

## THE LEGAL IMPLICATIONS OF A MULTIRACIAL CENSUS

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**B**ECAUSE it destabilizes established notions and measures of race, the move to a census race question that allows for multiple responses presents novel challenges for social scientists and policy makers. The chief effect of the new format for racial data, however, may be determined as much in the courtroom as in the computer lab. Lawyers and judges, to a large extent, will help decide the societal impact of this new means of expressing racial identity.

Although the short-term legal implications will most likely be minor, the shift in census format from a single response to multiple expressions of racial identity may represent a turning point, as Kenneth Prewitt suggests, in the way Americans conceive of and measure race and also in the way lawyers prove racial discrimination. Racial data, from the census and elsewhere, frequently make their way into litigation whenever a plaintiff seeks to prove that a law, policy, or even private action has had a discriminatory effect on a given racial group. Such discrimination claims may become more challenging to prove as the number of racial categories proliferates and the size of several single-race groups diminishes. The more complicated and debatable the description of a community's racial makeup becomes, the more difficult it may be to use racial data to prove the adverse effects of certain policies on racial groups. Moreover, rules developed to cope with this new complexity—to reaggregate multiracial data back into a single racial format, for example—create their own set of potential legal problems arising from race-based assumptions as to who “really belongs” in which racial category.

The new multiracial format for census data will have some effect on any case in which a legal claim depends on the size of a racial group's population. This chapter discusses three categories of cases. The first type consists of discriminatory impact cases, in which the plaintiff alleges that

an employer, the government, or some other defendant has discriminated against him or her on the grounds of race. To prove discrimination the plaintiff compares the racial composition of the advantaged or disadvantaged population to the racial composition of the background population. If the plaintiff can demonstrate a dramatic disparity—for example, if an employer in a heavily African American area hires very few African Americans—the defendant may then bear the sometimes difficult burden of proving that such a disparity arises as a result of something other than discriminatory policies. The second category of cases involves compliance with certain goals or timetables in achieving an appropriate racial composition of the relevant population. In affirmative action and school desegregation cases, for example, courts will often pay attention to racial data to determine whether the relevant governmental unit has successfully integrated its workforce or student population. The final category of cases arises in the context of legislative redistricting under the Voting Rights Act. More than any other area of the law, such litigation makes use of census race data—for example, to force the creation of a legislative district of a certain racial composition. All claims of race-based vote dilution depend on some theory about how the given racial population was packed into one district or split among several, such that the racial minority was unable to elect its candidate of choice.

The different methods of aggregating multiracial data back into a single-race format also present novel legal challenges. Other contributors to this volume have described the Office of Management and Budget's aggregation rules as a new incarnation of the historic "one-drop rule." Judges who will confront the OMB or other aggregation rules in the course of civil rights litigation will need to decide whether the Constitution prevents re-aggregation of multiracial census data back into a single-race format. Opponents of the aggregation rules argue that such rules create an unconstitutional presumption that multiracial individuals *really* belong to one of the single race categories.

Although the new format of the census race question poses a series of new legal questions, the number of discrimination claims in the near term that will turn on the new format or how multiracial individuals are counted is relatively small. The overwhelming majority of race discrimination claims are brought by African Americans, who have a low rate of multiracial response on the census, and Hispanics, who are unaffected by the multiracial categorization because they are counted as an ethnicity, not as a race. Moreover, of the universe of race discrimination claims, the ones that turn on racial data are also a small subset, and though some aggregation rules might conceivably raise constitutional questions, not all of them will. The differences between impermissible and permissible modes of re-aggregation of the multiracial subset of a racial group will often "come out in

the wash" of litigation, so to speak, when other issues submerge re-aggregation in importance.

Before discussing these legal problems and scenarios in detail, it should be stated at the start that one needs to tweak the 2000 census data and hypothesize sometimes absurd circumstances in order to highlight the possible problems the new multiracial format could independently cause. Racial statistics are one component of often complicated and drawn-out presentations of evidence in civil rights litigation. Well before the most recent change in racial categorization, the question of which racial statistics should be used often became a subject of vigorous disagreement in court. The new multiracial format for census data adds one more layer of complexity and one more subject for disagreement, but by concentrating on this subject, one should not assume that the use of race statistics was problem-free before the "multiracial question" became relevant.

### When Multiraciality "Matters"

The process of racial classification employed by the census does not raise any significant legal issues by itself. As the Office of Management and Budget (OMB) and the Census Bureau remind us at every opportunity, the process of checking off one's race is grounded in a theory of self-identification. The compilation of individual responses at larger and larger levels of aggregation (census blocks, block groups, political subdivisions, and so on) merely represents a collective registration and expression of individual self-identification.<sup>1</sup> Legal issues arise, if ever, when the census race data become evidence used to prove an argument in court or support a finding for a policy.

Because misconceptions about the types of legal claims arising out of the new race data appear to be widely held, let me begin by emphasizing the obvious: no individual has a personal claim arising out of how he or she was categorized by the census. In other words, someone who checks off both "black" and "white" on the census form but is intentionally or erroneously counted as "black" does not suffer a cognizable injury that a court can redress. Although the Constitution requires the taking of a census, it does not give individuals a "right to be counted" or a right to be counted honestly and accurately. The Census Bureau's failure to count an individual accurately does not injure that individual, for the same reason that the National Bureau of Labor Statistics does not injure someone if it counts him or her as unemployed when in reality that person has a job.<sup>2</sup>

However, census data, like all official government statistics, have definite legal consequences based on how the government or individuals use those statistics. As others in this volume have noted in greater detail than is warranted here, the new format has led to the creation of sixty-three possi-

ble racial combinations (126 if the Hispanic-origin question is included in the computation). For lawyers, like everyone else who uses the data, the exponential increase in categories creates complexity where previously there was relative simplicity. Lawyers and judges are not immune from the problems identified by social scientists in this volume. Their lives, too, will be made somewhat more difficult by the wholesale change from the data format that preceded it and by new challenges that arise from the need to deal with these additional layers of complexity.

The new multiracial-response format "matters" for the law principally because certain legal claims and arguments depend on the size and characteristics of racial minority groups. Census race data form a benchmark against which subsets of the general population are then compared to see if they "measure up." Only if we know how many African Americans live in a given area, for example, can we advance arguments about how many African Americans we should expect in some other context—a congressional district, a school's student population, or a factory's workforce.

The key impact of the new format on the law derives from its effect on the size of minority group populations as they are expressed in the census. With the opportunity for respondents to express fully their racial identities, did the Asian American share of the population increase or decrease with the recent census? The question implies an agreed-upon definition of who is an Asian American. Is the category limited to the 10.2 million people who checked only "Asian," or does it include the additional 1.7 million people who checked both "Asian" and another race? Depending on one's answer, the count of the Asian population could grow or shrink by 15 percent. Are there 2.5 million American Indians and Alaska natives in the United States or 4.1 million? Whether multiracial respondents are counted as members of that group could shift the number by as much as 65 percent. Admittedly, under either a minimalist or maximalist categorization scheme, Asians and American Indians together account for only 4.5 to 5.7 percent of the national population, but in certain areas of the country each group's numbers represent a greater population share, and their relative numbers (at least with regard to Asians) may be growing.

"Who counts as what?" is not a mere academic question, however. It forms the baseline assumptions about "who deserves and is entitled to what." Civil rights litigation is, in part, about ensuring that members of different racial groups receive equal treatment and are not deprived of opportunities to compete for their equal share. Although a guarantee of equal results is never a constitutional requirement and usually represents a constitutional problem, assessing a group's share of the population is often a much-needed first step in understanding whether unfair or unconstitutional barriers have been placed in its way. As the cases discussed here reveal,

identifying the existence or absence of discrimination requires some agreement as to the background racial contours of the general population. The addition of multiracial combinations to the census makes such agreement less likely.

## Types of Lawsuits Affected by the New Multiracial Categorization

Any lawsuit that depends on an argument derived from census data about the size and characteristics of a racially defined community will be affected by the new format of the race question. I address three such categories of lawsuits here: disparate impact cases; compliance with goals and timetables, particularly in the area of desegregation and affirmative action; and the unique setting of challenges to legislative districting schemes under the Voting Rights Act. For the first two categories, another word of caution is in order. Although race data are central to the litigation, disparate impact and compliance cases rarely use race data provided by the census. The parties or enforcement agencies usually rely on other sources of data (for example, student records, employee applications, or a special data set developed by an expert witness), or the parties construct the relevant data set themselves. I include a discussion of these categories here for two reasons. First, many of the noncensus data sets used in such lawsuits will also use a multiracial checkoff option similar to that employed on the 2000 census.<sup>3</sup> Second, whichever race-based data set is used for litigation, the multiracial "issue" will become more prevalent in coming years. The problems with categorization may arise largely from the format of the census race question, but they also come from what those questions attempt to capture: that is, the rising number of Americans who identify with more than one race.

### Disparate Impact Cases

Most laymen find race discrimination an easy concept to define. At its core, the concept refers to the treatment of individuals differently on account of their race. This relatively simple concept becomes infinitely complex in application, however. The fact that a given policy or decision adversely affects members of a given racial group is generally insufficient, by itself, to prove racial discrimination. After all, random, unintentional behavior or quite legitimate reasons may underlie policies that end up affecting one racial group more than another. The difficulty arises in separating impermissible modes of discrimination from permissible ones. In most cases that difficulty translates into whether the law ought to require discrimina-

tory intent as well as effect. Discrimination claims brought under the Equal Protection Clause require proof of discriminatory intent and impact,<sup>4</sup> whereas a prima facie case of discrimination under various civil rights statutes can sometimes be shown based only on a showing of disparate impact.<sup>5</sup>

Proving discriminatory impact often involves some statistical showing as to how many members of the plaintiff's racial group were affected by a policy and how large a share they constitute of the population. Census data or (more commonly) other statistics describing the racial composition of the population help establish the expectations as to what the racial composition of a work force, housing complex, or some other "treatment" population should be. Thus, if census data reveal a community population that is half Native American but the employer's work force is only 25 percent Native American, the disparity between the work force and the population, may give rise to an inference of discrimination. Of course, legitimate non-discriminatory reasons may explain the disparity. But the civil rights statutes sometimes require that the defendant demonstrate what those reasons are and explain why such a discriminatory impact flowed from necessary business policies. To take one real-world example, the Court in *Griggs v. Duke Power* (401 U.S. 424 [1971]),<sup>6</sup> found illegal discrimination in an intelligence test, which whites passed at a higher rate than African Americans and which, as compared to alternatives, represented a poor indicator of prospective job performance. In finding discriminatory impact, the Court noted the dramatic disparity between the percentage of African Americans in the applicant pool and population, and the percentage that passed the intelligence test.<sup>7</sup> That disparity forced the employer to justify the intelligence test on grounds of business necessity, a burden it could not satisfy.

In addition to claims brought under the civil rights statutes, race statistics often play an important role in discrimination cases brought under the Constitution. Discrimination in jury selection provides a case in point. Although no defendant is constitutionally entitled to a jury with a racial breakdown proportionate to the surrounding community, an unrepresentative jury pool could give rise to an inference of unconstitutional discrimination. If the state cannot rebut that inference by articulating unbiased reasons for the "tainted" jury, a violation of the Equal Protection Clause could be shown. Census race data are frequently used in jury cases to demonstrate the racial composition of the population from which a jury would be selected.<sup>8</sup> In *Castaneda v. Partida* (430 U.S. 482 [1977]), the Court explained the mode of analysis and the relevance of demographic data:

In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the

group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. . . . Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case. (*Castaneda v. Partida*, 430 U.S. 482, 494-95 [1977], citations omitted)

To make a showing of discriminatory effect or disparate impact, therefore, one must have a baseline against which to judge the benefited or disadvantaged population.

The new multiracial data format could introduce some uncertainty and variation in evaluating the proper benchmark. Before the multiracial check-off was introduced, statistics were always contested, but usually there existed greater agreement as to which individuals in the background population or applicant pool shared the plaintiff's race, such that they should be counted in the benchmark statistic used to measure the alleged disparity. Two problems now arise. First, the move to the multiple-race checkoff option has drained some single-race categories of many of their "members." Second, courts and parties to the litigation must now decide who should be counted in the benchmark statistic—individuals who just checked off the plaintiff's race or also those who checked off that race plus another one.

To make the point with the worst-case scenario, consider what could happen if a Hawaiian corporation were the defendant in an employment discrimination suit. One of the race categories on the 2000 census form is "Native Hawaiian or Other Pacific Islander." According to the data revealed by the Census Bureau, only 113,539 people in Hawaii, just 9.4 percent of the state's population, checked that category alone. However, 169,128 people, 13.9 percent of the state's population, checked off that category plus another one. Thus, 23.3 percent of the state's population checked "Native Hawaiian or Other Pacific Islander" either alone or in combination with another race. Which percentage, 9.4 or 23.3, should serve as the benchmark for judging the discriminatory effect of a Hawaiian corporation's employment practice? If the workforce is 10 percent "pure" Native Hawaiian and 90 percent white, does a "pure" Native Hawaiian have a claim? Would a "mixed" Native Hawaiian have a claim? What if the workforce were 25 percent mixed Hawaiian but there were no "pure" Hawaiians; would there then be any claim? How a court counts the multiracial population could affect its assessment of the discriminatory impact of the corporation's hiring policies.

There are plenty of problems with the foregoing hypothetical, of course, but the point remains that legal claims often depend on assumptions about the background racial composition of a community.<sup>9</sup> Those assumptions derive from race data provided by the census or some other source. The proliferation of racial categories introduces some uncertainty and complexity into the process of establishing the baseline against which to judge discriminatory impact by producing a new set of arguments over "who counts as what." These complexities are not insurmountable. Aggregation rules such as the ones discussed later in this chapter, as well as others that might be relevant to a given factual context, could go a long way toward reducing the complexity inherent in the litigation. To some extent the new data format may simply lead plaintiffs to tailor their claims to the new data format. Whereas previously an African American plaintiff may have contended that the employer "discriminates against African Americans," now the plaintiff will contend (if it is in his or her interest) that the employer "discriminates against anyone who is at least part African American." A court is still likely to consider such discrimination, if proven, as race-based and against a "protected class" and, therefore, prohibited by the civil rights statutes or the Constitution.

### Compliance with Goals of Desegregation and Affirmative Action

Race data can be used not only to support an inference of discrimination but also to set goals and to measure compliance with government measures designed to foster integration. Perhaps the two most contentious arenas of race-based goal setting are school desegregation and affirmative action. In both of these contexts, the question, once again, is whether the jurisdiction, government entity, or private actor "measures up": whether it has created a racial balance in the relevant employee or student pool that does not stray too far from the racial breakdown of the background population.

School desegregation cases come in many forms, as do the types of remedies that courts order to promote integration. Similar to the other cases of unconstitutional discrimination briefly mentioned earlier in this chapter, a court's finding of unconstitutional segregation in violation of the equal protection clause necessarily involves an appeal to racial data to prove that students of different races have been treated differently. Perhaps somewhat unlike the other cases discussed, however, the difference in treatment here manifests itself in separation of the races, which even nonlawyers know is unconstitutional—"separate but equal" no longer being a safe harbor for a state's discriminatory action. To establish the existence of such separation or segregation, a plaintiff must, among other things, identify the racial character or assess the racial imbalance of the relevant schools of the dis-

trict in question. Race data of the student population, provided by the schools themselves or by the census, become the building blocks for a finding of segregation as well as the critical information used to set goals for integration.

Once the court finds unconstitutional segregation, attention eventually turns to ways to remedy it. Through busing, magnet schools, rezoning, or a host of other possible remedies, jurisdictions acting under court supervision will attempt to move from segregation or "dual-system" status to a "unitary" status in which the vestiges of state-sponsored discrimination and segregation in education have been largely eliminated. A determination as to whether a school system has made the move to unitary status often requires detailed findings about the changing racial composition of school faculties and student bodies. Integration, of course, does not mean every school in a district is 50 percent white and 50 percent black. The precise percentages, which will represent the goal of the integration efforts, will vary based on expectations created from expert testimony as to which students of which race live in which location.

The multiracial format of the data, in theory, could add a complication to oversight of desegregation efforts and measurement of compliance with court-ordered goals. How should the goals of integration be defined when the relevant population has a high multiracial component to it? How should one "count" a black-white student or faculty member? Is a school that is 50 percent white, 25 percent black-white, and 25 percent black more or less integrated than one that is 50 percent white and 50 percent black? Such far-fetched scenarios should not be of concern for some time, because areas in which segregation is a problem generally do not have high multiracial populations. Moreover, one might say that a significant rise in the multiracial population is almost its own metric of integration: what better way to assess the erosion of race-based barriers (*de jure* or *de facto*) than through such personal evidence? At the theoretical level, however, this "counting" problem presents novel and difficult issues that might someday require judicial resolution.

Affirmative action presents similar issues involving goal-setting based on current assessments of racial imbalance and subsequent attempts to achieve some sense of proportionality with the background population. For many Americans, the racial checkoff on a university admission application is their earliest significant experience with the racial categories similar to those appearing on the census. The answers to that question are used to assess the racial diversity of the applicant pool and, along with census data, to calculate the benchmark against which the admitted population will be compared for antidiscrimination and affirmative action purposes.<sup>10</sup> Many universities have already adopted the census format of allowing applicants to check off more than one race.<sup>11</sup> Although they have run into opposition

at the Supreme Court, affirmative action policies, of course, are not limited to higher education. Racial data, particularly with regard to the identity of owners of certain businesses, are often used for so-called "minority set-aside" programs or programs targeting "disadvantaged business enterprises."<sup>12</sup>

Universities, private firms, and governments at all levels often set goals for admissions, hiring, or contracting based on assessments of the racial diversity of the available pool. The opportunity to check off more than one race, alongside an underlying rise in multiraciality of the population, will force new questions on these entities as to affirmative action goal setting and achievement. As for goals, the question is similar to disparate impact and school desegregation: who in the underlying population or applicant pool should count in the estimate of the desired or target percentage of a racial group in the final group of admittees or employees? Do we treat multiracial individuals as their own category, or do we add them somehow to one of the single-race categories? For if one treats them as their own category, then the number of "target" categories may increase to the point of unmanageability while the single-race categories become more and more depleted. Even the often-used category of "minority" does not remove the questions as to whether the 5.5 million whites (the largest multiracial group) who identified with another race in the 2000 census ought to count as part of "the majority" or as a "minority."

As the goals become uncertain, so will assessments as to whether they were achieved. If affirmative action goals continue to be expressed according to single-race groups, then the question arises whether the hiring of multiracial individuals fulfills such goals. One might also expect that the decision as to whether multiracial individuals "count" for affirmative action purposes might also have an effect on the propensity of at least some individuals to identify with one race as opposed to multiple races on an admissions or employment form. Unlike the checking off of a race question on a census form, there might be real costs or benefits to an individual, depending on whether he or she chooses a single race or multiple races on forms related to employment or education.

With regard to affirmative action, in particular, it should be noted that many of these problems of racial identity seemingly introduced by the multiracial format are not new. Which racial categories "deserve" affirmative action is always a subject of contention. Should Asians (of mixed race or not) or Cubans, for example, receive affirmative action in higher education? Moreover, the "authenticity" of an applicant's racial self-identification sometimes becomes an issue, especially in the context of set-asides for a business owned or operated by a member of a minority group. Questions often arise whether the owner is "really" a minority group member and whether a largely white business that puts forward a single minority member in a leadership position should receive the same affirmative action treat-

ment as a "bona fide" minority business. The most that can be said is that the new multiracial format has made a tricky problem even trickier. Despite the inherent contentiousness of regimes of racial categorization, however, the law has found a way around many problems of similar magnitude in the past. Aggregation rules and other judicial, legislative, and administrative means of coping will emerge to deal with this new layer of complexity.

### Voting Rights Act Cases

Litigation arising under the Voting Rights Act of 1965 represents the area of most immediate concern for those grappling with the challenges the 2000 census data present.<sup>13</sup> Census data exist as the building blocks for almost every legislative district in the country—from the smallest town council ward to congressional districts with more than six hundred thousand people. In a context beset by political and interest group power battles, state and local governments have rushed to redraw districts of equal population for the 2002 elections. The stakes could not be higher for this redistricting cycle. The major political parties, which are at near parity in the House of Representatives and in many state legislatures, see the redistricting cycle as an opportunity to define their candidates' electorates and cement their influence for the next ten years. Minority candidates and the interest groups that support them see the redistricting process as the critical juncture in the political process when decisions are made as to which interests will be represented and which will be ignored. These political battles take place on uncertain legal terrain, with statutes and Supreme Court precedents pulling jurisdictions in different directions. The added complexity of the new multiple-race format of the census data presents uncertainty and contentiousness in an already racially charged and unsettled process.

Just as in the legal contexts already discussed, litigation challenging districts alleges that the state's action was motivated by discriminatory intent or caused discriminatory effects (or both).<sup>14</sup> Discriminatory intent plus effect, once again, is required for a constitutional claim, whereas the relevant statute, here the Voting Rights Act of 1965, develops an impact or "results" test. Unlike the affirmative action or employment contexts, voting rights litigation relies almost exclusively on census race data to gauge a redistricting plan's discriminatory impact. Most race-based challenges to redistricting plans allege that a given set of lines "dilutes" the voting strength of a minority population. A plan can cause dilution by spreading the minority population among several districts or packing minorities into one or just a few. Section 2 of the Voting Rights Act prevents any legislative districting scheme anywhere in the country from diluting minority votes. Section 5 of the Voting Rights Act applies only to certain states and

jurisdictions and prevents them from enacting redistricting plans that worsen the position of racial minority populations.

*Vote Dilution Claims Under Section 2 of the Voting Rights Act*  
In proving vote dilution under section 2 of the Voting Rights Act, plaintiffs must demonstrate that the voting patterns of racial groups as channeled through a particular districting scheme deprives a racial minority population of an "equal opportunity to elect [its] candidate of choice." The Court has established a three-pronged test for vote dilution in which the plaintiff must show:

- that the minority community is "sufficiently large and geographically compact to constitute a majority in a single member district,"
- that the minority community is "politically cohesive," and
- that the white majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." (*Thornburgh v. Gingles*, 478 U.S. 30, 50-51 [1986])<sup>15</sup>

The new multiracial format of the census has the potential to affect plaintiffs' abilities to prove each of these "Gingles factors." Once again, I add the caveat that these potential problems are more theoretical than probable in the near term, but they draw our attention to the area of the law in which census race data are most often used.

The first factor, size and compactness of the minority community, assumes that the membership of the minority community in question can be accurately identified. Numerical minorities will always be disadvantaged in a majority-rule electoral system, thus not all racial minorities could possibly (or feasibly) be entitled to their own single-member district. Only minority communities that are "large enough" have the right to a judicial remedy. Therefore, the plaintiff must be able to point to a map overlaid on census race data and be able to say that "members of my racial group live in this area, and we are large enough to constitute a majority in a single-member district."<sup>16</sup> A new question then arises: who should count as a member of the minority community? If the multiracial population is large enough, perhaps the plaintiff might need to count multiracials as members of the minority community in order to prove that the community is sufficiently large. An unrealistic example might help prove the point. Suppose a given neighborhood is one-third African American, one-third white, and one-third biracial (African American-white). Does an African American plaintiff seeking a district that surrounds that neighborhood have a potential claim under section 2? The answer may depend on whether the biracial community is counted as African American. At this stage of the litigation,

it is usually in the plaintiff's interest to show that the minority community is as large as possible.

Strangely enough, the same cannot be said for fulfilling the second and third Gingles factors. Here, the size of the minority community is irrelevant; what matters is whether it is politically cohesive and is systematically outvoted by a white bloc-voting majority. Cohesion and bloc voting are demonstrated through statistical methods that suggest the members of the minority community tend to vote alike—that is, the racial minority group tends to rally around and vote for one candidate who is usually defeated because whites vote for his or her opponent. Here, increasing the size of the minority community by counting the multiracial population might actually harm a plaintiff's chances of proving illegal vote dilution. If the multiracial population votes differently from the single-race population (a rare event, to be sure), then treating the two groups together as "one race" would undermine the plaintiff's claims that his or her community is cohesive.

Another unrealistic example might help prove this point. Other authors in this volume have referred to the "Cherokee grandmother" phenomenon, in which a white individual, with some distant relative who is American Indian, checks off both white and American Indian on the census form. Suppose for a moment that a large number of such individuals live in a community alongside a large number of individuals who check off American Indian only. Assume also that the single-race respondents and the "Cherokee grandchildren" tend to vote for different candidates: for example, the American Indians tend to vote Democratic and the "biracial" community tends to vote Republican. If one counts the biracial community as American Indian,<sup>17</sup> it will appear that the American Indian community is not politically cohesive—that is, that they do not support the same candidates. If the community is not cohesive, then one cannot argue that their votes are being diluted by a given set of district lines. Rather, the candidate "preferred" by the American Indian community tends to lose because the community splits its vote.

Although the new multiracial format will have implications for calculating the necessary elements of a vote dilution claim, those implications cut in different directions. On the one hand, a plaintiff may be aided by counting the multiracial population as members of the plaintiff's race, thereby suggesting the largest possible size of the minority community. As the minority community is "enlarged" in this way, however, one runs the risk of "diversifying" the community to the point at which it lacks political cohesion. For those worried about the legal impact of the new race format, these counterbalancing effects ought to be the source of solace, not additional concern. Only politically cohesive minority communities have enforceable voting rights claims. Thus, if the multiracial population is genuinely

and systematically different from the single-race population (an improbable occurrence), then the plaintiff has nothing to gain, and perhaps much to lose, from aggregating multiracials with the relevant minority group. However, if it turns out that the multiracial population votes as the single-race population does, then a good argument can be made that the two groups share similar characteristics beyond one box checked on a census form: they constitute a unified political group and also share some racial characteristics.

*Retrogression Under Section 5 of the Voting Rights Act* A similar dynamic emerges with regard to litigation under section 5 of the Voting Rights Act, although the standard in section 5 cases is "retrogression" rather than dilution. Section 5 requires certain states and jurisdictions to gain approval from the Department of Justice or a federal district court in Washington, D.C., before they enact their redistricting plans into law. Most of the jurisdictions covered by section 5 have a history of denying or impairing the right to vote of certain racial or "language" minorities.<sup>18</sup> Covered states submit their plans to the Department of Justice for "preclearance" (that is, permission to let them go into effect). The department will deny preclearance if a plan has a "retrogressive" purpose or effect on minority voting power. Retrogression is determined by looking at minority voting power under the previous plan and comparing it with what minority voting power would be under the proposed plan.<sup>19</sup> If the new plan will make minorities "worse off," then the department will deny preclearance. One factor the Department of Justice has considered in its assessment of retrogressions is whether the number of majority-minority districts (that is, districts in which a racial minority, such as African Americans, constitutes a majority of the district) would decrease if the proposed plan were to go into effect.

As in the vote dilution context, retrogression depends on certain assumptions about exactly who "belongs" to the racial minority in question and where they live. If, under a covered jurisdiction's current redistricting plan, for example, African Americans live together in a district, then a new redistricting plan that splits them up among many districts is likely to be considered retrogressive and therefore would be denied preclearance by the Department of Justice. The new question posed then by the multiracial format is whether multiracial respondents will be grouped with single-race respondents for purposes of determining the retrogressive effect of a districting plan. Another absurd example, derived from the American Indian hypothetical presented earlier, might help prove the point. Assume that under the current districting plan in a covered jurisdiction (for example, Arizona) an American Indian community exists as a narrow majority in a single-member district. Suppose further that under the proposed redistrict-

ing plan that American Indian community would be split into two districts, but half of it will now be joined with a large biracial "American Indian-white" community (for example, "Cherokee grandchildren"). Is there retrogression? If one counts the biracial population as American Indian, then the number of districts with an American Indian majority has not declined, and preclearance would be warranted. If one counts the biracial community as its own distinct race or as white, however, then perhaps the new redistricting plan does retrogress—that is, it may split up the American Indian community and therefore worsen the position of American Indians by reducing their voting strength. How the multiracial population is counted may affect whether the new district lines retrogress.

Once again we should be cautious in estimating the independent impact of the change in the census data. First, as a result of several Supreme Court decisions in the past decade striking down intentionally created majority-minority districts as unconstitutional, the Department of Justice is much less likely to adhere to rigid numerical thresholds, such as a decrease in the number of districts in which racial minorities constitute more than 50 percent of the population. Thus, the precise size of the single-race community under the current and proposed plans will most likely not be of any determinative significance. Second, in its recent notices on the subject, the Justice Department, while promising to use the OMB's aggregation rules to determine retrogression, has stated that its determinations of retrogression will involve a detailed and multifactor analysis, of which census race data are only a part (U.S. Department of Justice 2001).<sup>20</sup> As in the section 2 context, the Justice Department now promises to analyze polarized voting patterns and other electoral data to evaluate changes in minority voting strength under proposal redistricting plans. Third and most important, the multiracial populations in covered jurisdictions are likely to be so small that they could not conceivably rise to levels of significance required for the Justice Department's retrogression inquiries—almost all of which, like section 2 vote dilution cases, involve examinations of the diminution of African American and Hispanic voting strength. As noted at the beginning of this chapter, African Americans display a low rate of multiracial identification, and Hispanics, counted through a separate "origin" question on the census, are unaffected by the new multiracial format. If any group's voting rights under section 2 or section 5 will be affected during the next ten years by the new race format, it will most likely be American Indians in small covered jurisdictions (for example, a county districting scheme in South Dakota, Arizona, or Alaska) and perhaps Asian Americans in New York City or California. Nevertheless, a remarkable confluence of political and geographic circumstances and a rejection of the OMB's aggregation rules would need to occur before the new racial data present real difficulties for voting rights litigation.

## Constitutional and Other Problems Posed by Aggregation Rules

A common feature of these legal claims is the need for some agreed-upon method of counting or categorizing the multiracial population. As others in this volume have noted, an almost infinite number of such aggregation rules could be used. One could simply leave the sixty-three categories as they are, counting each four-race combination, for example, as its own separate "racial group." Another possibility is that one could count a biracial person, for example, as two people of different races or as half a person of each race. If it is decided that reaggregation back into the six single-race categories is desirable, rules of thumb could be developed based on the different probabilities that a given multiracial individual would have checked one or another single-race category. Such probabilities could be developed through survey methods or simply by looking at how members of certain multiracial groups responded to the racial categories on the previous census, when the multiple-response option was not offered. For example, if 80 percent of those who checked Asian American and white in the 2000 census checked only Asian American in the 1990 census, then for each level of geography 80 percent of those who checked that biracial combination would be reallocated to the Asian category and 20 percent to the white category. The OMB has developed its own somewhat controversial aggregation rules, which will apply to civil rights monitoring and enforcement.

### The Scope and Meaning of the OMB's Aggregation Rules

Recognizing that its decision to allow for a multiple-race checkoff might spawn confusion in federal agencies that rely on racial data, the OMB developed certain aggregation rules for civil rights monitoring and enforcement. In Bulletin 00-02, the OMB provided the following rules of aggregation:

- Responses in the five single race categories are not allocated.
- Responses that combine one minority race and white are allocated to the minority race.
- Responses that include two or more minority races are allocated as follows:
  - If the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on.

- If the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations to each of the minority groups. (OMB 2000, 61-62)

For all practical purposes, the OMB rules provide that the data should be aggregated in the light most favorable to racial minorities—that is, to increase the size of the nonwhite categories by reallocating to them any who could possibly be counted in those categories. Thus, a person who checks off the white and African American boxes will be reallocated as African American. Some authors in this volume have criticized such a practice as reenacting the "one-drop" rule of the Jim Crow South.

Before assessing the problems with the OMB rules, it is important to understand their scope. As the OMB bulletin itself states, these rules are for "agencies responsible for enforcing civil rights laws, and does not preclude the use of more detailed data if an agency chooses to do so" (OMB 2000, 61). These rules are for government agencies, not for private citizens or federal courts. Thus, to the degree they bind anyone at all, they apply only to the federal government, and only to those parts of the federal government, such as the Department of Justice or the Equal Employment Opportunity Commission, that are responsible for enforcing civil rights laws.<sup>21</sup> Indeed, the Census Bureau itself (not a civil rights enforcement agency) developed different allocation rules when it tried to figure out how to recategorize people for purposes of conducting its method of statistical adjustment (see Persily 2001, 931-33). As Bulletin 00-02 itself also states, nothing in the rules prevents an agency from developing more complicated or sensitive reaggregation rules.

To clarify even further, these rules will become an issue in court only when the federal government is a party to the case. Thus, if a woman sues her employer for racial discrimination on a disparate impact theory, the rules do not bind the court in adjudicating her claim. Moreover, the contending parties could advance alternative theories and procedures for aggregation of multiracial responses, and the courts, on a case-by-case basis, might develop aggregation rules for different legal and demographic contexts. Of course, one would expect the courts to pay some deference to the OMB's rules, but such rules might be highly applicable to one set of facts and highly inapplicable to another.

Moreover, in case the point needs to be reemphasized, no individual has a claim against a federal agency for being reallocated into a category he or she did not check. (I state the point again because so many have suggested otherwise in private conversations.) Individuals cannot be injured by the reallocation process; indeed, they will be unaware that it has happened. The allocation process becomes legally relevant only when it skews

the data used as evidence in litigation in a direction favoring either the plaintiff or the defendant.

### The Rationale for the OMB Rules and Possible Constitutional Objections

In many respects, one's position on how multiracial respondents should or should not be reallocated depends on whether one believes civil rights actions should be easier or more difficult to pursue. The OMB has taken the position that the new data format ought not to become an additional barrier to proving a civil rights violation. The OMB has decided that, in the unlikely event that a case turns on how the multiracial population is counted, the data should be presented in the light most favorable to the plaintiff in a civil rights action. Recognizing that civil rights cases that depend heavily on racial statistics are often quite difficult to win anyway, the OMB decided not to allow the new data format to become a factor that might tip the scale against the government when it enforces the civil rights statutes.

However well intentioned, the OMB rules may lead to some perverse results and to constitutional challenges. As noted in the discussion of voting rights enforcement, sometimes it is not in the interest of minority plaintiffs to have multiracial respondents reallocated into their single-race category. If systematic differences exist between the multiracial and single-race respondents, then aggregating the two groups might make the group look less cohesive, suggesting that the racial group may be more diverse or "better off" than the plaintiff suggests. Furthermore, by introducing multiracial respondents into a plaintiff's racial group, one runs the (admittedly infinitesimal) risk that a defendant could "make up" for discrimination against the plaintiff by acting favorably toward those of mixed race.

Of greater concern to many observers are potential constitutional problems with the OMB aggregation rules. Some might argue that the rules themselves arise from discriminatory intent and portend discriminatory effects that violate the Equal Protection Clause. Like arguments against affirmative action, the argument against the OMB rules would suggest that the rules seek to advantage minority plaintiffs over white plaintiffs or white defendants; therefore, the rules act as intended to discriminate on the basis of race against some civil rights complainants in favor of others. The Constitution prevents a federal agency from employing the OMB allocation rules, the argument goes, so the civil rights agencies for whom the rules were presented as guidance should develop different allocation rules that treat each race equally or discard allocation rules altogether.

There are several reasons to think a constitutional challenge to the OMB rules either will not happen or will not be successful, at least in the near term. The first is that the OMB rules are subject to challenge only if

they actually make a difference. Like other types of discrimination, the rules themselves must have an identifiable discriminatory effect—a person or organization must be injured by the OMB's use of these allocation rules as opposed to some nondiscriminatory ones. As I have tried to emphasize, those injuries will be rare, because few claims will turn on the manner in which multiracial respondents are allocated. More specifically, a plaintiff challenging the OMB rules must show that the choice of the OMB rules over alternative constitutional ones injured the person challenging the rules.

Second, even if the OMB rules were found to be unconstitutional as applied in a given case, the judge, by rejecting them, would probably not strike them down as facially unconstitutional. The judge would simply replace those rules with others that he or she considers more appropriate in the given case. To be sure, that might have the effect of striking down the rules by setting a precedent as to when such rules are inapplicable. The decision, however, as to what allocation rules should be used is ultimately a question of law for the judge, who will interpret the given civil rights statute and arrive at allocation rules that he or she considers as flowing from the statute. There will undoubtedly be some circumstances in which the OMB rules will make absolutely no sense (as in the hypothetical case of vote dilution presented earlier), and a judge will recognize that fact in constructing different rules for a given case.

Finally, it is worth stating that the OMB rules, even in the worst-case scenarios, probably do not violate equal protection; they merely redefine somewhat our notions of what a "protected class" under the civil rights laws may be. As described earlier, plaintiffs will now frame discrimination claims in such a way as to suggest that the defendant discriminates against anyone who is even part African American, for example. Assume for the moment that a defendant actually does discriminate against anyone who is even part African American; is it irrational or unconstitutional, then, to organize the reference group data in such a way as to reflect or prove that fact? Any allocation rule or even refusal to allocate biases the data in favor of or against potential plaintiffs or defendants. The OMB's rule, while certainly inapplicable and maybe unconstitutional in some cases, is not systematically inferior to alternatives, especially given the contexts in which allocation rules will become relevant. So long as some circumstances exist under which the OMB allocation rules could be applied constitutionally, what we can expect is a series of judicial opinions that cabin the OMB rules to appropriate situations. As the multiracial population grows, perhaps even overtaking some of the single-race categories, one would expect judges and the OMB to discard these allocation rules for alternatives that are more sensitive to the demographic dynamics depicted with each census.

## Conclusion

The decision to allow respondents to check more than one race on their census forms will have its most significant consequences on the way inherently arbitrary racial categories are understood rather than on the way racial data are used in the courtroom. Nevertheless, there will be some cases in which the new format may have an impact, and over the long term, it is likely that the opportunity for self-identification with more than one race will further erode or make fuzzy the lines separating one racial category from another. Indeed, the "problems" with the multiracial checkoff and resulting sixty-three racial categories highlight difficulties that come with any regime of racial categorization. The choice of categories themselves and assumptions about the groups that belong in them necessarily lead to "unfairness" and misassignment at the individual level. So long as we rely on a process of racial self-identification, though, we run the risk that variation within a given racial category will sometimes exceed variation between them.

In assessing the independent legal consequences of the multiracial checkoff, then, there is cause for both caution and concern. The legal regime has confronted and solved similar problems of racial categorization. For example, in several respects the problems of allocation and creating racial baselines have existed for as long as the census has asked the race question. Consider, for example, the separate question that attempts to capture Hispanic origin. The presence of that question alongside the race question has always led to a multiracial census, of sorts, with which the law coped, in general, by adopting something akin to the OMB allocation rules. When Hispanic origin was relevant—that is, when a plaintiff claimed a defendant had discriminated against him because he was Hispanic or that Hispanic votes were diluted—the court would pay attention to data on Hispanic origin. The court would "reaggregate" those respondents, despite the fact that most who fell into that category also considered themselves black or white and had checked off one of those categories on their census forms. Conversely, for an African American plaintiff alleging racial discrimination, the data were usually retabulated with sole attention to the race question—despite the fact that the relevant category would include recent immigrants from Puerto Rico and the Dominican Republic as well as descendants of American slaves.

A second reason for caution in assessing the independent legal effects of the change in the format of race data is that discrimination claims that will turn on categorization will be few and relatively weak. As emphasized repeatedly throughout this chapter, the overwhelming majority of discrimination claims for all statutes are made on behalf of African Americans and Hispanics. African Americans display a low rate of multiracial response,

such that the choice of aggregation rules will not affect them. Data on Hispanics come from a separate question on Hispanic origin, and thus the change in data format leaves their numbers constant. Even for those racial groups with a relatively high rate of multiracial response, such as American Indians and Alaska Natives, Native Hawaiians and other Pacific Islanders, and Asians, a discrimination claim that turns on the way the multiracial population is categorized is probably relatively weak. Most discrimination claims that rely on statistics will not turn on a 10 percent difference in the benchmark population. If a county's population or teacher applicant pool is 33 percent American Indian, for example, but only 30 percent of the teachers employed in the county's public schools are American Indian, one would be hard pressed to find a judge who would suggest that such a disparity gives rise to an inference of discrimination. Numbers that close, in fact, usually suggest that the jurisdiction is doing something right. A plaintiff whose case depends on upping his racial group's numbers to the maximum probably has a pretty weak case in any event.

Finally, rules of aggregation will emerge to deal with this new complexity. We can be sure that the rules developed today will become irrelevant in succeeding censuses, but racial categorization (as the perpetual change even in the census single-race categories suggests) is an inherently evolving process. Indeed, courtrooms will serve as forums in which society arrives at rules for when, if ever, groups should be recategorized as one race or another. The inquiry and result will most likely depend on the circumstances. Different multiracial combinations may require different rules of aggregation, and some combinations may become so large as to warrant their own category.<sup>22</sup> In many respects, the legal rules that are developed will be based more on our underlying beliefs as to how high we think the barriers to bringing civil rights claims should be rather than on some shared agreement as to which type of person belongs in which racial category.

## Notes

1. Of course, the method of self-identification and the Census Bureau's procedures for occasionally *assigning* people racial identities have received much deserved criticism; see Skerry 2000, 46–79. For purposes of this chapter, the relevant point is that individuals who fill out census forms are never "injured" by any process that categorizes or miscategorizes them.
2. Although such breaches of official duties may not injure an individual, statistical agencies, like other federal agencies, are forbidden to engage in "arbitrary and capricious" conduct.
3. The OMB guidelines allowing for multiple-race responses do not limit themselves to census data. The 1997 standards apply to all racial information gathered by federal agencies. See OMB 1997.

4. See, generally, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1983) (holding that the equal protection clause is implicated only when a state's legislature selected a course of action at least in part because of, and not merely in spite of, its adverse effects on an identifiable group); and *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977) (reversing a Seventh Circuit decision and finding that while the plaintiff had standing to sue, they had failed to establish racially discriminatory intent or purpose was a motivating factor in the rezoning decision).
5. See Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2(k) (West Supp. 2000). Disparate impact analysis was an accepted part of Title VII of the Civil Rights Act until 1989 when the Supreme Court, in *Ward's Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), interpreted the Act in such a way as to limit disparate impact claims. The Civil Rights Act of 1991 overruled *Ward's Cove* and codified disparate impact analysis into the law of employment discrimination. The analysis, which presents a series of shifting burdens between the plaintiff and defendant, begins with the plaintiff's demonstration that a given employment practice has fallen more harshly on plaintiff's racial group. As proof a plaintiff will show that the employer hired members of plaintiff's race at a rate lower than that racial group's percentage in the population or qualified applicant pool. The defendant employer then must show that the practice is "job related for the position in question and consistent with business necessity." If the employer is able to prove business necessity, then the plaintiff must show that an alternative practice would fulfill the necessity but have less of a disparate impact on racial minorities.
6. *Griggs v. Duke Power* (401 U.S. 424 [1971]). *Griggs* established the disparate impact test that was limited by *Ward's Cove* but largely reinstated by the Civil Rights Act of 1991. *Griggs* also relied somewhat on census race and education data to show disparate impact. (*Griggs v. Duke Power*, at 430 n.6.)
7. *Griggs v. Duke Power*, at 430 n.6.
8. See, for example, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Turner v. Fouche*, 396 U.S. 346 (1970); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967); *Swain v. Alabama*, 380 U.S. 202 (1965).
9. The problems with the hypothetical also reflect the complexity of discrimination suits. First, the relevant benchmark would not be derived from the general population. If the claim is one of discriminatory hiring practices, one must use population statistics limited to those people who applied for the job or, perhaps, those who are of the correct age and education level for the job. Second, it is almost inconceivable that somehow an employer could successfully (let alone intentionally) discriminate just against the mixed-race population. Third, workforce data probably are not compiled with the same sensitivity to multiraciality that the census is. Thus, the 10 percent figure could reflect how many Native Hawaiians are counted by an observer rather than through a process of self-identification along the lines of the census. In other words, employers (at the present time) do not keep data on their work-

- force broken down into sixty-three racial categories. However, one might conceive of a future employer, either during litigation or preparing for it, who uses the census multiracial data format. Finally, the "Native Hawaiian or other Pacific Islander" category, even standing alone, falls prey to some of these problems. The category groups together a wide array of diverse groups found on either sides of the Pacific.
10. Sometimes even census race data are used to evaluate an affirmative action program. In the well-known case of *Regents of the University of California v. Bakke* (438 U.S. 265 [1978]), Justice Powell's opinion announcing the judgment of the Court, as well as the other opinions in the case, used census data to justify their positions. Justice Powell's opinion, for example, made note of the fact that "by 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened: The number of Negroes employed in medicine remained frozen at 2.2% . . . while the Negro population had increased to 11.1%. . . . The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years 1955 to 1964" (438 U.S., at 370). Justice William Brennan's opinion went even further in defending the university's affirmative action program: "True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—less than their proportion of the California population [footnote]—of otherwise underrepresented qualified minority applicants [footnote]" (438 U.S., at 374). The footnotes to the quoted section of Brennan's opinion are even more revealing of how racial data work in affirmative action programs and judicial consideration of them: In the first, Brennan notes that "Negroes and Chicanos alone constitute approximately 22% of California's population." The second reads as follows:

The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California. . . . This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16

places in each entering class for special admittees is unconstitutionally high (438 U.S., at 374, nn. 57 and 58).

11. For example, the University of Pennsylvania, Yale University, the University of Chicago, and Harvard University (which uses the "Common Application," as do approximately two hundred other colleges) now allow applicants to check off more than one race on their college applications. Subtle variations exist between the schools as to the format of the race-ethnicity question and available choices. The applications can be found at [www.upenn.edu/ugaol/forms/Domestic2001.pdf](http://www.upenn.edu/ugaol/forms/Domestic2001.pdf) (February 1, 2002); [www.yale.edu/admit/freshmer/application/pdf/yale-application.pdf](http://www.yale.edu/admit/freshmer/application/pdf/yale-application.pdf) (February 1, 2002); [www.college.uchicago.edu/College/App-ad/App/freshman0203.pdf](http://www.college.uchicago.edu/College/App-ad/App/freshman0203.pdf) (February 1, 2002); and [admis.fas.harvard.edu/Rollo01/application/49678A11-14.pdf](http://admis.fas.harvard.edu/Rollo01/application/49678A11-14.pdf) (February 1, 2002).
12. See, for example, 13 CFR § 124.1008 (describing the Small Business Administration's program for determining "small disadvantaged business" status); 49 CFR § 26.45 (describing the Department of Transportation's program for participation of "disadvantaged business enterprises," which refers to disparity studies and census data).
13. Elsewhere I discuss at greater length the voting rights implications of the new multiracial format; see Persily 2000, 2001. See also Saunders 2001.
14. Unlike the previous contexts, however, race-based intent by itself can, on rare occasions, give rise to a constitutional claim. In a set of controversial decisions beginning with *Shaw v. Reno* (509 U.S. 630 [1993]), the Court has invalidated districts in which race was the "predominant factor" in their creation.
15. Gingles involved a challenge to a multimember, at-large districting scheme that diluted the votes of African Americans. Dilution was shown there because the use of the multimember form acting alongside racially polarized voting submerged the votes of African Americans and thereby prevented them from electing the candidates of their choice.
16. Although *Gingles* seems to establish "majority" status as a threshold showing for a vote dilution claim, the Court (in footnote 12 of the *Gingles* opinion) left open the possibility that a community that did not surmount the "50 percent plus one" threshold might still have a claim under section 2. Although a few lower courts have entertained so-called influence-district claims, no such cases have made their way to the U.S. Supreme Court. In many respects, whether influence-district claims are justiciable under section 2 will determine the importance of the change in the census race format. If rigid numerical or percentage thresholds are unimportant, then how the multiracial community is counted (that is, whether its inclusion would bring the minority community over the 50 percent threshold) might not prevent a plaintiff from getting his or her foot in the courthouse door to argue the rest of a vote dilution claim.

17. Incidentally, this would be the practice under the OMB's aggregation rules.
18. Covered states include Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. States with covered jurisdictions include California, Michigan, New Hampshire, New York, North Carolina, and South Dakota.
19. See *Beer v. United States*, 425 U.S. 130, 141 (1976). A redistricting plan created with a retrogressive purpose (that is, with an intention to make minorities worse off) can also be denied preclearance by the Justice Department; see *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).
20. The same notice explains that the impact of multiple-race responses on the preclearance process is "expected to be minimal" (66 Fed. Reg. at 5414).
21. The Department of Justice is not technically an agency, but as noted in the previous section, it has agreed to use the OMB's aggregation rules, at least with respect to enforcement of the Voting Rights Act.
22. Indeed, OMB Bulletin 00-02 provides that for agencies collecting racial data, any individual multiracial combination that rises above 1 percent will be calculated separately (suggesting such a combination is entitled to its own line on the relevant form). It further specifies that the races on a given form will change based on where such data are collected. As the bulletin's footnote explains, "Based on Census 2000 data, agencies will determine the race combinations that meet the one percent threshold. For example, in Hawaii there may well be combinations of race groups that meet this threshold such as Native Hawaiian or Other Pacific Islander and Asian, or Native Hawaiian or Other Pacific Islander and White, or Native Hawaiian or Other Pacific Islander and Asian and White" (OMB 2000, Appendix B, 3).

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