemistically called,<sup>159</sup> became a national issue in 1870. The same year in which they were added to the census, seventy-five Chinese workers ar-

IMMIGRANTS AND MINORITIES IN AMERICA, 1890-1924, at 7-8 (1997).

<sup>150</sup> HOUSE COMMITTEE ON FOREIGN AFFAIRS, 51ST CONG., REPORT ON CHINESE IMMIGRATION, H.R. REP. NO. 2915, at 9-10 (1890) [hereinafter REPORT ON CHINESE IMMIGRATION].

<sup>151</sup> SALYER, *supra* note 130, at 9.

<sup>152</sup> REPORT ON CHINESE IMMIGRATION, *supra* note 150, at 10.

<sup>153</sup> MILLER, *supra* note 130, at 197.

<sup>154</sup> *Id.* at 134-35.

<sup>155</sup> SALYER, *supra* note 130, at 9.

<sup>156</sup> CONG. GLOBE, 41st Cong., 2d. Sess. 299-301 (1869). This bill was not a general prohibition against Chinese immigration but was instead directed at contract labor. As Senator Williams pointed out in debate on the bill, “All that this bill proposes to do is to prevent as far as practicable the importation of coolies and dissolute Chinese women into the United States.” *Id.* at 300 (statement of Sen. Williams).

<sup>157</sup> Ninety percent of the 10,000 workers on the Central Pacific Railroad were Chinese, and they were responsible for the perilous task of getting the line through the Sierra Nevada mountains. TAKAKI, *supra* note 133, at 230; TSAI, *supra* note 130, at 16-17. It is estimated that 1,200 Chinese lost their lives working on the railroad. *Id.* at 17.

<sup>158</sup> CHAN, *supra* note 109, at 32.

<sup>159</sup> TAKAKI, *supra* note 133, at 223 (citing contemporary sources).

rived in the little Massachusetts town of North Adams, hired by the owner of a shoe factory as strikebreakers.<sup>160</sup> They drew national attention as the vanguard of an invasion, an advancing Chinese army of laborers.<sup>161</sup> It was also in 1870 that Bret Harte published his famous poem, "Plain Language from Truthful James," popularly known as "The Heathen Chinee."<sup>162</sup> Harte's poem was a popular sensation, reprinted in countless newspapers around the country, and it fueled anti-Chinese feeling.<sup>163</sup>

Seen in the context of cheap and expanding Chinese labor, open and increasing Chinese immigration, and an accelerating national fear, anxiety, and hostility toward the Chinese, the addition of a Chinese census category can only be seen as a desire for control. In a Foucaultian sense, counting them was a form of surveillance, a mechanism for imposing order and racial clarity on the proliferation of an ambiguous alien.<sup>164</sup> Moreover, the census would serve to document this source of anxiety during an era in which documentation was more explicitly used in the service of racial discipline and power.

4. *The Anxieties of Racial Science.*—The racism of both friends and enemies of Chinese labor and the deeply racial debate over immigration makes clear that popularly they were not seen as simply coming from a different country but as representing a different race at a time when social theories of race were decidedly biological. Indeed, the quantification craze that helped generate the field of statistics and converted the census into a full-blown demographic event also had, in the late nineteenth century, a strong hand in theories of racial inferiority. "Another trend, equally irresistible, swept through the human sciences—the allure of numbers, the faith that rigorous measurement could guarantee irrefutable precision. . . . Evolution and quantification formed an unholy alliance; in a sense, their union forged the first powerful theory of 'scientific' racism . . ."<sup>165</sup> In 1839, the same year that Samuel Morton's famous *Crania Americana* appeared, the American Statistical Association was founded.<sup>166</sup> As Melissa Nobles has pointed out, beginning in 1840 the census played an important role in "reinforcing the scientific valence of racial discourse."<sup>167</sup>

<sup>160</sup> *Id.* at 232–35.

<sup>161</sup> *Id.* at 234. The reaction was not uniform of course. Employers were delighted: they cost less and produced more than white workers. *Id.* at 235.

<sup>162</sup> In the poem, a cheating card player, Bill Nye, is out-cheated by the Chinese Ah Sin. When Nye rises to attack Sin, he says, "We are ruined by Chinese cheap labor." Brent Harte, *Plain Language from Truthful James*, in YALE BOOK OF AMERICAN VERSE 454–56 (Thomas R. Lounsbury ed., 1912).

<sup>163</sup> TAKAKI, *supra* note 133, at 222–24.

<sup>164</sup> See *supra* text accompanying notes 88–90.

<sup>165</sup> GOULD, *supra* note 38, at 73–74.

<sup>166</sup> NOBLES, *supra* note 12, at 32.

<sup>167</sup> *Id.* at 32; see also GOLDBERG, *supra* note 12, at 30.

It was precisely at the same time that the Chinese began entering California that the new sciences of ethnology, craniometry, and phrenology were providing scientific explanations not only for the physical differences between races, but also for their claimed differences in morality, capacity, and worth. Morton's work inspired the scientific theories of George Gliddon and Josiah Nott;<sup>168</sup> in fact, it was Nott's efforts to prove his theory of polygenesis, and those of the Congressmen working at his behest, that prompted the counting of mulattoes on the 1850 Census.<sup>169</sup> In 1855, the Count Joseph Arthur de Gobineau published his highly influential multi-volume treatise on the inequality of the races.<sup>170</sup> The "Bible of nineteenth-century racists,"<sup>171</sup> his book was quickly translated and published in the United States because the translator thought the book especially important in America, as it was experiencing the introduction of a fourth race into its midst—the Chinese.<sup>172</sup> His theory was based on respected scientific research of the time and inspired further scientific studies of race as the century wore on.<sup>173</sup> The Chinese in these studies tended to fare better than the brown and

<sup>168</sup> WILLIAM STANTON, THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA 1815-59 45-53, 65-72 (1960).

<sup>169</sup> NOBLES, *supra* note 12, at 36-42. Polygenesis is the belief that different races do not share a common origin and represent different species. Under this theory, mulattoes, as the offspring of different species, would show decreased fertility and shorter life spans. *Id.* at 36-37. According to Nobles, the 1850 census "boldly ushered in the inextricable and enduring link between census categorization, racial scientific thought, and public policy in the United States." *Id.* at 42.

<sup>170</sup> COUNT JOSEPH ARTHUR DE GOBINEAU, ESSAY ON THE INEQUALITY OF RACES (1853-55); see MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 63-64 (2d ed. 1994); Gisela Kaplan & Lesley J. Rogers, *Race and Gender Fallacies: The Paucity of Biological Determinist Explanations of Difference*, in CHALLENGING RACISM AND SEXISM: ALTERNATIVES TO GENETIC EXPLANATIONS 68 (1994).

<sup>171</sup> STANTON, *supra* note 168, at 174.

<sup>172</sup> *Id.* at 174-75.

<sup>173</sup> Kaplan & Rogers, *supra* note 170, at 69-72. Samuel Morton's famous cranial studies are discussed and critiqued at length by Gould, who actually reexamines his data. GOULD, *supra* note 38, at 50-69. Nor have scientific accounts of racial inequality been relegated to the past; anthropologists in the 1960s, as well as sociobiologists from the 1970s to today, continued to espouse genetically determined racial inferiority. J PHILIPPE RUSHTON, RACE, EVOLUTION, AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE 108 (1995); see, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1996) (arguing that African Americans have lower IQs than whites and that the difference is partly genetic). The work of the Human Genome Project (HGP) to date indicates that there is no biological basis for race; it seems clear that people are much more alike than they are different. Indeed, the HGP has found that genetic variation is much greater within racial and ethnic groups than between them. Karen Nelson, *The Human Genome Project: Hereditary Diseases and Implications for Gene Therapy*, in THE HUMAN GENOME PROJECT AND MINORITY COMMUNITIES: ETHICAL, SOCIAL, AND POLITICAL DILEMMAS 17 (Raymond A. Zilinskas & Peter J. Balint eds., 2001). But there are also reasons to be cautious about how information from the HGP will be used. "History teaches that one must be wary of the nation's institutions and social strategies when it comes to situations where genetic information is linked with racial, ethnic, and class differences." Patricia A. King, *The Past as Prologue: Race, Class, and Gene Discrimination*, in GENE MAPPING: USING LAW AND ETHICS AS GUIDES 94, 95 (George J. Annas & Sherman Elias eds., 1992).

black races,<sup>174</sup> but they were considered decidedly inferior to whites.<sup>175</sup> The already crude judgments of ethnology were expressed even more crudely in the popular press, with the biological characteristics of the Chinese becoming the basis for their inability to assimilate and civilize.<sup>176</sup> Like the census itself, “the racial sciences were in fact racializing sciences, ever responding to the political imperatives” of slavery, imperialism, and immigration and in turn creating justifications and explanations for those questions.<sup>177</sup>

5. *Racing the Chinese.*—While the addition of a Chinese category to the census appeared to be a response to popular anxiety and scientific judgment, there is some evidence that the census helped in turn to stabilize official race thinking with respect to the Chinese. Given the racial tenor of the prevailing concerns over the Chinese, it is not surprising that the census would not only document and count Chinese, it would help to officially recognize and racialize them.

As Claire Jean Kim points out, arriving when they did, “during escalating national strife over slavery and Black-White relations, Chinese immigrants were a racial wild card of sorts.”<sup>178</sup> The Chinese exacerbated a popular confusion between nation-based and color-based notions of race.<sup>179</sup> It took a number of official pronouncements to begin to situate them racially, and the courts were among the most visible of official speakers on race. Courts were also influenced by both popular and official opinion, and particularly by the census, one of the “key actors in the creation and enforcement of these public fictions called races.”<sup>180</sup> For example, in *People v. Hall*,<sup>181</sup> the California Supreme Court exhibited genuine confusion over how to racially classify the Chinese when it was called upon to decide whether a Chinese witness fell within a statute prohibiting blacks and Indians from testifying in an action in which a white person was a party. The court surmised that the Chinese could be construed as Indians because Columbus had made the same mistake in reverse,<sup>182</sup> and that the term “Black” also applied to the Chinese because “we understand it to mean the opposite

<sup>174</sup> According to Nott, the Chinese and Asian Indians were able to achieve a semicivilized state while the American Indian and Negroes could not rise above a savage state. MILLER, *supra* note 130, at 158 (citing J.C. Nott, *Instincts of Races*, XIX NEW ORLEANS MED & SURGICAL J. 1, 1–16 (1866)).

<sup>175</sup> MILLER, *supra* note 130, at 155.

<sup>176</sup> *Id.* at 159.

<sup>177</sup> JACOBSON, *supra* note 108, at 33.

<sup>178</sup> Kim, *supra* note 111, at 109.

<sup>179</sup> Reynolds J. Scott-Childress, *Race, Nation, and the Rhetoric of Color: Locating Japan and China, 1870–1907*, in RACE AND THE PRODUCTION OF MODERN AMERICAN NATIONALISM 3, 6 (Reynolds J. Scott-Childress ed., 1999) (discussing how conceptions of the Chinese as a “nation-race” came up against the “biochromatic model of races” that was already in place).

<sup>180</sup> JACOBSON, *supra* note 108, at 3.

<sup>181</sup> 4 Cal. 399 (1854).

<sup>182</sup> *Id.* at 400–02.

of ‘white.’”<sup>183</sup> The court bemoaned the fact that at the time the law was passed ethnology “was unknown as a distinct science, or if known, had not reached that high point of perfection which it has since attained . . .”<sup>184</sup> Ultimately the court fell back on the intent of the legislature.

It can hardly be supposed that any Legislature would attempt this [protecting whites from the testimony of blacks and Indians] by excluding domestic negroes and Indians, who not unfrequently have correct notions of their obligations to society, and turning loose upon the community the more degraded tribes of the same species, who have nothing in common with us, in language, country or laws.<sup>185</sup>

In other words, the court in *Hall* was trying to situate the Chinese within competing discourses of race, using differences based on color, species, and tribe as possible vehicles for civic exclusion.

In cases after the 1870 Census, such as *In re Ah Yup*,<sup>186</sup> where a California court determined that the 1870 law allowing naturalization for whites and persons of African nativity and descent did not apply to the Chinese, there is more clarity and conviction that Chinese are of the Mongolian race, and that the Mongolian race is not white.<sup>187</sup> While it is difficult to demonstrate causation between census classification and official understandings of race, it is fairly safe to say that by classifying the Chinese as a race at a time when they were both racially ambiguous and inspired deep racial anxiety, the census participated in changing the Chinese from a group defined by national origin to one defined by race. In doing so, the census helped to assign and institutionalize a racial identity for the Chinese as both Chinese and non-white, the latter being the most legally significant.

My hypothesis is that the early census data from California, the racial anxiety occasioned by Chinese labor, the dramatic increase in Chinese immigration during the 1860s, especially the spike beginning in 1868, the signing of the expansive Burlingame Treaty in the same year, and the popularity of scientific racism together offer some explanation for the new racial category, a category which in turn helped to solidify and affix a view of the Chinese as a race. Moreover, when this census change is read in light of the prevailing antipathy toward the Chinese, it is best explained as a method of surveillance and control. However, before the Chinese could be categorically excluded and erased, they had to be recognized as a category. If this narrative is right, the census played a dual role: it initially occasioned a heightened awareness of increasing Chinese immigration by recognizing them, which in turn fueled fear and racism; and it was also part of the re-

<sup>183</sup> *Id.* at 403.

<sup>184</sup> *Id.* at 400.

<sup>185</sup> *Id.* at 403.

<sup>186</sup> 1 F.Cas. 223 (C.C.D Cal. 1878) (No. 104).

<sup>187</sup> *Id.* at 224.

sponse to the threat such an increase posed to the imagined community. By documenting difference, the census both defined the national unit and aggravated anxiety over national unity.

### B. *The Chinese in the National Imagination*

Against the backdrop sketched out above, counting the Chinese must be seen as primarily an exclusionary gesture, an effort to count them out of the growing nation. Well before 1870 the Chinese were routinely likened to both blacks and Indians,<sup>188</sup> and in that comparison seen as incompatible with Republican governance.<sup>189</sup> Indeed, as *People v. Hall* presaged, because they posed a threat to the stability of the polity, as it was traditionally configured, the Chinese came to be defined as undesirable members of that polity and were characterized as incapable of the duties membership conferred.<sup>190</sup>

The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. . . . The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.<sup>191</sup>

In the years leading up to the 1870 Census the nation was undergoing dramatic changes in its racial identity, and not easily. If prior to the Civil War a comparison with blacks and Indians was sufficient to exclude a group from the national imagination, after the War it was not. In 1865, the Thirteenth Amendment abolished slavery,<sup>192</sup> and in 1868 the Fourteenth Amendment extended citizenship and equal protection to all persons born in the United States.<sup>193</sup> In keeping with these changes, Congress amended the naturalization law, previously limited to free white persons, and extended

<sup>188</sup> TAKAKI, *supra* note 133, at 216–21.

<sup>189</sup> ROGERS M. SMITH, CIVIC IDEALS: CONFLICTED VISIONS OF CITIZENSHIP IN U.S. HISTORY 362 (1997); Volpp, *supra* note 105, at 62–63.

<sup>190</sup> 4 Cal. 399, 403 (1854).

<sup>191</sup> *Id.* at 404–05.

<sup>192</sup> U.S. CONST. amend. XIII.

<sup>193</sup> U.S. CONST. amend. XIV, § 1. In 1870, the Fifteenth Amendment, the last of the Reconstruction amendments, secured the right of all citizens to vote regardless of race or color. U.S. CONST. amend. XV, § 1. The distinction between “persons” in the Fourteenth Amendment and “citizens” in the Fifteenth Amendment was a compromise “between a vision of universal racial equality and the hatred for Chinese immigrants . . . .” Harris, *supra* note 11, at 1935. See generally John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigration and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996).

naturalization to aliens of African nativity and descent.<sup>194</sup> Blacks had become, at least formally, part of the nation.<sup>195</sup> Furthermore, while Indians were excluded from the 1870 naturalization statute, many Indians were granted citizenship through treaties and other statutes.<sup>196</sup> Given the expanding racial boundaries of the nation at this uneasy time in American history, it is not surprising that there needed to be a group against whom the nation could be defined, a group that was incurably alien.<sup>197</sup>

Courts, beginning in 1878, consistently concluded that the Chinese, and then other Asians, were excluded from naturalization because “[n]either in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words ‘white person’ used in a sense so comprehensive as to include an individual of the Mongolian race.”<sup>198</sup> In fact, the court in *In re Ah Yup* examined the legislative history of the 1870 Naturalization Act and concluded that it was “clear from the proceedings that [C]ongress retained the word ‘white’ in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization.”<sup>199</sup> In addition, the right of Chinese to birthright citizenship under the Fourteenth Amendment was not clear until the Supreme Court’s decision in *Wong Kim Ark*.<sup>200</sup> In that decision, the Court spelled out that the Fourteenth Amendment contemplates only two sources of citizenship—birth and naturalization.<sup>201</sup> The Court concluded that just because Congress can prohibit Chinese people from becoming naturalized citizens does not mean it can “exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: ‘All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United

<sup>194</sup> Act of July 14, 1870, 16 Stat. 254.

<sup>195</sup> To use a distinction elaborated by Linda Bosniak, and applied to Asian Americans by Leti Volpp, blacks had the legal status of citizens without the rights of citizens. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000); Volpp, *supra* note 105, at 57.

<sup>196</sup> See *Elk v. Wilkins*, 112 U.S. 94, 100, 103–05 (1884) (describing the numerous treaties and statutes by which tribes and members of tribes were naturalized).

<sup>197</sup> LOWE, *supra* note 105, at 3–10.

<sup>198</sup> *In re Ah Yup*, 1 F. Cas. 223, 224 (C.C.D Cal. 1878) (No. 104); see also *In re Kanaka Nian*, 21 P. 993 (Utah 1889) (finding native Hawaiian insufficiently white and insufficiently enlightened to be naturalized as a citizen); *In re Saito*, 62 F. 126 (D. Mass. 1894) (finding Japanese not white for purposes of naturalization); *In re Gee Hop*, 71 F. 274 (N.D. Cal. 1895) (nullifying citizenship granted to Chinese by a state). It should be remembered, however, that only a decade earlier “white” was a term comprehensive enough to encompass the then more racially ambiguous Chinese. See *supra* text accompanying notes 126–27.

<sup>199</sup> 1 F. Cas. at 224. The court was mostly right. The retention of the word “white” in the statute also restricted naturalization under that law to Indians. See IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 43 (1996).

<sup>200</sup> *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that a child born in the United States to parents who are subjects of China is a United States citizen by virtue of the Fourteenth Amendment).

<sup>201</sup> *Id.* at 702.

States.”<sup>202</sup> But this clarification of the scope of birthright citizenship came almost 30 years after the Naturalization Act prohibited the Chinese from being naturalized. “Thus, through the latter half of the century, Asians remained the United States’ only immigrant group who were absolutely denied the right to become citizens.”<sup>203</sup>

The 1870 Census reflected these adjustments in national inclusion and exclusion. It was the first American census to have no questions about slaves.<sup>204</sup> It was the first American census to formally count all Indians under the heading of color<sup>205</sup> and, as previously discussed, the first to count Chinese as a color.<sup>206</sup> It is not surprising that this shift in the racial paradigm occurred during Reconstruction, a time in which the country’s struggle for regional reconciliation and unity was delicately balanced against inclusion and equality for blacks.<sup>207</sup> After the Civil War, Lincoln strove to foster a sense of national belonging that would correspond to the newly unified state, referring often to “the nation,” establishing the Thanksgiving holiday as “a symbol of shared national heritage”<sup>208</sup> and not pushing too hard for rights for blacks in order not to antagonize the South.<sup>209</sup> After Lincoln’s assassination, Johnson’s even greater efforts at southern reconciliation provoked Congress “to greater militancy.... The war had not been

<sup>202</sup> *Id.* at 704.

<sup>203</sup> Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 115 (2002).

<sup>204</sup> ALTERMAN, *supra* note 71, at 224; 200 YEARS OF CENSUS TAKING, *supra* note 50, at 26–27.

<sup>205</sup> 200 YEARS OF CENSUS TAKING, *supra* note 50, at 26–27. In most previous censuses Indians who were taxed had been counted, usually in a catch-all category, such as “All other free persons, except Indians, not taxed” in 1800, or in no formal category at all. *Id.* at 17, 21. However, by 1860, taxed or “civilized” Indians were reported as a color. The 1860 instructions to the marshals read, “Indians *not taxed* are not to be enumerated. The families of Indians who have renounced tribal rule, and who under State or Territorial laws exercise the rights of citizens, are to be enumerated. In all such cases write ‘Ind.’ opposite their names, in column 6, under heading ‘Color.’” CENSUS OFF., U.S. DEP’T OF INTERIOR, EIGHTH CENSUS, 1860, INSTRUCTIONS TO U.S. MARSHALS 14 (1860). However, Indians were still occasionally included in aggregate numbers as white. See *supra* note 126. Apart from special Indian censuses, Indians who were not taxed were not counted prior to 1870. 200 YEARS OF CENSUS TAKING, *supra* note 50, at 27. In 1870, the marshals were still instructed not to enumerate untaxed Indians on Schedule 1 but to count all Indians living off reservations. “Although no provision is made for the enumeration of ‘Indians not taxed,’ it is highly desirable, for statistical purposes, that the number of persons not living upon Reservations should be known. Assistant Marshals are therefore requested, where such persons are found within their subdivisions, to make a separate memorandum of names, with sex and age, and embody the same in a special report to the Census Office.” CENSUS OFF., U.S. DEP’T OF INTERIOR, NINTH CENSUS, 1870, INSTRUCTIONS TO ASSISTANT MARSHALS 12 (1870).

<sup>206</sup> See *supra* text accompanying notes 110–13.

<sup>207</sup> ANTHONY MARX, MAKING RACE AND NATION 124–27 (2000); see ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 (1989).

<sup>208</sup> MARX, *supra* note 207, at 124–27.

<sup>209</sup> *Id.* at 126 (“Lincoln had some sympathy for the impetus to grant blacks equal rights after the war. But he well understood that such a policy would directly contradict the pressing need to make peace with the former Confederacy.”).

won in order to lose the peace.”<sup>210</sup> Radical Reconstruction was underway. Hundreds of thousands of newly enfranchised blacks “surged to the polls, into political clubs, and into statehouses and houses of Congress”,<sup>211</sup> eventually electing sixteen black congressmen and two black senators.<sup>212</sup> But the inclusion of blacks in the nation, however uneasy, required exclusion somewhere else. Nations, unlike states, are predicated on feelings of collective belonging, “a specific sentiment of solidarity *in the face of other groups.*”<sup>213</sup> In other words, nationalist belonging always entails a sense of both who belongs and who does not belong. The Chinese, and to some extent the Indians,<sup>214</sup> served this exclusionary purpose; they were the groups in the face of whom the nation could define itself. To this end, the Chinese were “racially triangulated” with respect to whites and blacks.<sup>215</sup> They were seen in some respects as superior to blacks, but at the same time configured as foreign relative to both blacks and whites “in order to ostracize them from the body politic and civic membership.”<sup>216</sup> This racial triangulation was famously articulated by Justice Harlan in his dissent in *Plessy v. Ferguson*.<sup>217</sup> It is evident to Harlan that the racial boundaries of the nation are at stake, and he makes a plea for black inclusion at the expense of the Chinese.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.<sup>218</sup>

<sup>210</sup> *Id.* at 128.

<sup>211</sup> Harris, *supra* note 11, at 1933.

<sup>212</sup> MARX, *supra* note 207, at 129.

<sup>213</sup> Max Weber, *The Nation*, in NATIONALISM 21, 22 (John Hutchinson & Anthony D. Smith eds., 1994) (emphasis added).

<sup>214</sup> I say “to some extent” because the unique status of Indian tribes as domestic “nations” configured them from the beginning as both part of and apart from the nation.

<sup>215</sup> Kim, *supra* note 111, at 106–08. Kim conceives of the racial positioning of Asian Americans occurring on two axes, one being relative valorization (superior/inferior) and the other civic ostracism (insider/foreigner) and hence the triangulation. *Id.* at 108 fig.1.

<sup>216</sup> *Id.* at 107.

<sup>217</sup> 163 U.S. 537 (1896).

<sup>218</sup> *Id.* at 561 (Harlan, J. dissenting). This statement is surprising coming from the same Justice and the same dissent that spoke so forcefully and famously for racial equality and a color-blind constitution. But sadly, Harlan’s “references to the Chinese were not aberrational.” Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996).

When racial violence and economic depression shook the North's commitment to Reconstruction, racial reform was abandoned in favor of regional reconciliation, with the country focused more on resolving intra-white conflict than on incorporating blacks into the national fabric.<sup>219</sup> Anthony Marx argues that "[w]hites could be and were unified as a race through a return to formal and informal discrimination. Blacks thus served as a scapegoat for white unity, allowing for greater stability and reducing the impediment of regional antagonism standing in the way of further nation-state consolidation."<sup>220</sup> First, to count the Chinese and count them as a race during Reconstruction, a precarious time for white hegemony, looks decidedly exclusionary, locating them outside a white nation that was undergoing considerable tension in trying to make room for blacks. This is particularly true given that they were a race that was, almost by definition, alien. And the aftermath of Reconstruction helps explain why eastern and southern Europeans were never counted by race on the census; they were undergoing a gradual, if somewhat violent,<sup>221</sup> transformation into uncontroversial whites.<sup>222</sup> This post-Reconstruction consolidation of a white national identity, coupled with the polarized politics and deep antipathy toward the Chinese, suggests that counting the Chinese—on its face an ambiguous act—was meant to recognize them for the purpose of excluding and erasing them. It was an exclusionary act meant to solidify a fractured white majority by redrawing and clarifying the boundaries of whiteness and documenting those who were incompatible with the nation. The racial construction of the Chinese was tailor-made to serve this purpose of exclusion. But virtually every exclusion begins with compulsory visibility and identification; in short, it begins with recognition.

Political documents after the 1870 Census support the conclusion that counting the Chinese was a deeply disciplinary act, confirming a vision of the Chinese as a race singularly unable to conform to the American political system and integrate into the polity. In 1872, the California legislature passed a resolution calling on Congress to discourage further immigration from China because they found the Chinese "incapable of assimilation with our own race, ignorant of the nature and forms of our Government, and who manifest no disposition . . . to conform to our habits, manners, and customs."<sup>223</sup> California passed another resolution in 1874 requesting modification of the Burlingame Treaty for the same purpose.<sup>224</sup> By this time, anti-Chinese sentiment was widespread enough that modification of the Burlin-

<sup>219</sup> MARX, *supra* note 207, at 132–33.

<sup>220</sup> *Id.* at 136.

<sup>221</sup> JACOBSON, *supra* note 108, at 56–68 (documenting the lynchings of Italians and later of a Jew).

<sup>222</sup> *Id.* at 43, 91 (noting that although Reconstruction helped to keep vivid the distinction between white and nonwhite, there was nonetheless much variegation and hierarchy among whites until Caucasian unity began in the 1920s).

<sup>223</sup> H.R. MISCELLANEOUS DOCUMENT NO. 42-120, at 1 (1872) ("Resolutions of the Legislature of California").

<sup>224</sup> H.R. MISCELLANEOUS DOCUMENT NO. 43-204, at 1 (1874) ("Resolution of the Legislature of California").

game Treaty became an issue in the national election of 1880.<sup>225</sup> That same year, the Treaty was amended to allow the United States to “regulate, limit, or suspend” the coming of Chinese laborers without prohibiting them outright.<sup>226</sup> Two years later, Congress did just that, passing the first of the Chinese Exclusion Acts prohibiting Chinese laborers from coming to the United States for ten years.<sup>227</sup> Both in 1884 and 1888, the exclusion law was strengthened and, in 1902, the exclusion of Chinese labor was made indefinite.<sup>228</sup> The symbolic banishment of counting Chinese on the census took literal form with the Chinese Exclusion Acts.

The exclusion acts gave final government sanction and even further momentum to the paranoia about the Chinese that began with popularized negative stereotypes in the 1840s and was facilitated, however ironically, by official inclusion in the census. In both popular and legal venues, fears about the Chinese “reached hysterical proportions by the end of the century.”<sup>229</sup> The decision to enumerate the Chinese on the census, much like the exclusion acts that followed, had profound effects on the perception and treatment of the many Chinese who had made the United States their home. Both partook of the twin project of recognition and erasure, serving to make the Chinese at once more visible and more unwanted. Both were government acts that “made the unfavorable image of the Chinese the official definition of these people.”<sup>230</sup> And this official, racialized definition, heard as often on the Senate floor as in public discourse, was so virulent as to sound facetious. To give but one example of the hundreds that are available in the congressional record, Senator Mitchell, in debates on amendments to the Chinese Exclusion Acts, called Chinese immigration

<sup>225</sup> SALYER, *supra* note 130, at 14.

<sup>226</sup> Treaty between the United States and China, concerning immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826. The Treaty itself explained that the modification was occasioned by the “embarrassments consequent upon such immigration” and the Supreme Court famously explained the reasons for the modification as follows:

After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests, and therefore requested and obtained from China a modification of the treaty.

Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893).

<sup>227</sup> Act of May 6, 1882, ch. 126, 22 Stat. 58.

<sup>228</sup> Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; Act of April 29, 1902, ch. 641, 32 Stat. 176. See generally JULES BECKER, THE COURSE OF EXCLUSION 1882-1924: SAN FRANCISCO NEWSPAPER COVERAGE OF THE CHINESE AND JAPANESE IN THE UNITED STATES (1991); ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACTS (1998); SALYER, *supra* note 130; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

<sup>229</sup> MILLER, *supra* note 130, at 202.

<sup>230</sup> *Id.*

this most herculean of all gigantic evils that is being imposed upon and impressed upon us, from the shores of Asia, this evil, which embraces within it explosives more deadly than dynamite, an evil that depresses labor, corrupts morals, debases youth, makes merchandise of personal freedom and female virtue, mocks at justice, defies law, dwarfs enterprise, obstructs development, chains personal liberty, destroys personal freedom, menaces the public peace, invades domestic tranquillity, endangers the public welfare, converts whole sections of beautiful American cities—the homes of civilized, cultivated, and refined people—into squalid, wretched, crime-smitten, and leprous-spotted habitations of the lowest and most debased classes of the pagan Mongol . . .<sup>231</sup>

Given the social anxieties of the time and the reconfigurations in the nation's racial boundaries, the decision to officially count the Chinese on the Census of 1870, and to count them as a race rather than a nationality, was decidedly disciplinary.

### C. Disciplining the Chinese

It is not surprising that in this climate, arrived at and exacerbated in part by the social statistics of the census, the census would be the suggested instrument of further control. Foucault suggests that the compulsory visibility inherent in enumeration and the organization of living beings into statistical charts is itself a form of discipline.<sup>232</sup> But of course disciplinary measures are much more overt when, in addition to categorizing and cataloguing, the state intentionally acts to exclude and control.

The original Exclusion Act of 1882 required Chinese laborers present in the country before the act was passed to obtain certificates of identification if they wished to exit the country and return.<sup>233</sup> In addition, those Chinese exempt from the law, such as merchants, teachers, and travelers, had to present a certificate from the Chinese government verifying their status in order to enter in the first instance.<sup>234</sup> The certificate requirement was onerous, but it was at least limited to entry into the country.<sup>235</sup> There was not, nor had there ever been in U.S. immigration law, a general requirement that legal residents of a particular class carry certificates of identification attesting to their right to be and remain in the country.

This remained true until 1892 when, in a draconian effort to more firmly enforce exclusion, Congress passed the Geary Act, which required that all legal Chinese laborers apply to the collector of the internal revenue

<sup>231</sup> 19 CONG. REC. 406–07 (1888).

<sup>232</sup> See *supra* text accompanying notes 87–93.

<sup>233</sup> Act of May 6, 1882, ch. 126, 22 Stat. 58.

<sup>234</sup> *Id.* Kitty Calavita has explored the problems and dilemmas of race and class that were confronted by the customs officials charged with enforcing the Chinese Exclusion Acts, particularly in making the determination of who was a laborer. Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L & SOC. INQUIRY 1 (2000).

<sup>235</sup> SALYER, *supra* note 130, at 17–21 (describing the enforcement of the certificate requirement by the collector of customs at each port and the countless court challenges by Chinese to denials of entry).

for certificates of residence within one year or be subject to arrest and deportation.<sup>236</sup> Now the certificate requirement applied to an entire class of residents, just by virtue of their presence in the country. The law provided for summary deportation proceedings, with a presumption that a Chinese person found without a residence certificate was unlawfully within the country unless he could affirmatively demonstrate otherwise.<sup>237</sup> To avoid deportation, the Chinese had to clearly show that their failure to obtain a certificate was due to accident, sickness, or unavoidable cause *and*, through the testimony of a credible white witness, show that they were legally in the country prior to the passage of the Act.<sup>238</sup> If a person was found to be unlawfully in the country, the statute required punishment of one year in prison at a hard labor camp prior to deportation.<sup>239</sup> The Chinese fought valiantly against the Geary Act, organizing a mass resistance to registration and challenging the Act in court.<sup>240</sup> But the Supreme Court upheld the constitutionality of the Geary Act,<sup>241</sup> and in doing so upheld the first expulsion statute since the 1789 Alien Act.<sup>242</sup>

Buried in the legislative dustbin of history is a bill which demonstrates the disciplinary impulse behind counting the Chinese. Although the bill failed, it was the first attempt at requiring residence certificates of the Chinese and it sought to use the census as the disciplinary vehicle. Oddly enough, this bill has been entirely overlooked by scholars of the census and historians of the Chinese in America.<sup>243</sup> Prior to the introduction of the Geary Act, Representative Morrow introduced a bill into the House of Representatives that would have required the Superintendent of the Census to enumerate the Chinese population "in such manner and with such particulars as to enable him to make a complete and accurate descriptive list of all Chinese persons of either sex who may be found in the United States" and further to issue to every person so enumerated an engraved certificate identifying who they are.<sup>244</sup> The bill was not limited to Chinese laborers, as the Geary Act would be, but instead applied to every Chinese person in the country, including children. Moreover, the bill made the certificate issued by the Census Office "the sole evidence of the right of such Chinese person

<sup>236</sup> Act of May 5, 1892, ch. 60, 27 Stat. 25. The law made certificates of residence voluntary for Chinese who were not laborers. *Id.*

<sup>237</sup> *Id.* at §§ 3, 6.

<sup>238</sup> *Id.* at § 6.

<sup>239</sup> *Id.* at § 4.

<sup>240</sup> SALYER, *supra* note 130, at 45–58 (describing the law and the popular and legal response by Chinese residents).

<sup>241</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

<sup>242</sup> *Cleveland*, *supra* note 203, at 138.

<sup>243</sup> The single reference I have found to this bill is only in passing. SALYER, *supra* note 130, at 86 (pointing out that then Judge Morrow had introduced legislation similar to the Geary Act when he was in Congress).

<sup>244</sup> H.R. 6420, 51st Cong. § 1 (1890).

to be and remain in the United States.”<sup>245</sup> Just as the Geary Act would do later, this bill made failure to comply with the act by refusing to submit to the enumeration and certification grounds for arrest and removal.<sup>246</sup>

The bill never became law. The bill’s sponsor, William Morrow, went on to become a federal judge in the Northern District of California and in that role was one of the most zealous enforcers of Chinese exclusion.<sup>247</sup> Not long after the Morrow bill died, Congress passed the Geary Act, which employed a strikingly similar scheme for requiring certificates of residence, although the new law was ultimately administered by the Internal Revenue Service rather than the Census Bureau. But that the initial effort at requiring residence certificates would have made them the responsibility of the Census Bureau remains a telling example of the disciplinary possibilities and impulses in census enumeration. Requiring certificates of every Chinese person in the United States is a vivid example of the sort of disciplinary mechanism Foucault had in mind in that it “coerces by means of observation” and through observation makes a clear display of power.<sup>248</sup> The certificate requirement was the ultimate Foucaultian gesture of regulatory discipline and control, requiring detailed bureaucratic coordination in its execution, providing for physical punishment in its breach, and effecting national erasure in its very articulation.

The Morrow bill also made clear the entanglement of recognition and erasure, as its exclusionary purpose was effectuated through a ritual of recognition: each Chinese person needed to be recognized *as* Chinese and visibility was rewarded with an engraved certificate. The engraving is a potent and evocative touch, suggesting both suspicion of fraud and ceremonial acknowledgement. But even without the engraving, the certificate labeled in order to both identify and expel, to recognize and erase. In reacting to news of the Geary Act, a San Francisco poultry dealer could well have been talking about the decision to include Chinese in the census in the first instance: “For some reason you people persist in pestering the Chinese. . . . You now insist on labeling us.”<sup>249</sup> That the initial impulse was to bring the census and the certification processes together helps to make clear the motivation for enumerating the Chinese in the first instance. It was an act of political arithmetic, defining and quantifying both the nation and its enemies.

The creation of a census category for the Chinese in 1870 and their subsequent exclusion made way for the addition of other Asian race categories when new immigrant groups came to fill the vacuum of cheap labor.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> SALYER, *supra* note 130, at 72, 86.

<sup>248</sup> DISCIPLINE & PUNISH, *supra* note 85, at 170–71.

<sup>249</sup> SALYER, *supra* note 130, at 46 (quoting *Tie No Tag on Us*, S.F. CALL, Sept. 14, 1892).

For example, a Japanese category was added in 1890.<sup>250</sup> With the increasing exclusion of Chinese workers beginning in 1882, Japanese immigration increased to fill the gap and that increase, although much smaller as a percentage of the entire population than the Chinese had been, seems to have partly prompted the new category.<sup>251</sup> Similarly, the 1930 addition of a Filipino category followed the arrival of Filipino farm workers in the 1920s.<sup>252</sup> In each case, the government employed the new statistical science in the service of nation-building in such a way as to represent in racial terms who counted and who did not, this despite the fact that some of those counted for the purposes of being counted out were citizens. As Lisa Lowe points out, "the Asian American, even as a citizen, continues to be located outside the cultural and racial boundaries of the nation."<sup>253</sup>

The history of counting the Chinese shows that census classification is what Omi and Winant have called a "racial project," in that it represents and explains the racial dynamics of the national imagination and influences redistributions of membership along racial lines.<sup>254</sup> It also shows how government categorization works as a disciplinary mechanism, a nation-building tool, and a participant in the development of cultural and racial identity. For less powerful groups, identity is not entirely voluntary. "Politically dominant groups shape societal definitions of ethnic groups through the categories they use to count and classify them."<sup>255</sup> It is the census that helped create and solidify Chinese as a racial identity through which people would come to see themselves and through which others could forge a national identity that did not include them. For example, the Chinese who came to the United States to work in the middle of the nineteenth century thought of themselves not as Asian or even Chinese, but as people from "Toisan, Hoiping, or some other district in Guandong Province in China . . .".<sup>256</sup> Their identities as Chinese, and later Asian American, have

<sup>250</sup> 200 YEARS OF CENSUS TAKING, *supra* note 50, at 34, 36 (noting the race options in 1890 were "white, black, mulatto, quadroon, octoroon, Chinese, Japanese, or Indian").

<sup>251</sup> See Yen Le Espiritu & Michael Omi, "*Who Are You Calling Asian?*": *Shifting Identity Claims, Racial Classification, and the Census*, in *TRANSFORMING RACE RELATIONS* 43, 47–48 (Paul M. Ong ed., 2000).

<sup>252</sup> *Id.* at 60 (noting the race categories in 1930 were "White, Negro, Mexican, Indian, Chinese, Japanese, Filipino, Hindu, Korean"); *see also* YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* 117–18 (1992).

<sup>253</sup> LOWE, *supra* note 105, at 6. Lowe does not ignore those aspects of American law and culture that seek inclusion and assimilation of immigrants but puts these impulses in context. "Yet the project of imagining the nation as homogeneous requires the orientalist construction of cultures and geographies from which Asian immigrants come as fundamentally 'foreign' origins antipathetic to the modern American society that 'discovers,' 'welcomes,' and 'domesticates' them." *Id.* at 5.

<sup>254</sup> OMI & WINANT, *supra* note 170, at 55–56 ("A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.").

<sup>255</sup> ESPIRITU, *supra* note 252, at 132.

<sup>256</sup> *Id.* at 19.

been largely forged by the politics of race and nation in America.<sup>257</sup> Government classification systems, the census chief among them, have played a consistently vital role in that politics.<sup>258</sup>

#### IV. ENUMERATION AS ASPIRATION: THE DEBATE OVER A MULTIRACIAL CATEGORY

[T]hroughout history, in almost every country, there have been groups of people who existed “outside the census.”<sup>259</sup>

— Hyman Alterman

##### *A. From Discipline to Aspiration*

Part III of this paper tells a dark story about the uses of the census in American history and documents its disciplinary role in classifying and counting the Chinese. But there is another narrative that can be told about the way in which the census has been used to bring racial and ethnic minorities within the national fold. In its aspirational role—used by groups who seek to be counted in order to gain identity recognition, respect, and sometimes rights protection—the census has been a powerful mechanism for imagining the nation. However, these two narratives, it must be remembered, are part of the same story about the paradoxical power of counting. The disciplinary and aspirational powers of the census are not separated by history or even intent, despite the modern rhetoric to the contrary.

That the census, guardian of state knowledge and power, would come to play an aspirational role is not obvious. While traditionally it has been used to monitor, discipline, and symbolically erase minorities, for racial and ethnic minorities in the late twentieth century, their engagement with the politics of enumeration has been largely voluntary and aspirational. One explanation is that, as Espiritu notes, resurgences of ethnic identification “are strongest when political systems structure political access along ethnic lines and adopt policies that emphasize ethnic differences.”<sup>260</sup> The United States has always emphasized racial differences in some form or another; but since the 1960s racially inclusive statutes more than exclusionary ones have played the spoiler of our mythically colorblind political system. In an

<sup>257</sup> See Mari Matsuda, *Planet Asian America*, 8 ASIAN L.J. 169, 184 (2001) (“We had little in common, they point out, in the old country. We became a group here out of political necessity. I think we are more than an arranged marriage. The history of race and racism in America does more than just force us together like strangers on a lifeboat.”).

<sup>258</sup> It is worth noting that neither the politics nor the identities the census has helped to engender have been static; although that point does not diminish the important role the census has played.

<sup>259</sup> ALTERMAN, *supra* note 71, at 66.

<sup>260</sup> ESPIRITU, *supra* note 252, at 10 (citing Joane Nagel, *The Political Construction of Ethnicity, in COMPETITIVE ETHNIC RELATIONS* (Susan Olzak & Joane Nagel eds., (1986)).

effort to reverse centuries of racism, Congress adopted important civil rights laws that require accurate counts of minorities for effective enforcement.<sup>261</sup> Today, census data on race is used by at least ten federal agencies, not to mention countless state and local governments, to determine things like education grants, affirmative action programs, community reinvestment and development, public health programs, mortgage lending, low-income housing tax credits, voting rights, employment rights, legislative redistricting, government contracting, food stamps, and veteran benefits.<sup>262</sup> Each year more than \$100 billion in federal funds are allocated based on census data.<sup>263</sup>

To aid in this endeavor, the Office of Management and Budget (OMB) promulgated Statistical Directive 15 in 1977, which laid out four races and two ethnicities to be used in all federal statistics.<sup>264</sup> The OMB revised the categories slightly in 1997 by splitting the Asian and Pacific Islander category into two categories, so now there are five race categories: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White.<sup>265</sup> The two ethnicity categories remained the same with a slight variation in name, so that the choices for ethnicity are currently “Hispanic or Latino” and “Not Hispanic or Latino.”<sup>266</sup> While OMB insists that these categories do not correspond to minority groups and do not determine eligibility for federal programs,<sup>267</sup> the fact is that civil rights laws explicitly link census data with political access for minorities. For example, voting rights enforcement depends on the racial make-up of Congressional districts as determined by census numbers.<sup>268</sup>

<sup>261</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000 (1994); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994); Fair Housing Act of 1968, 42 U.S.C. § 3601 (1994); Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691 (1994).

<sup>262</sup> BUREAU OF THE CENSUS, USES FOR QUESTIONS ON THE CENSUS 2000 FORMS 10 (1998), available at <http://www.census.gov/dmd/www/content.htm>.

<sup>263</sup> *Id.* at I-1.

<sup>264</sup> The race categories at the time were American Indian or Alaskan Native, Asian or Pacific Islander, black, and white. The ethnic categories were “Hispanic origin” and “not of Hispanic origin.” Statistical Directive No. 15: Race and Ethnic Standards for Federal Agencies and Administrative Reporting, 43 Fed. Reg. 19,269-70 (May 4, 1978) [hereinafter Statistical Directive 15]. For a history of OMB Directive 15, see Lott’s 1993 testimony before the Census Subcommittee. *Review of Federal Measurements of Race and Ethnicity: Hearings Before the Subcomm. on Census, Statistics and Postal Personnel of the House Comm. on Post Office and Civil Service*, 103rd Cong., 1st Sess. 36-47 (1993) [hereinafter 1993 Hearings] (statement of Juanita Tamayo Lott, President, Tamayo Lott Associates).

<sup>265</sup> Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-90 (Oct. 30, 1997) [hereinafter OMB Revisions].

<sup>266</sup> *Id.*

<sup>267</sup> Statistical Directive 15, *supra* note 264, at 19,269-70; SKERRY, *supra* note 1, at 72 (“Try as it might for understandable political reasons, OMB had difficulty avoiding the reality that its own operations affect the statistics for which it has responsibility.”).

<sup>268</sup> 42 U.S.C. § 1973b (requiring the Director of the Census to provide certain statistics for the purposes of voting rights enforcement); *see, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 326 (2000)

Likewise, many employment discrimination claims depend on comparisons between the defendant's workforce and the racial make-up of the relevant labor pool, as determined by census numbers.<sup>269</sup> In addition, census numbers on racial minorities determine levels of federal funding for myriad programs.<sup>270</sup> Indeed, the civil rights laws were the catalyst for the articulation of the racial categories that we use today. Not surprisingly, as Espiritu suggests, the motivation for ethnic and racial identification has been particularly strong as civil rights enforcement has been tied to census numbers.<sup>271</sup>

Needless to say, the modern census classifications of race, like the nineteenth century classifications before them, have influenced the meanings and politics of race. Historian David Hollinger has called Statistical Directive 15 "the single event most responsible for the lines" that configure our understanding of race, an understanding which he calls the ethno-racial pentagon of African American, Asian American, Native American, Hispanic, and white.<sup>272</sup> Other scholars mark Directive 15 as the point when "the use of racial classification shifted from one of exclusion to one of explicit inclusion of specific groups."<sup>273</sup> In this context, where the census is one of the primary vehicles for the distribution of certain group protections and entitlements based on race, one sees the strategic investment in the politics of enumeration for many groups in the modern welfare state.

The engagement with the politics of enumeration has been not only strategic, but also deeply symbolic for some communities of identity. The symbolic consequences of census inclusion might also be said to derive from the civil rights movement in the sense that it helped give rise to identity politics and multiculturalism, movements in their own right which spawned claims for "official" recognition by many groups. These recogni-

(discussing claim under Voting Rights Act relating to school board redistricting plan based on the 2000 census).

<sup>269</sup> E.g., *EEOC v. Olson's Dairy Queens, Inc.*, 989 F.2d 165, 166 (5th Cir. 1993) (using data from U.S. Census to determine statistical disparity between racial composition of workforce and that of relevant labor pool); *see also Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989) (holding that a statistical disparity between the racial composition of workers and the racial composition of the labor pool can make out a prima facie case of disparate impact discrimination).

<sup>270</sup> For example, census numbers on race are used to evaluate the availability of credit to low-income minorities under the Community Reinvestment Act, 12 U.S.C. § 2901 (1977), and the distribution of funds for medical services for underserved populations under the Public Health Services Act, 42 U.S.C. §§ 254b-254e (2000).

<sup>271</sup> In this respect, one sees why the differential undercount of minorities has significant political consequences. See, e.g., MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS? THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA (1999); HARVEY M. CHOLDIN, LOOKING FOR THE LAST PERCENT: THE CONTROVERSY OVER CENSUS UNDERCOUNTS (1994).

<sup>272</sup> DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 33 (rev. ed. 2000).

<sup>273</sup> JUANITA TAMAYO LOTT, ASIAN AMERICANS: FROM RACIAL CATEGORY TO MULTIPLE IDENTITIES 28 (1998).

tion claims were often made on the basis of color, but as often served as a proxy for culture.<sup>274</sup> With the demise of scientific accounts of racial difference, and the ascendancy of social and political explanations,<sup>275</sup> identity politics became the arena in which communities and individuals alike struggled for cultural recognition by society at large. As Charles Taylor has made clear, identities are always dialogical, forged through interactions and relationships with others, and in that sense they rely on recognition by others (and conversely, can be harmed by misrecognition by others).<sup>276</sup> In this way, identity politics emphasized the need to be affirmed by others and the overriding value of recognition by the state, itself symbolic of national inclusion. Thus the census has been an important mechanism for symbolic inclusion in the nation, quite apart from the material consequences of being counted that have inspired the strategic push for inclusion by groups.

However, it is important to note that precisely because identities do not have an independent existence, but rather depend on social and cultural acknowledgment to be called into being, the race categories on the census have always played a dual role: of recognizing identity and also of *conferring* it. As Sharon Lee has observed, "One function of official race classifications is to create a sense of group membership or even community where there had been none before."<sup>277</sup> Lee points to the way in which the creation of an official category coalesces a group that may not have understood itself as a group before, or at least was not commonly understood to be a group. For example, "the social construction of a pan-ethnic racial group called White served to minimize ethnic differences among the numerous European ethnic groups while fostering a common racial identity. It also hardened the

<sup>274</sup> This conflation of color with culture is the subject of much critique. Hollinger's is emblematic: Race does not serve us at all well, however, when we want to talk about culture. Although the [ethno-racial] pentagon has been taken up by multiculturalism as a convenient basis for organizing the defense of cultural diversity, the lines dividing the five parts of the pentagon are not designed to recognize coherent cultures. They are designed, instead, to correct injustices committed by white people in the name of the American nation, most but not all of which can be traced back to racial classifications on the basis of morphological traits.

HOLLINGER, *supra* note 272, at 35–39; see also KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 45 (1992); Richard T. Ford, *Race as Culture? Why Not?* 47 UCLA L. REV. 1803 (2000).

<sup>275</sup> Omi and Winant credit Max Weber, W.E.B. Du Bois, and Franz Boas with helping to turn the tide away from biological accounts of race to social and political accounts, and they mark the "racial horrors of the 20th century," apartheid and the holocaust to mention only two, as the basis for the popular rejection of scientific racism. OMI & WINANT, *supra* note 170, at 65.

<sup>276</sup> Charles Taylor, *The Politics of Recognition, in Multiculturalism: Examining the Politics of Recognition* 25, 32–34 (Amy Gutmann ed., 1994); see also G.W.F. HEGEL, THE PHENOMENOLOGY OF MIND 228–40 (J.B. Baillie trans., 1807). As John Powell succinctly puts it, "there is no identity qua identity." John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 115 (1997); see also Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 211 (1996) (noting that identity itself has little substance and can only be effectively investigated in a particular context in which claims are made on the basis of identity).

<sup>277</sup> Lee, *supra* note 9, at 84.

division between White and Others.<sup>278</sup> More recently, the census classification of Asian has had a similar effect of creating, among heterogeneous groups of Asian descent, a common pan-ethnic identity through which people have come to see themselves and others.<sup>279</sup> This was also true much earlier of counting the Chinese as Chinese; it created a Chinese identity for people who had not necessarily thought of themselves that way before, and it created a Chinese race, which at least for a time did not include other Asians.<sup>280</sup> The National Academy of Sciences report on federal race classification similarly claims that it was the Census Bureau's use of the then uncommon designation of "Hispanic" in the early 1970s that led to its wide circulation and use as an identity referent.<sup>281</sup> As that report attests, "[t]here is a symbiotic relationship between categories for the tabulation of data and the processes of group consciousness and social recognition, which in turn can be reflected in specific legislation and social policy."<sup>282</sup>

Because official recognition has the power, not just of acknowledging an identity that already exists, but of conferring or solidifying an identity around a particular set of characteristics, it is not surprising that the census became one of the grand prizes in the politics of identity. More surprising is the easy assumption many make that recognition has effectively dis-

<sup>278</sup> *Id.* at 85.

<sup>279</sup> *Id.* Asian Americans and Pacific Islanders have been particularly savvy and successful in forming coalitions to lobby the Census Bureau. SKERRY, *supra* note 1, at 41; ESPIRITU, *supra* note 252, at 112–33. The complexity and influence of the Asian American alliance was evident from the fact that through their collective lobby they were recognized as a formal census advisory committee for the 1980 census and used their access to fight against census classification as Asian Pacific Americans. What they sought, and got, was the addition of more Asian subcategories: Asian Indian, Vietnamese, Samoan, and Guamanian. *Id.* at 119–21. This assured more reliable responses because it meant that fewer respondents would list their race as "other" and more responses that could be captured as "reliably" Asian American or Pacific Islander would redound to the benefit of the group. As Espiritu notes, "more was at stake here than statistical reliability. Status perception was of equal concern. Asian Pacific American groups wanted the American public to regard them as significant populations; being listed alongside the major racial minorities (blacks and American Indians) helped their cause." *Id.* at 121. This political move was thus emblematic of the way in which enumeration had become both strategically and symbolically aspirational for many groups.

<sup>280</sup> Scott-Childress, *supra* note 179 (finding considerable confusion at the turn of the century over whether Chinese and Japanese were of the same color or race).

<sup>281</sup> SPOTLIGHT ON HETEROGENEITY: FEDERAL STANDARDS FOR RACIAL AND ETHNIC CLASSIFICATION 9 (Barry Edmonston et al. eds., 1996). However, consolidations of identity based on census classification don't always map neatly with census categories, and "Hispanic" is a good example. While people did in fact mobilize around a Hispanic identity, there was and there remains considerable disagreement among Hispanics about whether to identify themselves as an ethnicity, race, national origin, or culture. RODRIGUEZ, *supra* note 12, at 7, 10. According to Rodriguez, in 1990 more than 40 percent of Hispanics chose the "other race" category, compared with less than 1 percent of the non-Hispanic population. *Id.* at 130. Put another way, 97.5% of those who chose the "other race" category were Hispanic. *Id.* at 12. Thus, although use of the term "Hispanic" by the Census Bureau may have led to its popular adoption, the continued insistence by the Census Bureau that Hispanic is an ethnicity rather than a race has not been so widely embraced.

<sup>282</sup> *Id.*

placed erasure as the motivation for enumeration. Certainly the current rhetoric of inclusion adopted by the state has appeared to change the stakes of counting. But just as exclusion depends on categorical recognition, so categorical recognition depends on exclusions: every group that is officially identified as such creates new axes of visibility and power, and new erasures as well. Thus, it is somewhat ironic that roughly 100 years after first counting the Chinese in a retributive act of erasure, the census has become the principle vehicle of official recognition in the politics of identity and in political accounting.

### *B. The Multiracial Lobby and the Politics of Recognition*

Nowhere has the aspirational aspect of census inclusion been more clearly articulated than in the push for a multiracial category in the 2000 census. For mixed race individuals, a claim for census recognition cannot logically be motivated by political self-interest, by the benefits tied to enumeration. Those who understand themselves as multiracial, and who sought government recognition of their identity, did not stand to gain any legal or political entitlements that they could not get from simply checking a single race category. Indeed, according to many civil rights groups, their claims ran counter to their political self-interest by complicating, perhaps even undermining, the enforcement of civil rights laws.<sup>283</sup>

The genesis of the multiracial lobby in this country is deeply aspirational: it began and continues as a grassroots effort to be recognized as multiracial on official forms. One of the leading multiracial groups, the Association of MultiEthnic Americans (AMEA), itself grew out of a number of local multiracial organizations, the oldest of which—Interracial Intercultural Pride (I-Pride)—began in the San Francisco Bay Area in the late 1970s in order to convince the Berkeley public schools to include an “inter-racial” category on official forms.<sup>284</sup> I-Pride succeeded in Berkeley, but the state balked at using categories that were out of sync with federal classifications.<sup>285</sup> A decade later, the AMEA resulted from a number of organizations, including I-Pride, taking their recognition claim to the national level.

Shortly after its founding, Carlos Fernandez, president of the AMEA, wrote to Congressman Thomas Sawyer, chairman of the House subcommittee with jurisdiction over the census. “Among the many issues of interest to our members,” Fernandez wrote, “perhaps none is of more concern than racial classification on official forms.”<sup>286</sup> The reason for the focus on official forms, particularly the census, was first and foremost a desire for recognition and an aversion to the perceived harms of misrecognition.

<sup>283</sup> See *infra* Part IV.C.

<sup>284</sup> The history of the AMEA is recounted on its website at <http://www.ameasite.org/history.asp>.

<sup>285</sup> *Id.*

<sup>286</sup> Letter from Carlos A. Fernandez, Esq., President, AMEA, to Congressman Sawyer (Sep. 15, 1989), available at <http://www.ameasite.org/classification/sawltr89.asp>.

The process of gathering racial and ethnic data by government [sic] must also be conducted in a manner that demonstrates respect for the dignity of the individual, an essential aspect of which entails truth and integrity of identity. There is, for example, no compelling state interest of which we are aware that justifies asking a child on a form at school to deny one of their parents at the same time they are asked to deny their specific identity as a multiracial/interracial individual. Such a scheme is demeaning, degrading and esteem-damaging.<sup>287</sup>

The push for recognition of a multiracial identity as a dignity claim was also evident in testimony provided by the AMEA in Congressional hearings on federal measures of race held in 1993 and 1997. This testimony makes clear that being counted as *multiracial* is of both personal and national significance. That is, a person can only sustain her identity if others recognize her as she recognizes herself and that she is only included in the national community to the extent that the government classifies her in a recognizable way.<sup>288</sup> Ramona Douglass' testimony on behalf of the AMEA in 1997 explicitly integrates personal and national identity, and the mechanism of integration is the census. To be counted is to be included in the country, to not be counted in a way that conforms to one's self-identity is to be discounted.

Please count us, track us, begin the process of including us in the American framework that has monitored the evolution and growth of other racial/ethnic populations throughout our history. We are the changing face of America and a reflection of its highest ideals when it comes to human interaction, acceptance and love. Asking us to endure another decade or another census unacknowledged, discounted or ignored isn't an option any of us can afford to live with any longer.<sup>289</sup>

The reasons why the census has monitored the evolution and growth of various populations has changed radically over time, as comparison with the enumeration of the Chinese shows; Douglass' statement attests to the salience of the modern discourse of enumeration in which census inclusion is the highest triumph in the politics of recognition. Ironically, despite the dramatic changes in emphasis over time, the broader role of the census as a lens for the national imagination is much the same. Moreover, the disciplinary potential of recognition has not changed all that much. In fact, one could easily read Douglass' statement as an example of Foucault's insight

<sup>287</sup> *Id.*

<sup>288</sup> Carlos Fernandez's testimony on behalf of the AMEA in 1993 identifies the organization's goal as promoting a positive awareness of multiracial identity and its way of accomplishing that goal is by winning government and media recognition. *1993 Hearings*, *supra* note 264, at 128 (statement of Carlos Fernandez, President, AMEA).

<sup>289</sup> *Federal Measures of Race and Ethnicity and the Implications for the 2000 Census: Hearings Before the Subcomm. on Government Management, Information, and Technology of the House Comm. on Government Reform and Oversight*, 105th Cong., 1st Sess. 387 (1997) [*hereinafter 1997 Hearings*] (statement of Ramona E. Douglass, President, AMEA).

that the disciplinary power of the state is most effective when citizens internalize its norms;<sup>290</sup> in other words, the state exercises power most effectively not through threat of punishment but through cultivating a sense of obligation and even desire to be subject to its command.

Even more directly than the AMEA, Project RACE began in reaction to the census; its founder, Susan Graham, could not find a race category for her multiracial children on the 1990 Census forms.<sup>291</sup> She created the organization with the aim of adding a multiracial category to federal, state, and local school district forms.<sup>292</sup> Her principal concerns seem to be not making multiracial children choose between their parents in identifying their race, and in solidifying, through formal recognition, a sense of multiracial identity and community. The refrain in her 1997 congressional testimony is a classic articulation of the modern politics of recognition and aspiration: “The recommendation of this committee should be clear: Multiracial children exist and the Federal government recognizes them.”<sup>293</sup>

Graham made explicit that alongside their desire for official recognition, advocates of a multiracial category also wanted the other powerful effect of classification—the conferral of identity and community. This was evident in the hostility of some multiracial advocates to the OMB’s decision to reject a multiracial category on the 2000 Census and instead to allow people to check more than one box. In her testimony in opposition to this proposal Graham said, “You must understand that the proposal in effect says multiracial persons are only parts of other communities. They are not whole.”<sup>294</sup> The belief that census recognition can make you whole is admittedly an extreme version of the politics of recognition, but the desire for wholeness is powerful in this instance precisely because it echoes the constitutional moment in which the census became the instrument for severing the bodies of slaves, “counting three fifths of all other persons.”<sup>295</sup> If the census can partition you, perhaps it is not absurd to believe that it can, at least in the eyes of the state, make you whole.

It is almost certain that a multiracial category, had it been adopted, would not only have been used by those who already thought of themselves

<sup>290</sup> I thank Jonathan Kahn for making this connection.

<sup>291</sup> 1993 Hearings, *supra* note 264, at 108 (statement of Susan Graham, Executive Director, Project RACE).

<sup>292</sup> Project RACE, *About Project RACE: Why We Need a Multiracial Classification*, at <http://www.projectrace.com/aboutprojectrace>. Project RACE has been successful in getting a number of states to provide a multiracial category on official forms. Project RACE cites legislative recognition in Ohio, Georgia, Illinois, Indiana, Michigan, and Maryland, as well as a multiracial category on the ACT Scholastic Test. Project RACE, *History and Results: What We've Seen Since 1991*, at <http://www.projectrace.com/historyandresults>.

<sup>293</sup> 1997 Hearings, *supra* note 289, at 556 (statement of Susan Graham, Executive Director, Project RACE).

<sup>294</sup> *Id.* at 553.

<sup>295</sup> U.S. CONST. art. I, § 2, cl. 3.

as multiracial, but also by people who were acknowledging that as a possible identity for the first time. Here one sees the construction of race and racial identity at work, as well as the interdependence of legal and cultural categories. Modern census recognition both approves an identity and fixes it within the limited constellation of options we have for self-identification. But such fixity is both liberating and constraining, depending on who is subject to its authority. Every new recognition brings voluntary and involuntary subjects. It is not simply semantic, but epistemic, influencing what sorts of identities are available to us. As David Theo Goldberg notes, while the census “provides to the cultural categories it disseminates the imprimatur of official approval,” it also authorizes “the prevailing language of imposed identity and identification, licensing it in the name of the law and the state—from the constraints of which there is no escape.”<sup>296</sup> The grassroots advocacy of relatively few multiracial people almost created a governmental category that in turn would have conferred a multiracial identity on countless individuals, helped to consolidate a community, and added to the official possibilities and constraints on our racial imagination. It seems fair to say that even without a multiracial category and with an option of checking more than one race, similar results might be had, although not as swiftly.

### C. Opposition to the Multiracial Lobby and the Politics of Race

Traditional civil rights groups who testified before Congress on the issue uniformly opposed a single multiracial category. Their motivation appeared to be twofold. First and foremost, they sought to protect the fragile advances that anti-discrimination laws have made toward racial equality, and this entailed protecting the prevailing race categories and the number of minorities who identified with them. A related but distinct strategy also becomes evident in their testimony: they sought to police the boundaries of racial identity in effort to keep those who might identify themselves as multiracial from defecting.

1. *Protecting Anti-Discrimination Law.*—Although some civil rights groups indicated that they could accept a “select one or more” option for race categories, acceptance of this more limited proposal was conditioned on a tabulation method that allowed for continuity in the counting of minorities. Harold McDougall, testifying on behalf of the NAACP, acknowledged and sympathized with the symbolic aspirations of the multiracial community,<sup>297</sup> but ultimately took a strategic position: given that census data has been critical to documenting “the deep racial inequalities which still exist in virtually every dimension of American social, economic, and

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<sup>296</sup> GOLDBERG, *supra* note 12, at 52–53.

<sup>297</sup> 1997 Hearings, *supra* note 289, at 583–84 (statement of Harold McDougall, Director of the Washington Bureau, National Association for the Advancement of Colored People).

political life . . . any effort that threatens to complicate, retard or thwart the collection of this useful data will meet vigorous resistance from the NAACP.”<sup>298</sup> The concern of the NAACP and others was that a separate multiracial category would dilute the numbers of currently recognized minority groups and weaken the legal protections to which their members are entitled.<sup>299</sup>

The strategic argument against a multiracial category says that because the concern is discrimination, the relevant issue for purposes of enumeration is appearance rather than self-identification.<sup>300</sup> People discriminate based on who they think you are and not on how you understand yourself. So, this argument goes, self-identification as multiracial will not change the fact that others discriminate based on minority appearance. Of course, taken to its logical conclusion, this argument would tend to favor the historical method of enumeration by observation rather than self-identification. The fact that few minority groups would want to return to this system attests to the symbolic role the census continues to play even for those who use its classifications for mainly strategic reasons. It should be noted that despite moving to a system of self-identification in 1960,<sup>301</sup> the census, unlike college applications, for example, does not create incentives for individuals to identify as minorities as a strategic matter because resource distribution based on census figures is group-based.<sup>302</sup>

The traditional civil rights groups that testified on a possible multiracial category, including the NAACP, the National Council of La Raza, the National Asian Pacific American Legal Consortium, and the National Congress of American Indians, all attested that they had many members who were mixed race and expressed some sympathy for their emotional desire for recognition.<sup>303</sup> Nonetheless, they all opposed a separate category. Eric

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<sup>298</sup> *Id.* at 583.

<sup>299</sup> *Id.* at 584.

<sup>300</sup> “In most cases, people encounter discrimination based on their appearance, rather than how they describe or identify themselves. It is our view (indeed, our experience) that persons who are genetically even part African are subject to discrimination in our society.” *Id.* at 587.

<sup>301</sup> SKERRY, *supra* note 1, at 46. Prior to 1960, enumerators decided the race of each of the members of the household. The fact that racial affiliation is self-selected on the census might be seen as undercutting the argument that the census contributes to the social construction of race. However, the role of the census in articulating and popularizing official race categories seems clear regardless of the mode of identification of individuals, and the subjective choice of each individual to identify as one race or another is deeply constrained by the internalization of the choices they are presented with as well as the choices made by others.

<sup>302</sup> Of course, as Peter Skerry points out, individuals stand to benefit from census counts “as members of designated minority groups. But as individuals minority group members are free riders: the benefits they derive from affirmative action programs do not depend on how they identify on the census.” SKERRY, *supra* note 1, at 76.

<sup>303</sup> 1997 Hearings, *supra* note 289, at 307, 322, 414, 425 (statements of Eric Rodriguez, Policy Analyst, National Council of La Raza; Jacinta S. Ma, Legal Fellow, National Asian Pacific American Legal Consortium; JoAnn K. Chase, Executive Director, National Congress of American Indians).

Rodriguez, testifying for the National Council of La Raza, bluntly favored the strategic over the symbolic when he said, “the Census is not meant to capture or express ‘identity.’ Strictly from a public policy perspective, not a personal one, the interest of the ‘common good’ is not represented by emotional or personal opinions regarding identity . . . .”<sup>304</sup> In fact, those groups with many multiracial members felt there would be considerable confusion over what multiracial meant.<sup>305</sup> The result would be fewer people identifying themselves as belonging to a single race and disruption of civil rights enforcement for all minority groups. This was especially a concern for American Indians and Asian Americans; as the two groups with the highest rates of intermarriage and with the smallest numbers relative to the general population, pilot tests for the 2000 Census suggested that use of a multiracial category would affect their numbers more dramatically than other groups.<sup>306</sup>

The unanimity of opposition to the multiracial category by representatives of previously recognized racial and ethnic groups both suggests the policing power conferred with recognition and belies some conflicting interests among the different groups in a multiracial category. Rachel Moran has pointed out that very different rates of intermarriage have made even the potential attractiveness of a multiracial category very different for different groups.<sup>307</sup> To the extent that a multiracial option might allow some groups to more readily access white privilege, Moran has argued that this would be most available to Asian Americans, who could potentially use multiraciality to begin converting their racial status into an ethnic one.<sup>308</sup> In contrast, African Americans, who have the lowest rate of intermarriage with whites, whose intermarriage when it occurs is still less approved by others, and who remain the most segregated of all racial groups, have the least to gain from a multiracial option.<sup>309</sup> Conversely, they also have the most to lose, both in terms of important material protections and entitlements based on numbers as well as increased internal divisiveness based on color, where light-skinned blacks could opt out of an African American identity at the

<sup>304</sup> 1997 Hearings, *supra* note 289, at 322 (testimony of Eric Rodriguez).

<sup>305</sup> Eric Rodriguez gave the example of a black Cuban who might think she is multiracial when her race is black and her ethnicity is Hispanic. *Id.* at 323. Jacinta Ma thought that confusion would arise for the Asian American who was half Chinese and half Japanese, who might well mistake her multiethnicity with multiraciality. *Id.* at 416 (testimony of Jacinta S. Ma).

<sup>306</sup> *Id.*; *id.* at 425–26 (testimony of JoAnn K. Chase). The pilot tests were the National Content Survey and the Race and Ethnic Target Test. See, e.g., *id.* at 119–27 (prepared statement of Nancy M. Gordon, Associate Director for Demographic Programs, U.S. Bureau of the Census).

<sup>307</sup> Rachel F. Moran, *The Mixed Promise of Multiracialism*, 17 HARV. BLACKLETTER L.J. 47, 49–50 (2001). See generally RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE 154–60 (2001).

<sup>308</sup> Moran, *supra* note 307, at 51. Moran suggests this conversion would be possible for Asian Americans precisely because they have been successful at using intermarriage with non-Hispanic whites to assimilate. *Id.*

<sup>309</sup> *Id.* at 49.

expense of those with less identity mobility.<sup>310</sup> Christine Hickman puts it bluntly when she claims that a multiracial category would only create direct competition between those who identify as multiracial and other minority groups, setting up “a no-win rivalry between racial and multiracial groups for the allegiance of *Loving’s* children.”<sup>311</sup> Implicitly at issue here are the boundaries of the race categories we use, boundaries that are at once fragile and fiercely powerful.

2. *Policing Racial Identity*.—Embedded in the congressional testimony on census categories is another debate about the role of the census in the production of identity: it is a debate about what race is, how we confer and “administer” it,<sup>312</sup> and who gets to define its contested contours. And the answers to those questions matter to how we imagine ourselves as a nation. It is in this sense that the battle over a multiracial census category participates in the larger politics of “racial formation,”<sup>313</sup> and control over racial identity. This debate has serious implications for our national imagination at a time when there is deep ambivalence about the racial choices available to us.

In policing the boundaries of their different racial identities, the civil rights groups seek to protect a particular vision of the group against attack from both within and without. From within, they have to confront the dissent or exit of those likely to identify as multiracial, and from without they have to fight against deracialization by those who see a multiracial category as a step toward colorblindness. The danger in both cases is the ease with which such maneuvers end up essentializing race. For example, evident in arguments against census recognition of a separate multiracial category by various opponents are implicit claims that multiracial advocates are betraying their (minority) race. While arguments by opponents of a multiracial category take a number of forms, almost all of them are at heart claims that “you are really one of us,” and to the extent that multiracial people reject that appeal, they are serving the interests of racial subordination.<sup>314</sup> Such moves are emblematic of the tendency of all cultural and racial groups to discipline from within and to use law to protect themselves from redefini-

<sup>310</sup> *Id.* at 50. On the politics of color among African Americans, see KATHY RUSSELL, MIDGE WILSON & RONALD HALL, THE COLOR COMPLEX (1992); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Leonard M. Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENVER U. L. REV. 131 (1997).

<sup>311</sup> Hickman, *supra* note 10, at 1171.

<sup>312</sup> Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

<sup>313</sup> The term is Omi and Winant’s, by which they mean “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” OMI & WINANT, *supra* note 170, at 55.

<sup>314</sup> See, e.g., Tanya Kateri Hernandez, *“Multiracial” Discourse: Racial Classification in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998); Hickman, *supra* note 10.

tion and “cultural dissent.”<sup>315</sup> What opponents fail to appreciate is that their attempts to police the borders of group identity are partly responsible for the multiracial movement. As Maria Root notes, “multiracial people experience a ‘squeeze’ of oppression *as* people of color and *by* people of color.”<sup>316</sup>

The problem, of course, is that the opponents of a multiracial category are also right; the dissent they are trying to suppress is potentially dangerous to efforts aimed at ameliorating discrimination on the basis of race. Internal resistance has been used in the service of external attack. For example, opponents worry about how attractive the multiracial movement has been to some alarming bedfellows on the right (and left, it should be admitted) who seek to destabilize racial categories altogether.<sup>317</sup> This is not an inconsequential concern. Newt Gingrich endorsed adding a multiracial category not only as a step toward overcoming racial division but also as an effort to get rid of race categories altogether.<sup>318</sup> Gingrich’s push toward ultimate color blindness has gained many allies in the 1980s and 1990s who have wanted to deracialize American law and culture. John Powell has pointed out that this position is not necessarily benign. “The language used by the new right of a raceless, colorblind society is viewed by some not simply as an error, but as a strategy or racial project to maintain white supremacy and racial hierarchy.”<sup>319</sup> Yet it is not clear that those who advocate dismantling racial hierarchies should embrace our current and increasingly incoherent race categories. As Angela Harris has observed, “the notion of race is problematic for anti-racists because at the most subtle, seldom examined level, ‘race’ entrances us in a familiar but dangerous metaphysics: a representational economy in which bodies stand in both for power and history.”<sup>320</sup>

<sup>315</sup> Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (exploring cultural dissent as both a descriptive and normative matter and the increasing tendency by groups to turn to law in an effort to stave off cultural change).

<sup>316</sup> Maria P.P. Root, *Within, Between, and Beyond Race*, in RACIALLY MIXED PEOPLE IN AMERICA 3, 5 (Maria P.P. Root ed., 1992).

<sup>317</sup> Eric Rodriguez testified that “many non-multiracial persons—particularly those who oppose civil rights initiatives—appear to be advancing the multiracial cause. In addition, the multiracial cause has begun to appeal to many non-multiracial persons who believe that the very existence of racial classifications divides the nation and exacerbates racial tensions.” 1997 Hearings, *supra* note 289, at 324–25.

<sup>318</sup> Speaker of the House Newt Gingrich, Speech Before the Orphan Foundation of America, Washington, DC (June 18, 1997), available at <http://www.multiracial.com/gingrich2.html>.

We must break down rigid racial classification. A first step could be to add a “multiracial” category to the census and other government forms to begin to phase out the outdated, divisive, and rigid classification of Americans as “blacks” or “whites” or other single races. Ultimately, our goal is to have one classification—“American.”

*Id.*

<sup>319</sup> John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 793 (1997); Harris, *supra* note 11, at 1926.

<sup>320</sup> Harris, *supra* note 276, at 209–10.

There exists a very real dilemma of how to best think and speak about race when we do not know what it is, but we know it matters and wish it did not. One of the failings of the debate over the multiracial category is that, while it touches the heart of this dilemma, the discourse of the debate has mostly sidestepped this issue and become mired in its own problems of racial essentialism. Rodriguez's congressional testimony on behalf of La Raza is emblematic. His anxiety that a multiracial category might be used by those who want to end all race categories led him to repeatedly dismiss the multiracial category as "a heterogeneous identifier that is not an actual race category."<sup>321</sup> The implication is that the race categories designated by the census are real, in that they not only correspond to something we might call "actual races," but also that those races are homogeneous. Michael Omi has argued convincingly that the census classifications, as defined in Directive 15, are both inconsistent and heterogeneous. As he points out, only one of the categories is specifically defined by reference to race (black), another category is based on cultural designators (Hispanic), and another on community affiliation (American Indian).<sup>322</sup> Nor are the groups stable or homogeneous; Omi cites as an example the current pan-ethnic identity of Asian American that grew out of the alliances forged by numerous and distinct Asian ethnic groups.<sup>323</sup> Regardless of whether we think Rodriguez is right, his testimony makes clear that the argument *against* a multiracial category on the grounds that it is not a real race risks falling into the trap of discredited scientific accounts of race and racial essentialism.

However, John Powell and Michael Omi, among others,<sup>324</sup> have shown how the arguments advanced *on behalf* of multiracial advocates also tend to rest on biological theories of race and essentialism. As Omi puts it, "The very terms 'mixed race' or 'multiracial' imply the existence of 'pure' and distinct races."<sup>325</sup> Powell goes further in suggesting that a multiracial category ends up undermining its own claim to distinctiveness because virtually all Americans are of mixed race, and to the extent multiracial proponents reject that proposition they are forced back toward the position of biologically recognizable races.<sup>326</sup>

But these may not be our only options. Adopting a social constructivist account of race does not entail thinking that race is mere illusion that can or should give way to color blindness.<sup>327</sup> Indeed, as Harris points out, "the scandal of race is that both racism and anti-racism are flourishing in a cul-

<sup>321</sup> 1997 Hearings, *supra* note 289, at 324 (testimony of Eric Rodriguez).

<sup>322</sup> Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 11 (1997).

<sup>323</sup> *Id.* at 17–18.

<sup>324</sup> See, e.g., Hickman, *supra* note 10, at 1202–08.

<sup>325</sup> Omi, *supra* note 322, at 19.

<sup>326</sup> Powell, *supra* note 319, at 796–99.

<sup>327</sup> "Regardless of how we feel about race as a physical reality, race plays an undeniably central role in our everyday understanding of and interaction with one another." Powell, *supra* note 276, at 101.

ture in which the concept of ‘race’ itself is increasingly incoherent.”<sup>328</sup> powell has argued for recognizing a multiplicity of truths with respect to race, and in particular has distinguished between scientific truth and experiential truth.<sup>329</sup> Appreciating race as experiential truth is one way of crediting the multiracial position, which argues that the experience of being and being perceived as multiracial differs from the experience of being or being perceived as a single recognizable race. One of the abiding experiences that many multiracial people attest to is the sense of not belonging comfortably in any single racial category.<sup>330</sup> This sense of difference is often articulated not just as self identity (how I see myself) but also as imposed identity (how others see me). This is important in the context of the census debate, because most critiques of the multiracial position assume that it seeks to validate the former at the expense of the harms done by the latter. Richard Ford also makes this assumption, although he usefully explains why self identity and imposed identity are both the products of racial power. “The new census achieves the goal of more accurately reflecting the subjectively embraced racial identities of the responders. . . . But it does so at a cost. . . . By reflecting the subjective identification of individuals, the new census attempts to know its subjects as they have been produced by racial power while deemphasizing the fact of that racial power.”<sup>331</sup> Nor should the diversity of racial combinations within a multiracial category matter if we are truly committed to a social constructivist account of race. If their common experience of being multiracial is sufficient to bind together the group, then their racial heterogeneity would appear immaterial. Indeed it may even tend to support a more sophisticated version of the critique of race that

<sup>328</sup> Harris, *supra* note 276, at 210.

<sup>329</sup> powell, *supra* note 276, at 100–03.

<sup>330</sup> Michelle M. Motoyoshi, *The Experience of Mixed-Race People: Some Thoughts and Theories*, 18 J. ETHNIC STUD. 77 (1990); MORAN, *supra* note 307, at 154–60. There has been a boom in the literature on multiraciality. It generally falls into one of two subgenres: theoretical and policy debates or experiential testimony. While it should go without saying, it bears saying anyway, that there is no consensus in this literature on what it means to claim a multiracial identity or the virtue of a separate multiracial category on the census. See generally G. REGINALD DANIEL, *MORE THAN BLACK? MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER* (2002); *MIXED RACE AND THE LAW: A READER* (Kevin R. Johnson ed., 2003); JILL OLUMIDE, *RAIDING THE GENE POOL: THE SOCIAL CONSTRUCTION OF MIXED RACE* (2002); BARBARA TIZARD & ANN PHOENIX, *BLACK, WHITE, OR MIXED RACE? RACE AND RACISM IN THE LIVES OF YOUNG PEOPLE OF MIXED PARENTAGE* (1993); MORAN, *supra* note 307; *RETHINKING ‘MIXED RACE’* (David Parker & Miri Song eds., 2001); *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW* (Werner Sollors ed., 2000); JAYNE O. IFEKWUNIGWE, *SCATTERED BELONGINGS: CULTURAL PARADOXES OF “RACE,” NATION AND GENDER* (1999); RAINIER SPENCER, *SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES* (1999); RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996); LISE FUNDERBERG, *BLACK, WHITE, OTHER: BIRACIAL AMERICANS TALK ABOUT RACE AND IDENTITY* (1994); NAOMI ZACK, *RACE AND MIXED RACE* (1993); *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 316.

<sup>331</sup> See, e.g., Ford, *supra* note 274, at 1808–09.

seeks to acknowledge the instability of racial categories without denying the reality of race and racism.

The problem, as many scholars point out, is not races as such but racism. Put another way, it is not difference that matters but the hierarchies based on difference that we use to structure social and political life.<sup>332</sup> This seems undeniably right, and yet the question still remains whether the way in which we construct, deconstruct, and reconstruct racial categories matters to the larger project of antiracism. Does the experiential reality of multiraciality matter and merit recognition if those who are mixed race experience the same racism as those who are not? Ford argues a powerful but unidirectional version of this point—that racism creates racial categories and not the other way around. “Racism must not be understood as a set of practices that targets a group because of some preexisting characteristics of its members, but instead as a set of practices that establishes racial hierarchy and assigns individuals to distinctive statuses within that hierarchy.”<sup>333</sup> Harris makes the related point that it is a history of racism that has made the imaginary lines of race real; “that white supremacy, with its obsessions, exploitations, and cruelty over the past two and a half centuries, has made us into a people really divided by those imaginary lines.”<sup>334</sup>

While it seems undeniable that racism creates race, I am not convinced that racial categories and racism do not inform and influence each other, and that sometimes the influence works in the other direction as well, such that certain ways of thinking about and using race can affect the practices of racial subordination, depending on the “racial project.”<sup>335</sup> If we take Foucault and Hacking seriously, the racial project of census enumeration is one with discursive and epistemological power. It does not just reinstate racial subordinations, although it certainly can do that. It also opens up the possibility of reimagining and reinhabiting our racial and national boundaries. Of course, this position is easier to see in its oppressive manifestations, in the ways that the census and “state definitions of race have inordinately shaped the discourse of race in the United States,”<sup>336</sup> and how the terms of that discourse were used, for example, to subordinate the Chinese within a racial hierarchy that was established without reference to them. The point is that “racial and ethnic categories are often the effects of political interpretation and struggle and that those categories in turn have political effects.”<sup>337</sup>

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<sup>332</sup> See, e.g., powell, *supra* note 319, at 803–06; Ford, *supra* note 274, at 1805.

<sup>333</sup> Ford, *supra* note 274, at 1805.

<sup>334</sup> Harris, *supra* note 276, at 212.

<sup>335</sup> OMI & WINANT, *supra* note 170, at 55–56.

<sup>336</sup> Omi, *supra* note 322, at 21.

<sup>337</sup> *Id.* at 23.

*D. Census 2000: Outcomes and Ironies*

“The size of the American multiracial population,” according to Melissa Nobles, rests on the movement’s success “in attaching identities to bodies.”<sup>338</sup> The movement has been creating a new identity as much as working on behalf of a recognizable one. But as we have seen, naming and numbering go hand in hand on the census; to the extent that the movement failed to be recognized *by name*, it undoubtedly affected its numbers, although in what direction we cannot know. In 1997, the Interagency Committee, appointed to review the classification of federal race and ethnicity data, recommended to the OMB that it should not add a separate multiracial category, but that it should allow respondents to check more than one box; OMB accepted this recommendation.<sup>339</sup> The results of Census 2000 were interesting. Almost 7 million people, or 2.4 percent of the country, marked two or more races.<sup>340</sup> Of the “two or more races population,” as designated by the Bureau, 93 percent reported just two races, and the most common combination at 32 percent was white and “some other race.”<sup>341</sup> This is not as vague as it first appears; “some other race” is a sixth catch-all race category that is used overwhelmingly by Latinos who define their ethnicity as a race despite Census Bureau admonitions. For example, of those who chose “some other race” on the census, either alone or in combination with other races, over 90 percent were Hispanic.<sup>342</sup> Moreover, Hispanics were three times as likely as non-Hispanics to report more than one race, and of all those reporting two or more races, nearly one third were Hispanic.<sup>343</sup> The next most common combinations of races were white and American Indian or Alaska Native, at 16 percent of the multiracial population, then white and Asian at 13 percent, and white and Black or African American at 11 percent of those reporting two or more races.<sup>344</sup>

It also turned out that the smaller the racial group, the higher its proportion of multiracial individuals.<sup>345</sup> For example, of those who reported

<sup>338</sup> NOBLES, *supra* note 12, at 129.

<sup>339</sup> OMB Revisions, *supra* note 265, at 58,786.

<sup>340</sup> ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 3 (Census 2000 Brief, No. C2KBR/01-1, 2001), available at <http://www.census.gov/population/www/cen2000/briefs.html>. In contrast, of those marking one race only, 75 percent were white, 12 percent were Black or African American, 4 percent were Asian, 1 percent were American Indian or Alaska Native, .1 percent were Native Hawaiian and Other Pacific Islander, and 5 percent were some other race. *Id.*

<sup>341</sup> *Id.* at 4, tbl.2.

<sup>342</sup> *Id.* at 10, tbl.11.

<sup>343</sup> *Id.* at 10. Roughly 6 percent of Hispanics chose two or more races compared with just under 2 percent of non-Hispanics. *Id.* Of course, some of the Hispanics who checked “some other race” because they see themselves as multiracial might be seen by the census as having a race and an ethnicity (“Hispanic”).

<sup>344</sup> *Id.* at 4, tbl.2.

<sup>345</sup> See SHARON M. LEE, KIDS COUNT/POPULATION REFERENCE BUREAU, CENSUS 2000: USING THE NEW RACIAL CATEGORIES IN THE 2000 CENSUS 12 (2001), available at

Native Hawaiian and Other Pacific Islander, either alone or in combination with other races, 54 percent were multiracial.<sup>346</sup> Similarly, 40 percent of American Indians are multiracial, compared with 14 percent of Asian Americans, 5 percent of African Americans, and 3 percent of whites.<sup>347</sup> Of those who selected "some other race," either alone or in combination, 17 percent were multiracial.<sup>348</sup> Those who chose two or more races also tended to live in the west and in urban areas.<sup>349</sup> In addition, the OMB's guidelines for the aggregation and allocation of race responses for use in civil rights monitoring and enforcement now include, in addition to the five single race categories, the four most common combinations of two races.<sup>350</sup>

One of the most interesting, although perhaps least surprising, findings was that children were much more likely to be multiracial than adults. Of the total multiracial population, 42 percent were under 18 years of age.<sup>351</sup> Among the total U.S. population, only 25 percent are under 18. As Sharon Lee has noted, while children tend to be twice as likely as adults to be reported as multiracial, immigration and intermarriage histories make this tendency variable between groups.<sup>352</sup> American Indians, who have a long history of intermarriage, and African Americans, who have consistently low

[http://www.aecf.org/kidscount/racial2000.pdf.](http://www.aecf.org/kidscount/racial2000.pdf)

<sup>346</sup> NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2000 7, *tbl.5* (Census 2000 Brief, No. C2KBR/01-6, 2001), available at <http://www.census.gov/population/www/cen2000/briefs.html>.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 8.

<sup>349</sup> *Id.* at 3, fig.2; 5, fig.3; 6, *tbl.3*.

<sup>350</sup> OFFICE OF MANAGEMENT AND BUDGET, GUIDANCE ON AGGREGATION AND ALLOCATION OF DATA ON RACE FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT (Bulletin No. 00-02, Mar. 9, 2000) (hereinafter OMB GUIDANCE). Those race combinations are White and American Indian or Alaska Native, White and Asian, White and Black or African American, and Black or African American and American Indian and Alaska Native. GRIECO & CASSIDY, *supra* note 340, at 5. However, for the purposes of civil rights monitoring and enforcement, the OMB directs federal agencies to allocate multiple-race responses that select one minority race along with white into the minority category. When the response includes two or more minority races, agencies assign the respondent to the race that the alleged discrimination is based on; if the action requires assessing disparate impact or discriminatory patterns, the respondent will be allocated to each race selected as the basis of discrimination and the analysis will be conducted using all the alternative allocations. OMB GUIDANCE, *supra*. Allocating mixed white and minority respondents into the minority category is intended to preserve civil rights enforcement efforts by creating a presumption that a mixed-race complainant belongs to a protected group. BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY 18 (Nathan Persily ed., 2000). However, some see the practice as tantamount to a bureaucratic institutionalization of the "one-drop rule." Joshua R. Goldstein & Ann J. Morning, Back in the Box: Allocating Multiple Race Responses Back to Single Races 3 (Sept. 2000) (unpublished manuscript, on file with author). Another fear is that it will result in the inclusion in the minority population of people who formerly identified as white but have some minority ancestry, thus extending civil rights protections to individuals who have never suffered from race-based discrimination. *Id.* at 4.

<sup>351</sup> JONES & SMITH, *supra* note 346, at 9.

<sup>352</sup> LEE, *supra* note 345, at 11.

intermarriage rates, have a more even age distribution among those who identify themselves as multiracial.<sup>353</sup> In contrast, Asians have recently begun to intermarry more and therefore have more multiracial children.<sup>354</sup> "In Maryland, for example, about 20 percent of Asian children were identified as multiracial in the 2000 census, compared with only 8 percent of Asians age 18 and over."<sup>355</sup>

What is particularly interesting about the high percentage of multiracial children is that children do not fill out census forms. Children are being identified as multiracial by their parents, or by the parent who fills out the census form as the head of the household. This tends to corroborate the claim that the multiracial movement has been fueled by parents of multiracial children.<sup>356</sup> But it also underlines the instability of this category, not to mention the other categories as well. We do not know, for example, if these children will continue to identify as multiracial when it is their turn to fill out the census form. Lee suggests that the "number of people who identify with more than one race is likely to increase as interracial marriages increase."<sup>357</sup> This may be so, but we also know that many people who could report themselves as multiracial choose not to.<sup>358</sup> We also know that how people report their identity depends on the prevailing discourse of race and the options available at any given time. Current multiracial children, and multiracial adults for that matter, may in the future decide not to identify themselves as multiracial. They may decide to identify with a single minority race, or they may decide to identify themselves as white.<sup>359</sup> When these multiracial children are grown, the categories will undoubtedly have changed, just as they have every year since 1790, and with them, the debate about race and identity. What is clear is that "the parameters of self-definition have never been open-ended, for the state has always furnished the range of available, credible, and reliable—that is, of licensed and so permissible—categories in which self-definition could occur."<sup>360</sup>

The decision by OMB to use a check-all-that-apply approach was "revolutionary" according to then-director of the Census Bureau Kenneth

<sup>353</sup> *Id.* at 12.

<sup>354</sup> *Id.* at 11–12.

<sup>355</sup> *Id.* at 12.

<sup>356</sup> See, e.g., Hernandez, *supra* note 314, at 106 ("In fact, the principal proponents of the multiracial category are 'monoracial' Black and White parents of biracial children.").

<sup>357</sup> LEE, *supra* note 345, at 1.

<sup>358</sup> Eric Schmitt, *Blacks Split on Disclosing Multiracial Roots*, N.Y. TIMES, Mar. 30, 2001, at 2 ("For all intents and purposes, you are either black or white in Mississippi,' said Representative Bennie G. Thompson.").

<sup>359</sup> A Los Angeles Times article identifies a 1995 federal schools survey which found that 17 percent of children with a black parent and a white parent chose white as their primary race, and half of those with an Asian American parent and a white parent chose white. Solomon Moore & Robin Fields, *The Great 'White' Influx*, L.A. TIMES, July 31, 2002, at A12.

<sup>360</sup> GOLDBERG, *supra* note 12, at 51–52.

Prewitt.<sup>361</sup> It was, nonetheless, a disappointment to many advocates of a separate multiracial category in that it did not satisfy their desire for a category that would validate and aid their sense of a unified self. There are, however, at least two ironies in the decision. First, by more or less retaining intact the already established race and ethnicity categories the census may have staved off the push towards deracialization by the right. Ironically, the very categories that were instituted in order to further the racist project of imagining a white nation are now retained to serve as a basis for fighting racism and to protect against moves to use a multiracial category as a step toward the abolition of all race categories.<sup>362</sup>

Second, this approach might end up going farther than a separate category would have toward creating the possibility in the popular imagination for a more destabilized, non-biological view of race that nonetheless steers clear of the pitfalls of a crude version of constructivism. The decision to allow people to check more than one race may ironically be more revolutionary than what the multiracial proponents advocated for, because it recognizes multiracial people and at the same time opens a space for acknowledging that our identities are multiple, shared, divided, composite, and that they are so even in the face of an otherwise enduring regime of race.

But protecting traditional race categories and race-based rights and at the same time allowing for a radical rethinking of identity does not come without costs. One cost may be the very thing the traditional civil rights groups feared most from a single multiracial category: movement of more minorities away from a single racial identity and potentially toward whiteness. Of course this is not just the result of individual choice, but occurs through the reclassification of bodies based on changes to the categories. In discussing the oft-cited projections that the United States will be a minority-majority country by 2060 based on current immigration trends, John Powell notes that he is skeptical "that we will categorize those immigrants such that the majority is non-white. When we talk about changing demographics we must remember that we are in control of how we categorize our population. Racial ordering is not a natural phenomenon."<sup>363</sup> If history is any indication, enough people will be allowed to claim whiteness that the country can maintain a white majority, with its attendant white power and privilege, and the nation as currently imagined can be preserved. There is already a good deal of flexibility in the white category even as it is currently defined, as a person "having origins in any of the original peoples of Europe, the

<sup>361</sup> Solomon Moore, *Census' Multiracial Option Overturns Traditional Views*, L.A. TIMES, Mar. 3, 2001, at A1. Others disagree about whether this was so revolutionary given the fact that multiracial people in the form of mulattoes were counted in seven censuses between 1850 and 1920. NOBLES, *supra* note 12, at 18.

<sup>362</sup> I thank John Powell for discussing this point with me.

<sup>363</sup> John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1415 (2002).

Middle East, or North Africa,”<sup>364</sup> and there is reason to expect this definition will continue to change with time. Even if it does not, racial performance will undoubtedly continue to inform our legal definitions.<sup>365</sup> Immigrants, much like they did one hundred years ago, are changing the meaning of whiteness. There were 28 million foreign-born residents of the U.S. in 2000; two-thirds reported that they were white.<sup>366</sup> Not only are American race categories somewhat meaningless to many immigrants, but to the extent they have meaning it is abundantly clear that immigrants “equate whiteness with opportunity and inclusion.”<sup>367</sup> Furthermore, the Hispanic/Latino category, an already ambiguous ethnicity, is another possible gateway to whiteness. In 2000, nearly half of all Hispanics classified themselves as white.<sup>368</sup>

But of course, the OMB did not undo the basic race categories nor did it create a separate multiracial category. Hence, another important cost in its final decision is to those who understand themselves as multiracial and who feel that they exist in liminal spaces on official forms, in the national imagination, and in communities and even families. This nonrecognition is acknowledged and perhaps exacerbated by the Census Bureau when it refers to multiracial people as “The Two or More Races Population.”<sup>369</sup> By not fundamentally changing the categories by which we understand and struggle with race, the check-all-that-apply decision continues to discipline and discount those who do not fit within them. At this point, I tend to agree that it is a price worth paying, but it is not a price that should be discounted or ignored.

## V. CONCLUSION

*In naming or refusing to name, existence is recognized or refused, meaning and value are assigned or ignored, people and things are elevated or rendered invisible.*<sup>370</sup>

— David Theo Goldberg

### A. Past and Present

I have tried to show how the census, as the principal producer of social statistics, provides a mechanism for imagining the nation, and for imagining

<sup>364</sup> OMB Revisions, *supra* note 265, at 58,786, 58,789.

<sup>365</sup> For superb historical accounts of racial performance, see John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000); Gross, *supra* note 10.

<sup>366</sup> Moore & Fields, *supra* note 359, at A12.

<sup>367</sup> *Id.*

<sup>368</sup> GRIECO & CASSIDY, *supra* note 340, at 10, tbl.10.

<sup>369</sup> *Id.*

<sup>370</sup> GOLDBERG, *supra* note 12, at 29.

it in a distinctly racial way. The image it provides is neither unitary nor stable, but it is politically and legally potent. From the 1870 addition of Chinese to the census, the Chinese Exclusion Acts, and countless other governmental efforts at surveillance, control, and erasure, eventually emerged various coalitions of color fighting for recognition by the census and inclusion in its enumeration.

As different as these historical moments and these visions of the census are, there are, nonetheless, some fruitful comparisons that can be made between the uses of the census in 1870 and its uses in 2000. At the level of national identity, in both cases the census is a lens through which we make judgments about the nation and its racial boundaries. Both multiracial advocates and traditional civil rights groups seek inclusion in the nation through the instrumentality of the census, although inclusion is more strategic for the latter and almost wholly symbolic for the former. For the Chinese, the census was indisputably a mechanism of exclusion, and by excluding the Chinese, the census policed the racial boundaries of the nation. In both instances, the census was a state mechanism employed in the service of a mythic American nation whose racial boundaries have real implications for full citizenship.

At the level of group identity, one could characterize the category changes in 1870 and 2000 as principally the result of popular demand. In this view, the census provides a democratic forum for popular disputes about race and nation.<sup>371</sup> But democracy can be an ugly institution, and nowhere was this as evident as in the popular referenda—the census among them—that defined, excluded, and erased the Chinese. Counting the Chinese in 1870 was probably more responsive to popular sentiment than allowing people to choose multiple races was in 2000, but of course, in 1870 it was not the Chinese whose views were elicited. The politics of enumeration in 2000 was much more a vehicle for group recognition, and a platform where conflicting norms of racial identity were publicly contested, albeit in the form of interest group lobbying. While it is true as a scholarly matter that the “Census Bureau has escaped inquiry both as a state institution that determines the benefits and penalties of racial membership through the data it collects and as a place where racial categories themselves are constructed,” popularly and politically it is increasingly less true.<sup>372</sup>

Distinguishing between the census as disciplinary and the census as aspirational is one way of getting at the very important differences between the politics of categorical change in 1870 and that of 2000. But the contrast between the disciplinary and aspirational uses of the census should not be understood to mean that the census was historically coercive and is in its modern incarnation benign or even beneficial, or even that its disciplinary and aspirational roles are mutually exclusive. The census is almost always

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<sup>371</sup> I thank Emma Coleman Jordan for this insight.

<sup>372</sup> NOBLES, *supra* note 12, at 17.

both. The disciplining of the Chinese required that they be recognized. And the recognition sought by multiracial advocates also subjected them to discipline, both by traditional civil rights groups in their enforcement of racial boundaries and by the state in its decision to “misrecognize” them. There are disciplinary and aspirational aspects to being included in any rights regime and to using categories at all.

One example will serve to show that in any instance the census could be either disciplinary or aspirational or most likely both. One of the major categorical innovations proposed for the 2000 census was the addition of a separate ethnic category for Arab Americans and Middle Easterners,<sup>373</sup> who are currently counted as white racially and are counted separately to the extent they write in a response to the ancestry question. The proposal was not adopted, but one can readily imagine, in the wake of September 11, the myriad ways that an enumeration of Arab Americans might be used for disciplinary purposes. Such a category would have undoubtedly exaggerated the exclusion of Arabs from the body politic, an erasure that has happened even without a census category.<sup>374</sup> At the same time, such a categorization could also have aided Arab Americans in accessing some of the legal protections against an increase in discrimination and violence.<sup>375</sup>

### B. Naming and Unnaming

Ursula LeGuin, in her beguiling short story *She Unnames Them*,<sup>376</sup> recounts Eve unnamning the animals. “Most of them accepted namelessness with the perfect indifference with which they had so long accepted and ignored their names.”<sup>377</sup> The yaks protested, but finally agreed because “yak,” from the yak point of view, is redundant. The swine, asses, and mules were delighted “to give their names back to the people to whom—as they put it—they belonged.”<sup>378</sup> The insects parted with their names in clouds of buzzing syllables. One of the reasons the story is so compelling is because it makes evident both the power of names as well as their utter inconsequentiality. And it makes clear that there is a power and a politics to naming and to unnamning as well. Even though their unnamning is a liberating gesture in the

<sup>373</sup> OMB Revisions, *supra* note 265, at 58,786–87.

<sup>374</sup> See Volpp, *supra* note 32, at 1595 (“The ‘imagined community’ of the American nation, constituted by loyal citizens, is relying on difference from the ‘Middle Eastern terrorist’ to fuse its identity at a moment of crisis.”). As one Afghani who has lived in the United States for 15 years put it, “Until September 11, I just felt like this was my own country. Now it’s different. I feel like a minority.” Moore & Fields, *supra* note 359, at A12.

<sup>375</sup> Volpp, *supra* note 32, at 1575 (noting that there have been more than one thousand incidents of anti-Arab hate violence since September 11).

<sup>376</sup> URSLA K. LEGUIN, BUFFALO GALS AND OTHER ANIMAL PRESENCES 194 (1987). I am grateful to Judith Resnik for directing me to this story.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

story, it is still Eve who makes it happen. Moreover, every naming also unnames. Every recognition entails some erasure.

One of the most effective ways in which the law calls people into being is by naming them. But it also unnames people, sometimes consciously, sometimes just as a necessary consequence of naming others. To the extent that law enforces some identities, it "unmakes" others.<sup>379</sup> So it is with the census. By making and using some racial categories, the census effectively undoes other categorical possibilities. One of the reasons Asian Americans have lobbied to retain a list of specific national origins on the census form is so that the naming of Asians *as Asians* does not unname Chinese, Samoans, and Vietnamese.<sup>380</sup> By failing to recognize a multiracial category, OMB incidentally unnamed those who understand themselves as multiracial. But the Census Bureau unnamed (or renamed) them more overtly by officially calling those who report more than one race "The Two or More Races Population." This is akin to the South African practice of calling African, colored, and Indian people "previously disadvantaged individuals."<sup>381</sup> Of course, in naming themselves, groups must create and enforce boundaries of their own, and this is no less true of those within the multiracial movement who have keenly felt the boundaries of other groups.<sup>382</sup>

The census, by naming and counting, is engaged in a powerful business. "To ask some questions is to sacrifice others. The boundaries of official inquiry are the statistical counterpart to the boundaries of the political agenda; and it is an elementary point of political analysis that the control of such boundaries is a critical face of power."<sup>383</sup> Official questions and government classifications are powerful in both creative and repressive ways. They create deep cognitive commitments as well as provide avenues of control. "Official categories may help to constitute or divide groups and to illuminate or obscure their problems and achievements."<sup>384</sup> Official categories name, and by naming unname. They recognize, and through recognition erase.

While ultimately I agree with David Theo Goldberg that, as paradoxical as it seems, we need "to count by race in order to undo racial counting,"<sup>385</sup> the narrative of this Article is not directed toward a decision about whether race counting by the census is, on balance, worth it. Just as rights

<sup>379</sup> Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98 (1995).

<sup>380</sup> See *supra* note 279.

<sup>381</sup> Lisa R. Pruitt, *No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession*, 23 MICH. J. INT'L L. 545, 612 (2002).

<sup>382</sup> NOBLES, *supra* note 12, at 134 ("Although it would seem clear who the presumed and desired members of the multiracial community are, it is not. Activists have had to create and communicate the boundaries of membership.").

<sup>383</sup> Starr, *supra* note 38, at 41.

<sup>384</sup> *Id.* at 53.

<sup>385</sup> GOLDBERG, *supra* note 12, at 57.

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entail regulation and repression,<sup>386</sup> just as culture constrains,<sup>387</sup> I have attempted to show how legal and regulatory regimes that recognize identity also erase it. The census, as a powerful legal mechanism, has played a crucial role in affirming and disciplining groups, in making and unmaking, and in naming and unnaming the boundaries of group and national identity.

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<sup>386</sup> See, e.g., Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999) (discussing the paradox of rights in context of postbellum recognition of African American marriages); Wendy Brown, *Suffering the Paradoxes of Rights*, in LEFT LEGALISM / LEFT CRITIQUE 420 (Wendy Brown & Janet Halley eds., 2002) (discussing the paradox of rights in context of struggle for gender and sexual orientation equality). See generally Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

<sup>387</sup> Janet E. Halley, *Culture Constrains*, in IS MULTICULTURALISM BAD FOR WOMEN? 100 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).