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Comparative Study on the Collection of data to Measure the Extent and Impact of Discrimination in a selection of countries

Medis Project (Measurement of Discriminations)

Final Report on The United States

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United States law at the federal, state and local levels include antidiscrimination provisions on the basis of all four of the motifs at issue here: (1) religion; (2) disability; (3) sexual orientation; and (4) race (along with color and national origin).

The plurality of meanings associated with this last term in the American context is worth emphasizing from the start. On the one hand, beliefs in race as essential biological or cultural difference still retain their currency in the American public imagination (American Sociological Association (2003); Jayaratne (2002); Morning (2004); Omi (2001)). Growing conviction that racial groups are – or should be treated as – social equals has not entirely dislodged the belief that "races" exist.[1] On the other hand, nowadays, "race" refers not only to an anthropological classification of human beings into a plurality of genetically distinct subgroups, but also, in an elliptic fashion, to those collectivities that have experienced the most severe forms of discrimination originally predicated upon this now quasi-defunct "scientific" racism. While "race" used to relate to a set of biologically determined, immutable, group-owned features, in most quarters of the academy it now serves to designate a specific kind of *social* identities – essentially produced by some discriminatory behaviors that one can – and should – attempt to modify through political and legal action. According to what currently stands as its only legitimate *positive* definition, race thus tends to be reduced to *a basis of illegitimate inequalities* – hopefully bound to disappear over time ; it refers to a specific kind of social *disadvantage* deriving from external and internal identification to a group originally stigmatized as an inferior "race". Thus, while in the United States the delegitimization of racism has not entailed the disqualification of "race" as a descriptive category, it has *implicitly* modified its content.

In general, U.S. laws prohibit discrimination in a wide range of sectors, including employment, education, voting, housing, public accommodations, credit and banking. However, the degree of protection afforded varies considerably depending on the discriminatory motive. A large body of legal protections has been developed to prohibit discrimination on the basis of race, disability, and religion, whereas gays and lesbians are largely unprotected by such legal provisions at present and in fact are simultaneously subject to explicitly discriminatory laws, such as those forbidding their military service, adoption of children, or recognition of their marriage. Similarly, the principle of non-discrimination in each area enjoys different levels of public support; while freedom of religion is a longstanding norm and protection of the handicapped has met little disagreement, the rights of gays and lesbians are currently a topic of widespread debate.

[1] Consider the rise of "recreational genomics" services that analyze customers' DNA to provide their racial ancestry profile; see for example *The New York Times*' article "For Sale: A DNA Test to Measure Racial Mix" (Wade 2002).

Also, while there is a broad consensus on the desirability of or need for legal provisions to combat *intentional* racial discrimination, affirmative action programs[2] designed in part to compensate for the effects of indirect, systemic discrimination remain unpopular with a majority of the American public[3] and have been challenged repeatedly over time.[4] More generally, social scientists have long noted a disjuncture between Americans' support for non-discrimination in the abstract and their lesser enthusiasm for concrete policy measures designed to eliminate or compensate for the effects of past and present discrimination (Schuman *et al.* (1997); Kinder and Sanders (1996)).

As for quantitative data, they have indeed played an important part in the implementation and enforcement of antidiscrimination laws since the 1960s. But just as these laws cover race, religion, handicap, and sexual orientation to different degrees, the role of statistical analysis in antidiscrimination law and policy varies according to the basis and sector of discrimination. It is primarily racial discrimination in employment, education, and voting that is likely to be subjected to statistical analysis in the United States today. And because the first two of these areas are also among the most common sites for affirmative action goal-setting, the collection and analysis of quantitative data is also central to affirmative action initiatives. The use of statistics in antidiscrimination law set the stage for affirmative action's goals and timetables approach.

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[2] Affirmative action refers to "a range of governmental and private initiatives that offer preferential treatment to members of designated racial or ethnic minority groups (or to other groups thought to be disadvantaged), usually as a means of compensating them for the effects of past and present discrimination" (Swain (2001), at 319). In particular, such initiatives involve college and university admissions policies, the distribution of scholarships and grants, private and public-sector employment, and government contracting. These groups that stand to benefit from affirmative action are African Americans, Hispanics, Native Americans, women, and sometimes Asians (religious affiliation is not a factor; neither is handicap or sexual orientation). The phrase "preferential treatment" should not be understood as having any negative implication. It refers to a situation where, for example, a black applicant, B1, would be selected for a job (for which he or she is minimally qualified) in spite of there being at least one white applicant whose qualifications were deemed to be "higher". "Higher" means that if another black applicant, B2, came up with exactly the same qualifications as the white applicant, the employer would have hired him instead of B1 (see Nagel (1977), at 3). In other words, racial identification is the key factor here: B1 succeeds in obtaining the job he applied for and would have failed but for his being identified as black. While this definition of affirmative action is not the only conceivable one, it captures the dominant meaning of the phrase as it is now being used in the American public debate and brings into relief the main subject of political and legal controversy.

[3] Sniderman and Piazza (1993); Sniderman and Piazza (1997).

[4] See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (imposing strict scrutiny on state and local set-asides of public contracts for minority firms); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) (extending *Croson* to federal minority set-asides); *Hopwood v. State of Texas*, 78 F.3d 932 (5th Circuit 1996) (striking down an affirmative action program set up by the University of Texas' law school to promote diversity of the student body), *Gratz v. Bollinger*, No. 02-516, 2003 WL 21434002 (U.S. June 23, 2003) (striking down the affirmative action policy of the University of Michigan's undergraduate school, which systematically distributed 20 points of the 100 needed to guarantee admission to all members of designated racial or ethnic minorities. In that case, whether the specific element triggering the judgment of unconstitutionality was the extent of the bonus granted to minority candidates or simply its quantification is not entirely clear. Still, the automatic assignment of a predetermined, constant, numerical value to ethnoracial minority membership high enough to virtually guarantee admission to every minimally qualified minority student was held unconstitutional). Popular initiatives and state executive decisions have also led to the elimination of affirmative action in at least part of the public sector in California (1996), the State of Washington (1998), and Florida (2000): see generally Sabbagh (2003): 77-128.

To a certain extent, the statistical analysis of racial discrimination is a by-product of the extension of the antidiscrimination movement from the South – where the existing systems of *de jure* segregation made such data seem superfluous, since the reality of discrimination was official and acknowledged by all – to the North. It is made possible by the routine and widespread collection of data on Americans' race, on official records from the national census to birth and death certificates, school records, and job applications. In contrast, religious identification is generally avoided or even prohibited on the same documents, consistent with the longstanding norm of separating church from state and thus precluding government circumvention of religious freedom. Sexual orientation is also largely absent from government forms, but for diametrically opposite reasons: homosexuality remains a widely stigmatized behavior that has only recently (and incompletely) emerged as an acceptable basis for public identification.[5] Nor is there any consensus that gays and lesbians should benefit from special protection of their civil rights.[6] However, the existence of quantitative data is no guarantee of the incorporation of statistical analysis in antidiscrimination protection. Although the U.S. Census Bureau collects information on respondents' disability status, these data are not generally used to build evidence of discriminatory patterns. As a result, race-based discrimination remains the primary field to which statistical analysis is applied. This realm of study meets the conditions of being grounded in existing antidiscrimination law (unlike the absence of protections for gays and lesbians), public acceptance of the collection of related data (unlike the case of religion), and devoting considerable attention to broad-based patterns of discrimination (unlike the individual complaints usually investigated under disability law).

However, since the civil rights legislation of the 1960s and 1970s and the concomitant use of race data to protect minority rights and grant race-based preferences, both the issues of data collection and its classification have become the focus of new controversies. Objection to affirmative-action plans has fueled attempts to prohibit state-level collection of race data. And the categories used in data collection have come under scrutiny, both from technocrats who demand a clear and uniform scheme to facilitate civil rights enforcement and from individuals who wish to find their personal sense of identity accurately reflected in government racial classifications. In this connection it must be noted that in 1977, the Office of Management and Budget (OMB), issued Statistical Policy Directive 15 in order to impose a uniform set of racial categories for federal agencies to adopt.[7] Twenty years later, OMB revised these standards in large part to accommodate multiracial Americans who sought the option of identifying themselves with a combination of two or more races (Office of Management and Budget (1997a)).

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[5] A recent survey found that only 51 percent of Americans interviewed believed that homosexuality should be accepted by society, compared to 83 percent of German respondents, 77 percent of French interviewees, 74 percent of British interviewees and 72 percent of Italians (The Pew Global Attitudes Project 2003).

[6] A February 2004 *Newsweek* poll found that 22 percent of interviewees believed that gay rights were already sufficiently protected, 25 percent felt more effort was needed in this area, and 45 percent thought that efforts to protect gay rights had "gone too far" (American Enterprise Institute 2004).

[7] Although Directive 15 was originally promulgated solely for the use of federal agencies, it has become the de facto standard for state and local agencies, the private sector, the non-profit sector, and the research community.

At the end of the day, the United States' collection of race-classified data can be likened to a double-edged sword. On one hand, the analysis of racial statistics has contributed significantly to the civil rights assault on centuries-old practices of exclusion in the social, economic, and political spheres. Statistical portraits of racial groups' differing experiences in schooling, housing, the labor market, and elsewhere held up a mirror to a nation that few Americans wanted to face. The reflection continues to startle: for example, sociologist Devah Pager's (2003) recent finding that whites with criminal records are more likely to be considered for employment than blacks with clean records has been widely reported in the media.

On the other hand, the collection of data on race arose from – and may help perpetuate – longstanding American beliefs in the reality and significance of "race". Clearly, the absence of statistical measurement of discrimination does not preclude its existence. As the American Sociological Association (2003) has stated, "refusing to employ racial categories for administrative purposes and for social research does not eliminate their use in daily life, both by individuals and within social and economic institutions". But whether the systematization of race-based data collection has an entirely positive impact on discrimination is far from obvious. The United States' experience does not provide a simple answer because its racial statistical system preceded the development of most current antidiscrimination law by nearly two centuries.

I - ANTIDISCRIMINATION LAW AND POLICIES: A GENERAL OVERVIEW

A/ The Historical Background

The United States' legal apparatus for protection against discrimination traces its roots back to the Constitution, known as the "supreme law of the land", which was officially adopted in 1789. Moreover, subsequent amendments to the Constitution play a major role in antidiscrimination law today. Chief among these are the First Amendment (ratified in 1791), protecting freedom of religious worship; the 14th amendment (1868) guaranteeing equal protection under the law;[8] the 15th amendment (1870) ensuring citizens' right to vote regardless of "race" or "color"; and the 19th amendment (1920) guaranteeing the same right to vote regardless of sex.

As is well known, however, the existence of such legal provisions did not preclude widely-sanctioned public and private practices of the most discriminatory nature. Race-based slavery continued until 1865, and even after passage of the 15th amendment, blacks were effectively disenfranchised through unfair poll requirements, intimidation, and violence (Marx 1998). Although the nation's first civil rights laws were passed in this post-Civil War period (known as "Reconstruction"[9]), the failure to enforce them rendered them virtually meaningless. In fact, many of the state "Black Codes" and "Jim Crow" statutes forbidding social interaction between blacks and whites were adopted during (and in reaction to) Reconstruction, regardless of non-whites' new constitutional protections (Woodward (1974)). Moreover, 19th- and early 20th-century courts routinely interpreted the Constitution as being consistent with segregationist principles that would now be considered discriminatory. Perhaps most prominent among these is the 1898 *Plessy v. Ferguson* case,[10] in which the Supreme Court found that "separate but equal" accommodations for different races were not in violation of the 14th Amendment's Equal Protection Clause.

The most extensive development of antidiscrimination protections to date – and the source of most of today's law in this arena – emerged from the civil rights movement of the 1950s, '60s and '70s. One of the earliest and most widely-hailed steps in this process was the 1954 *Brown v. Board of Education* decision, in which the Supreme Court overturned the *Plessy* principle of "separate but equal" to rule that racially segregated schools were inherently unequal.[11] The Civil Rights Act of 1964 and Voting Rights Act of 1965 were also milestones of this era, and they spurred a tide of subsequent laws, such as the Fair Housing Act of 1968, the Equal Employment Opportunity Act of 1972, and the Equal Educational Opportunities Act of 1974.

[8] "…No state shall deny any person living under its jurisdiction the equal protection of the laws".
[9] See generally Foner (1988).
[10] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[11] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

This build-up of statutory law on discrimination meant that civil rights protection branched out from its prior concentration in Constitutional law. Accordingly, many actors have played significant roles in the creation and elaboration of federal antidiscrimination law since the mid-20th century. The Supreme Court is central given its authority as interpreter of the Constitution, but lower courts have also made significant contributions to the body of antidiscrimination law. As the nation's legislative branch, the U.S. Congress generated the laws (or Acts) that became the backbone of the civil rights revolution. And the executive branch has often taken the lead in promoting antidiscrimination protection through the presidential issuance of Executive Orders – regulations that are binding on federal government agencies, employees, and contractors. In 1941, for example, President Franklin D. Roosevelt issued E.O. 8802 to prohibit private federal contractors from discriminating in employment on the basis of "race, creed, color or national origin", and in 1948, President Harry Truman initiated the desegregation of the U.S. military through Executive Order 9981's call for "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin". Similarly, the term "affirmative action" first acquired its civil rights connotation when President John F. Kennedy used it in E.O. 10925 (1961) to order federal contractors to take "affirmative action" against discriminatory practices.[12]

In retracing the historical evolution of U.S. antidiscrimination protection, it must be noted that affirmative action was not an element of the early wave of civil rights legislation, but rather such programs came to be undertaken later as strategies for preventing or addressing charges of discrimination. The Civil Rights Act of 1964, for example, did not push beyond antidiscrimination measures to institute preferential treatment goals. By the early 1970s, however, the "equal opportunity" rhetoric of the civil rights movement seemed insufficient to counter entrenched patterns of discrimination, and President Nixon approved the use of numerical quotas in construction-industry hiring as part of what became known as the Philadelphia Plan. This local experiment served as the blueprint for regulations that would later be applied to all private federal contractors, requiring them to establish statistical "goals and timetables" under the supervision of the Department of Labor's Office of Federal Contract Compliance Programs. Similarly, minority "set-aside" programs emerged in the 1970s, requiring government contracts to dedicate a certain proportion of funds for minority firms.

[12] The term "affirmative action" was first used in a labor context, however, in the 1935 Wagner Act.

The Philadelphia Plan and its descendants illustrate the use of what has come to be called "hard" affirmative action—such as mandatory numerical quotas—versus "soft" measures like special recruitment or outreach.[13] The distinction is important because hard affirmative action has met with public resistance since its introduction, and it continues to provoke public outcry today. Moreover, the backlash against the use of statistics for affirmative action programming may threaten the use of quantitative data in documenting discrimination as well.

B/ "Forbidden Grounds"[14] : race ; religion ; sexual orientation ; handicap

Legal protections against discrimination on the basis of religion, race, disability and sexual orientation generally arose at different stages of U.S. history. As mentioned previously, the guarantee of religious freedom was incorporated in the Constitution's Bill of Rights before the end of the 18th century. The first steps toward federal protection of racial minorities did not take place until the second half of the 19th century, when slavery was abolished and the 15th amendment prohibited discrimination in voting on the basis of "race, color, or previous condition of servitude". Legal protection against racial discrimination was not consolidated for another century, however. The prohibition of disability-based discrimination followed the civil rights movement, taking its most comprehensive form to date in the Americans with Disabilities Act of 1990. And if religion can be said to be the oldest basis for antidiscrimination protection in the United States, race the next oldest, and disability the most recent, then sexual orientation could be said to be the discriminatory domain whose time has not yet come—or is perhaps in its infancy. As we will explain, very little federal law currently offers protection to gay and lesbian people, and instead, explicitly discriminatory laws remain on the books.

The staggered chronology of U.S. antidiscrimination law means that such provisions are often grounded in different bodies of law and reflect different concerns and theories. At the same time, earlier legislation has often served as a model for later laws, and single laws have prohibited more than one form of discrimination (recall Truman's executive order forbidding military exclusion on the bases of either race or religion). As a result, it is difficult to draw neat boundaries between antidiscrimination law on race, religion, disability, and sexual orientation. Below we offer a rough sketch of the principal legal provisions for antidiscrimination in each realm, following the chronological order in which they arose in order to identify some of the conceptual similarities across domains. The topic of racial discrimination will be most extensively discussed, both because it is associated with a larger body of law than the other grounds and because it is most likely to be subject to the collection and analysis of statistical data. Note also that for the sake of brevity, the discussion will focus on

[13] In the employment field, up to the end of the 1960s, affirmative action policies were mainly concerned with increasing the number of black applicants, by running job advertisements in black newspapers or by setting up special training programs in areas where blacks were heavily concentrated. This type of affirmative action – also known as "outreach" – did take race into account, but in a rather limited way. Race was allowed to enter the picture only within the preliminary process of enlarging the set from which individuals would be selected, not at the selection level itself. However, in current affirmative action policies, the recruitment process is often entirely permeated by color-consciousness, even during the final decision stage.

[14] This is the title of a book by legal scholar Richard Epstein, of the few opponents to contemporary antidiscrimination legislation; see Epstein (1992).

federal law as opposed to state and local laws, which also incorporate antidiscrimination provisions stemming from their own judiciary, legislative, and executive branches.

1) Religion

The Constitution remains an important foundation for legal protection against religious discrimination. The First Amendment (1791) begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and has thus been held to incorporate both an "Establishment Clause" and an "Exercise Clause" that embody the principle of non-discrimination on the basis of religion. For nearly the first two centuries of the United States' history, the First Amendment was the primary source of protection against discrimination on account of religion.

In the 1960s, the Civil Rights Act and other new legislation entered the arena of religious protection by prohibiting discrimination on grounds of religion alongside grounds like race and sex. Title VII of the Civil Rights Act of 1964 (Public Law 88-352), for example, prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin". Executive Order 11246, issued in 1965, prohibits discrimination on the same bases in the public and federal contractor sectors.

This more active engagement on the part of the government in combating discrimination also gave rise to an expanded definition of what constituted religious discrimination. Previously, the Constitution and early civil rights legislation like Title VII upheld the principle of "equal treatment" regardless of creed, implying a kind of "religion-blind" approach that forbade employers, government, or other entities from recognizing religious affiliation. In the 1960s and 1970s, however, some courts and government agencies came to argue that protection from discrimination included a "duty to accommodate" diverse religious practices, thus calling for a certain degree of recognition of religious pluralism.[15] This broadened interpretation of antidiscrimination was incorporated into Title VII when the Civil Rights Act was amended in 1972.[16] As a result, antidiscrimination law now contains provisions for protecting both freedom of religious belief and freedom of religious practice (Beckley and Burstein 1994).

[15] As early as 1952, Supreme Court Justice William O. Douglas suggested that the legal accommodation of religious practice was not necessarily antithetical to the separation of church and state (in *Zorach v. Clauson,* 343 U.S. 315 (1952)). The watershed Supreme Court cases in this realm, however, were *Sherbert v. Verner* (374 U.S. 398) in 1963 and *Wisconsin v. Yoder* (406 U.S. 205) in 1972, which ruled that state regulations had to accommodate religious minorities if they could show those regulations to infringe on their religious observance. This accommodationist view has since been described as mandated by the Constitution (see Chief Justice Burger's remarks in *Lynch v. Donnelly,* 465 US 668 (1984)).

[16] Section 701 (j) of Title VII of the 1964 Civil Rights Act makes it "an unlawful employment practice for an employer to fail to accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business".

The expansion of the concept of religious discrimination has not avoided controversy, however. In the *Hardison* (1977) and *Philbrook* (1986) cases,[17] the Supreme Court required only limited concessions to religious practices on the part of employers and unions, and suggested that accommodation of diverse religious practices might constitute discrimination against others. And in *Goldman v. Weinberger* (1986),[18] the Supreme Court decided 5-4 that the Air Force had the right to force out an employee whose yarmulke violated military dress requirements. Perhaps the most striking measure of public reluctance to accommodate religious practice lies in the degree of Congressional opposition to a subsequent amendment to Title VII in favor of accommodation – 42 senators voted against it – when the 1972 amendment in the same vein had been approved unanimously. The essence of this opposition is reflected in Defense Secretary Weinberger's argument that the departure from dress uniformity would foster "resentment and divisiveness" among members of the armed forces (quoted in Beckley and Burstein 1994: 291).

The relatively recent tension between the principles of religion-blind equal treatment and religion-sensitive accommodation reveals an important dimension of the traditional American conception of freedom from religious persecution. In the past, freedom of religion was associated with the separation of church and state, where "church" largely denoted Christianity (albeit fragmented in distinct denominations). This strict separationism, however, did not necessarily entail respect or appreciation of a wider spectrum of religious and cultural diversity. Today, however, greater religious pluralism may test the principle of religious accommodation (and even of equal treatment) in ways that were unforeseen 40 years ago. One illustration of this can be found in the U.S. Equal Employment Opportunity Commission's (2001a) efforts to educate the public about religious discrimination as directed specifically toward Muslims. This post-9/11 initiative, which addresses "discrimination or harassment against individuals who are—or are perceived to be—Muslim, Arab, Afghani, Middle Eastern or South Asian (Pakistani, Indian, etc.)," suggests that the prohibition against religious discrimination is complicated by a growing public association of religious affiliation with ethnic pluralism.

2) Race

As in the case of religion, U.S. legal protection against racial discrimination is grounded both in the Constitution and in more recent statutory law. The Fourteenth Amendment (1868) to the Constitution contains the "Equal Protection Clause", according to which no state may "deny to any person within its jurisdiction the equal protection of the laws". The Fifteenth Amendment (1870) commands, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The two Amendments may appear to represent distinct approaches to the recognition of difference in the service of antidiscrimination. Whereas the Fifteenth Amendment explicitly names race as a form of

[17] *Hardison v. Trans World Airlines, Inc.*, 432 U.S. 63 (1977); *Ansonia Board of Education v. Philbrook,* 479 US 60 (1986).
[18] *Goldman v. Weinberger*, 475 U.S. 503 (1986).

difference that cannot underpin discrimination *in matters of voting rights specifically*, the Fourteenth Amendment, requires "equal protection" without specifying any particular class of individuals whose protection is to be assured. In particular, the Equal Protection Clause does *not* incorporate a broader principle of color-blindness according to which the state must abstain from drawing distinctions on the basis of race – regardless of the specific domain under consideration. Indeed, when one of the most influential Republican leaders of the Reconstruction Era, Wendell Phillips, proposed a constitutional amendment prohibiting the states from drawing legal distinctions along racial lines, that amendment was rejected and the "equal protection of the laws" formula was chosen instead on account of its more flexible character. Phillips's proposal would have had the (then unwanted) consequences of ending school segregation and prohibiting laws restricting interracial marriage, and the phrase "equal protection of the laws" offered the political advantage that its meaning remained comparatively vague in that respect (Kull 1992).

More recently, the Supreme Court's case law has gestured at times toward equating the Equal Protection Clause with the principle of color-blindness, by considering that classifications based on race are inherently "suspect" and should trigger the most exacting level of judicial scrutiny.[19] As a practical matter, this means that race-based classifications are now allowed to stand only if they are proved to be "narrowly tailored" – that is, strictly indispensable – in achieving a "compelling state purpose".[20] But the Court has never gone so far as to establish a general prohibition on the use of race classifications by state authorities, thereby leaving them free to set up race-conscious antidiscrimination and affirmative action policies within certain parameters.[21]

In addition to the Supreme Court, U.S. presidents since the 1940s have contributed to antidiscrimination law as it pertains to race. As mentioned earlier, Executive Orders 8802 and 11246 prohibited employment discrimination in the public sector and among federal contractors, and Executive Order 9981 called for military desegregation.

Finally, the U.S. Congress has been a major source of antidiscrimination law since the 1960s, in some instances expanding the reach of policies contained in Executive Orders that were binding only on federal government employees. The most prominent statutes to emerge from this era are the 1964 Civil Rights Act and the 1965 Voting Rights Act. They were quickly followed, however, by such legislation as the 1968 Fair Housing Act, the 1972 Equal Employment Opportunity Act, the Equal

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[19] See Calvès (1998): 191-219. Other "suspect" classifications triggering strict scrutiny are those based on national origin (*Hernandez v. State of Texas*, 347 U.S. 475 (1954)), alienage (*Graham v. Richardson*, 403 U.S. 365 (1971)) and birth illegitimacy (*Levy v. Louisiana*, 391 U.S. 68 (1968)). Classifications based on handicap or on sexual orientation are neither prohibited nor considered as "suspect" under the Equal Protection Clause.

[20] See *Korematsu v. United States*, 323 U.S. 214 (1944), at 216; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), at 16-17; *Shapiro v. Thompson*, 394 U.S. 618 (1968), at 634; *Wygant v. Jackson Board of Education,* 476 U.S. 274 (1985); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 227 (1995). When there is no "suspect" classification involved, heightened scrutiny is not triggered and the Court only subjects the law to a "rational basis" review. Under this test, courts presume the law is constitutional and will uphold it if they can find that it is a rational means of advancing *any* legitimate state interest.

[21] See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (an affirmative action program in university admissions that considers race as a "plus" without establishing a quota is permissible under the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900 (1995) (taking race into account within a redistricting process is constitutionally allowed so long as race is not the "predominant" factor).

Educational Opportunities Act (1974), and the Equal Credit Opportunity Act (1974). As their titles suggest, these laws applied the prohibition against racial discrimination well beyond the sectors of employment or education alone. See section 1.4 for a chronological synopsis of the major civil-rights era antidiscrimination laws.

Covering private employers with fifteen or more employees, as well as federal, state, and local governments, educational institutions, employment agencies and labor unions, the 1964 Civil Rights Act (as amended) prohibits discrimination on the basis of race, color, religion, national origin, and sex in access to public accommodations (Title II), access to all programs subsidized by the federal government (Title VI) and in employment (Title VII).[22]

[22] Initially, discrimination on the basis of race was clearly the main target, and the other motives were included as an after-thought. The inclusion of women among the groups to be protected by the statute, in particular, was an accident of politics. The term "sex" was added to the legislation in an effort to defeat it: the amendment was introduced by Representative Howard Smith, a senior Southern Democrat who assumed that the inclusion of sex among the forbidden categories would render the bill impassable. He assumed – incorrectly – that banning sex-based discrimination would seem to be such an obviously absurd decision that a bill including that provision would necessarily be rejected. Besides, even after the 1964 Civil Rights Act was finally promulgated, there was still a significant delay between the moment the Executive intervened to strengthen that legislation as far as race discrimination was concerned and its decision to do the same in order to protect women. Thus, after President Johnson signed Executive Order 11246, on September 25, 1965, requiring federal contractors to "take affirmative action" to ensure that no race-based discrimination was taking place within the hiring process, it took about two years for a similar executive order covering gender-based discrimination (EO 11 375) to be adopted.

The 1965 Voting Rights Act prohibits states or subdivisions from using any "standard, practice or procedure" for voting that will deny or "abridge" the right to vote "on account of race or color" or because a citizen "is a member of a language minority" (this last concern was added in 1975).[23]

The recourse to disparate impact law also has important implications for the use of statistics as evidence of discrimination (as will be discussed in greater depth in Section 2). Simply put, one of the most prominent roles played by quantitative data in U.S. antidiscrimination law has been to demonstrate the unequal impact of facially neutrally employment practices. Not only did the *Griggs* case help establish the doctrine of disparate impact, but it also sanctioned the use of statistical data as acceptable evidence of discrimination. Disparate treatment cases, in contrast, do not draw on the kinds of data about group representation in a particular industry or occupation that are used in race- or gender-based class-wide discrimination suits. Moreover, disparate impact cases are more likely to result in the establishment of an affirmative action program as a remedy for discrimination (Landsberg 1997), thereby giving rise to subsequent use of quantitative data.

3) Disability

The centerpiece of U.S. legislation on disability discrimination is the Americans with Disabilities Act (ADA) of 1990, which was modeled on the Civil Rights Act of 1964. The ADA prohibits discrimination on the grounds of disability in the following sectors:

- employment practices of employers with 15 or more workers (Title I)
- activities, programs and services of state and local governments (Title II)
- public transportation (also Title II)
- places of public accommodation (including privately-operated hotels, restaurants, stores, theaters, hospitals, parks, etc.) (Title III)
- telecommunications (Title IV)

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[23] Originally, the Voting Rights Act applied to all districts in which the two following conditions were met : first, the use of literacy tests by state authorities so as to disenfranchise those who were deemed unfit for the full enjoyment of their citizenship rights on account of their not reaching a minimal threshold of competence – considering that such tests were specifically designed to have a disparate impact on blacks and could therefore be conceived as a kind of *indirect* but *intentional* discrimination; second, a turnout rate below 50% in the 1964 presidential election – *this statistical variable thus being one of the key criteria for defining the coverage of the new antidiscrimination statute*. The law provided for the immediate suspension of literacy tests and entrusted the Attorney General with the power to send in those states federal marshals in charge of registering African American citizens on the electoral rolls.

However, in 1975, contrary to the original intent of the 1965 Congress, as a practical matter the Voting Rights was expanded so as to cover Hispanics. From then on, the statute also applied to counties in which 1) ballots were in English only; 2) persons whose native language was not English made up more than 5% of the voting age population (this percentage being calculated from census data); 3) turnout was below 50% in the 1972 presidential election. True, in those states that were thus brought within the statute's coverage – Texas, Arizona, and a fraction of California –, Mexican Americans were not prevented from voting because of an intentional discrimination against them by state authorities similar to that experienced by blacks in the South. Still, the language impediment and the absence of Spanish-written ballots were then considered as a functional equivalent of the literacy tests that had been outlawed in 1965, insofar as this fact also had a – particularly obvious – disparate impact on non English-speaking voters. It therefore could appear as "discriminatory" – according to the enlarged meaning of the word « discrimination » that the Supreme Court had endorsed in its 1971 *Griggs v. Duke Power Company* decision (see below). Thus, the transfer of this expanded concept of discrimination to the domain of voting rights paved the way for an increase in the number of groups that would be considered as « protected classes ».

The Rehabilitation Act of 1973, as amended, similarly prohibits discrimination on the basis of disability in federal employment and the employment practices of Federal contractors, as well as in programs conducted by federal agencies or receiving federal financial assistance. Moreover, the Rehabilitation Act requires federal agencies and contractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities."[24] Finally, several other federal laws either focus on, or contain provisions regarding, disability-based discrimination; examples include the Architectural Barriers Act of 1968, the Civil Rights of Institutionalized Persons Act (1997), the Fair Housing Amendments Act of 1988, the Individuals with Disabilities Education Act (formerly called the Education for all Handicapped Children Act of 1975), and the Voting Accessibility for the Elderly and Handicapped Act of 1984 (U.S. Department of Justice 2002b).

U.S. law on disability bias is similar to legislation prohibiting religious discrimination in that it targets two forms of prejudicial practice. On one hand is classic disparate treatment discrimination, which for example might prevent an employer from offering a position to an individual identified with a particular physical handicap or religion. On the other, discrimination is now also equated with an employer's (or other regulated entity's) failure to *accommodate* an employee's handicap or religious practice. The principle of "reasonable accommodation", found in both the Rehabilitation and the Americans with Disabilities Acts, has been defined by the Equal Employment Opportunity Commission (EEOC) as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities" (U.S. Equal Employment Opportunity Commission and U.S. Department of Justice 1991). The issue of accommodation also underpins the ADA's provisions concerning equal access to public spaces, transportation, and telecommunications. In a sense, the accommodation principle may be comparable to the disparate impact theory of discrimination, in which employer or other practices that appear to be neutral on the surface, or do not evince any animus toward a particular class of people, may nonetheless be found to be discriminatory given their unintended consequences for the group in question. The disparate impact analogy cannot be taken too far, however, because suits of disability discrimination – even when targeting public accommodations – usually result from individual charges of maltreatment, rather than claims of class-wide discrimination.

[24] 29 USC Sec. 793.

Similarly, the tension between the prohibition of differential treatment coupled with the injunction to take differences into account is felt in the realm of disability law just as it is in the areas of race and religious discrimination. Under the ADA and related EEOC guidelines, applicants or employees should not be limited, segregated, or excluded on the basis of handicap. Yet in order to provide necessary architectural or workspace accommodations, for example, disability status must somehow be recognized and taken into account. This paradox is reconciled by a disability rights advocate as follows: "The ADA requires the employer to treat people differently, when they need to be treated differently. But only to the extent they need to be treated differently, and only to the extent it doesn't affect [the] business operation unduly" (quoted in Fersh and Thomas 1993: 42).

A final common point shared by disability law with other areas of antidiscrimination protection is the concern about how to define the membership of the protected class. It is worth noting that this topic is one on which the Supreme Court has been most active in terms of shaping disability antidiscrimination law. In *Bragdon v. Abbott* (524 U.S. 624, (1998)), for example, the Court ruled that an individual with asymptomatic HIV can be considered as disabled and thus protected by the ADA.

4) Sexual Orientation

In the United States, discrimination on the basis of sexual orientation faces much less legal sanction than do the forms of bias described above. Unlike disability, there is little public consensus about gays' and lesbians' right to protection from discrimination; unlike the case of religion, there is no longstanding precedent for protection; and unlike race, there exists little in the way of legal framework or statistical apparatus to enforce protection. In fact, federal, state, and local law all contain provisions that expressly discriminate against individuals on the basis of their sexual orientation. For all these reasons, the gay rights movement has been called "the last civil rights frontier for American society" (Walzer 2002).

At the federal level, discrimination on account of sexual orientation is not addressed by any of the major civil rights laws, such as the Civil Rights Act of 1964 or the Fair Housing Act of 1968[25]. Employees of the federal government may seek relief from employment discrimination under the Civil Service Reform Act of 1978, which forbids discrimination "on the basis of conduct which does not adversely affect the performance of the applicant or employee", as the Office of Personnel Management has interpreted "conduct" to cover sexual orientation (U.S. Equal Employment Opportunity Commission 2001b).

[25] As for the Americans with Disabilities Act, Congress deemed it necessary to emphasize that "homosexuality and bisexuality are not impairments and as such are not disabilities under this Act" (Americans with Disabilities Act, Section 511). The opposite idea had been tentatively floated in the *Federal Register* by the Department of Health, Education and Welfare (HEW) in May 1976, on the ground that Section 504 of the 1973 Rehabilitation Act protected from discrimination people who were not disabled but were nevertheless treated as disabled, but it was ultimately rejected: see Skrentny (2002), at 319.

Federal employees also benefit from President Clinton's 1998 issuance of Executive Order 13087, which explicitly prohibits employment discrimination on the basis of sexual orientation. However, these legal provisions do not extend to employers beyond the federal government, nor do they apply to realms other than employment, such as housing or education. Some states offer wider legal protection to gays and lesbians, by forbidding discrimination on the part of private-sector as well as public employers (Shah 2002), and extending antidiscrimination protection to such areas as public accommodations, education, housing, and credit (Eskridge 1999). However, the patchwork of state and local antidiscrimination law, like its federal counterpart, is sparse.

Not only is legal protection for gays and lesbians scarce in the United States, but federal (and state) laws contain several items that in fact discriminate on the basis of sexual orientation. Gay people are prohibited from serving openly in the military; under what has been dubbed the "Don't Ask, Don't Tell" policy (1993), an admission of homosexuality remains grounds for military discharge. In reaction to a 1993 suit pressing for same-sex marriage,[26] Congress passed the Defense of Marriage Act in 1996 to establish that only opposite-sex marriages are recognized for federal administrative purposes, and that no state is required to recognize same-sex marriages contracted in another state. More than half the states also passed "defense of marriage" legislation at this time. The consequences of prohibitions on gay marriage are more than symbolic; the lack of a legally-recognized relationship prevents same-sex couples from enjoying such activities and services as hospital visitation rights, immigration benefits, certain forms of joint property ownership, and inheritance. Gay and lesbian family formation is further hampered by a raft of state and local laws forbidding child custody or adoption by homosexual parents.

Against this backdrop of much legislative discrimination and little antidiscrimination on the basis of sexual orientation, the judiciary has come to play an important role for those seeking protection. Gay plaintiffs who had lost jobs after revealing their sexual orientation have brought suits based on the Fourteenth Amendment's Equal Protection Clause and the First Amendment right to free expression. Although the courts have issued many decisions deemed unfavorable to the plaintiffs, several recent high-profile cases have given new hope to gay rights supporters. In *Romer v. Evans* (517 U.S. 620, 1996), the Supreme Court struck down a Colorado constitutional amendment (adopted by referendum) that barred state actors and local authorities from prohibiting discrimination on the basis of homosexuality, ruling that such an amendment was a "status-based enactment" that "deem[ed] a class of persons a stranger to [Colorado's] laws" and was thus unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[27] In *Lawrence and Garner v. Texas* (2003),[28] the U.S. Supreme Court struck down all state criminal sodomy laws as infringing on the right to privacy. Those laws, even when they ostensibly applied to both heterosexual and homosexual couples, were usually used to prosecute only gay couples. The Court thus overruled *Bowers v. Hardwick*,[29] a 1986 case in which a 5-4 majority had held that there was no constitutional right that states invade when they make

[26] Hawaiian Supreme Court case *Baehr v. Lewin*, 852 P.2d 44.
[27] *Romer v. Evans*, 116 S. Ct. 1620 (1996), at 1629.
[28] *Lawrence and Garner v.* Texas, 539 U.S. 558 (2003).
[29] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

homosexual activity a crime. And at present, the right of same-sex couples to legally marry is perhaps the most prominent and incendiary civil rights topic in the United States. In November 2003, the Massachusetts Supreme Judicial Court granted same-sex couples the right to marry in that state, and state officials began issuing marriage licenses to gay and lesbian couples on May 17, 2004. Massachusetts is now the only state in the U.S. that permits gay marriage, although the State of Vermont's Supreme Court permitted the recognition of gay "civil unions" in 1999.[30] In response, President Bush has repeatedly announced his support for a future amendment to the U.S. Constitution to forbid gay marriage on a national basis. Consequently, antidiscrimination law as it relates to sexual orientation is very much in the process of evolution, and it is difficult to foresee at this juncture what types of statutory law or constitutional interpretations will emerge in the future.

C/ The antidiscrimination apparatus

In addition to the judicial, legislative, and presidential branches of the federal government, which generate antidiscrimination law, several federal (as well as state and local) agencies are tasked with the implementation and enforcement of antidiscrimination provisions.

1) U.S. Department of Justice

The Department's Civil Rights Division, established in 1957, is "the primary institution within the federal government responsible for enforcing federal statutes prohibiting discrimination on the basis of race, sex, handicap, religion, and national origin" (U.S. Department of Justice 2002a). The Civil Rights Division includes several sector-specific Sections, such as: Disability Rights; Educational Opportunities; Employment Litigation; Housing and Civil Enforcement; Office of Special Counsel for Immigration Related Unfair Employment Practices; and Voting Section. Together, the Sections enforce a wide range of federal antidiscrimination statutes, including the Civil Rights Acts of 1957, 1960, 1964, and 1968; the Voting Rights Act of 1965, as amended through 1992; the Equal Credit Opportunity Act; the Americans with Disabilities Act; the National Voter Registration Act; the Voting Accessibility for the Elderly and Handicapped Act. The laws enforced by the Department of Justice prohibit discrimination in education, employment, credit, housing, public accommodations and facilities, voting, and certain federally funded and conducted programs. Civil Rights Division also coordinates the enforcement efforts of federal agencies with certain covered programs, and assists federal agencies in eliminating discriminatory practices in their policies and programs.

2) U.S. Equal Employment Opportunity Commission (EEOC)

The Equal Employment Opportunity Commission was established by Title VII of the Civil Rights Act of 1964 and charged with enforcing Title VII by investigating complaints of unlawful discrimination in employment. Today, the Commission's enforcement responsibilities extend to the Equal Pay Act of 1963; Age Discrimination in Employment Act of 1967; Rehabilitation Act of 1973, Sections 501 and

[30] Attempts to issue marriage licenses to same-sex couples in other parts of the country (notably San Francisco, CA and New Paltz, NY) without state government sanction are now under legal proceedings.

505; Title I and V of the Americans with Disabilities Act of 1990; and the Civil Rights Act of 1991. The EEOC also coordinates all federal equal employment opportunity regulations, practices, and policies; monitors federal programs; interprets law; supports approximately 90 state and local Fair Employment Practice Agencies, and offers guidelines as part of outreach efforts to inform the public (both employees and employers) about antidiscrimination law. Through its regional field offices, the EEOC registers individual complaints, investigates them, and determines if "reasonable cause" exists to believe discrimination has occurred. If so, the Commission may seek conciliation, bring suit,[31] or refer cases for litigation to the Department of Justice.

3) Office of Federal Contract Compliance Programs (OFCCP)

The OFCCP was established in 1965 in the U.S. Department of Labor in order to enforce Executive Order 11246 (1965). As amended, the Order prohibits discrimination in hiring or employment decisions on the basis of race, color, gender, religion, and national origin, applying to all nonexempt government contractors and subcontractors and federally-assisted construction contracts and subcontracts in excess of $10,000 (Office of Federal Contract Compliance Programs 2002). Moreover, E.O. 11246 requires that contractors and subcontractors with a federal contract of $50,000 or more, as well as 50 or more employees, develop a written affirmative action program.

In addition to E.O. 11246, the OFCCP is responsible for monitoring Section 503 of the Rehabilitation Act of 1973 as amended (concerning disability) and the affirmative action provisions (Section 4212) of the Vietnam Era Veterans' Readjustment Assistance Act, as amended. It also offers employers information and guidance – or "compliance assistance" – concerning these laws as well as the Americans with Disabilities Act of 1990.

At present, the OFCCP is the federal agency that most actively conducts systematic analyses to detect the occurrence of discriminatory practices. As we will describe in Section 4, other agencies involved in the enforcement of civil rights law (such as the Department of Justice and the EEOC) are more likely to act in response to specific complaints brought forward, rather than pro-actively study patterns that may indicate the presence of discrimination.

4) U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights (USCCR) does not have enforcement powers, but rather is a fact-finding agency and national clearinghouse for information related to discrimination on grounds of race, color, religion, sex, age, disability, or national origin. Its mission includes the appraisal of federal laws and policies, as well as the publicization of its reports and findings. Although the Commission may hold hearings and issue subpoenas for the production of documents and the attendance of witnesses at such hearings, its lack of enforcement powers prevents it from applying specific remedies in individual cases; instead, it may refer complaints to the appropriate enforcement agency.

[31] In addition to extending the reach of the 1964 Civil Rights Act to employers with 15 to 25 employees and state and local governments, The Equal Employment Opportunity Act of 1972 gave the EEOC the power to file suits in its own name, along with private action.

5) Other Federal Agencies

In addition to the institutions named above, whose primary objective is the enforcement or implementation of civil rights law, a number of other federal agencies with widely-varying missions also hold some responsibility for guaranteeing antidiscrimination protection.

The U.S. Department of Education's Office of Civil Rights (OCR) is responsible for implementing and enforcing several civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age. These laws extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive U.S. Department of Education funds. OCR also has responsibilities under Title II of the Americans with Disabilities Act of 1990, which prohibits disability discrimination by public entities, whether or not they receive federal financial assistance.

The U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity implements and enforces the Fair Housing Act and other civil rights laws, including Title VI of the Civil Rights Act of 1964, Section 109 of the Housing and Community Development Act of 1974, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, Title IX of the Education Amendments Act of 1972, and the Architectural Barriers Act of 1968. The Office's mission is to ensure equal opportunity regardless of race, color, religion, sex, national origin, age, disability, or familial status in the sale or rental of housing and in other real-estate related transactions (mortgage lending, zoning activities), with certain limited exceptions. Familial status[32] and disability were added by the 1988 amendment. In the area of disability law, the U.S. Departments of Transportation and of Health and Human Services, and the Federal Communications Commission share enforcement responsibilities with several of the agencies described above (U.S. Department of Justice 2002b). And the Civil Service Reform Act of 1978, which has been interpreted as providing a measure of protection against employment discrimination on the basis of sexual orientation, is enforced by the U.S. Office of Special Counsel, an independent federal investigative and prosecutorial agency.

[32] Familial status means the presence or anticipated presence of children under 18 in a home

II - USES OF STATISTICS IN ANTIDISCRIMINATION LAW AND POLICY

Americans have sought to define and measure "race" and "ethnicity" in order to measure differences in a wide range of social, economic, health, and housing conditions among the groups thus identified, and to examine whether these differences might represent inequalities arising from the past, and perhaps continuing discrimination suffered by members of these groups. Statistical analysis of such data has come to be a routine feature of both government regulatory practice and litigation procedures. Research suggests that this is *not* the case for the enforcement of antidiscrimination provisions against religion-, disability-, or sexual orientation-based bias. Charges of discrimination on the latter biases are likely to revolve on individual accusations of deliberate mistreatment rather than claims of class-wide discrimination that may in fact be unintentional.

On the other hand, as far as race is concerned, there are many fields in which statistics play a more or less significant role. As soon as 1935, in a case concerned with the exclusion of African Americans from jurys in the State of Alabama, the Supreme Court considered it to be evidence of discrimination that eligible Blacks comprised 7.5% of a jury pool and yet not one had ever been called[33]. Later on, in that particular sphere (in which no special qualification beyond citizenship is usually required), the Court would confirm that "once the defendant has shown *substantial underrepresentation* of his group [within the jury], he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case").[34] That "substantial underrepresentation" is ultimately determined in reference to census data. Also, in the 1970s, data on race were needed in order to assess the extent to which the actual desegregation of public schools arguably mandated by the 1954 Supreme Court decision *Brown v. Board of Education of Topeka* was in fact taking place – through the transportation of black children to predominantly white schools in particular.[35] Court desegregation orders thus required racial data from the schools and from the census. Nevertheless, the two antidiscrimination fields in which the use of statistical data on race has been most extensive are voting rights and employment. We shall consider them in turn.

[33] *Norris v. Alabama*, 294 U.S. 587 (1935), at 590-591.
[34] *Castaneda v. Partida*, 430 U.S. 482 (1977), at 495 (our emphasis).
[35] See generally Frankenberg, Lee and Orfield (2003).

A/ Voting Rights

First, one should note that voting rights is the only domain in which it is legally required that data on race and Hispanic ethnicity be provided by the Census Bureau.[36] Thus, the Census 2000 Redistricting Summary File provides population counts for all persons and all persons 18 years and over (the voting age population), as well as counts of Hispanic/Latino persons by race and not Hispanic/Latino persons by race for both the total population and the population 18 years and over. It does not include citizenship data, however, and therefore redistricting must proceed without this information. Data are presented for the 50 states and the District of Columbia in a hierarchical sequence down to the block level. Types of geographic entities covered include states, counties, county subdivisions, census tracts, block groups, blocks, Congressional districts (106th Congress), American Indian and Alaska Native Areas, and Hawaiian home lands.

After the 1965 Voting Rights Act was passed, while the Supreme Court, in its *City of Mobile v. Bolden*[37] decision, had required that a demonstrable discriminatory "purpose" be shown in cases arising under the Act, Congress, fearing that this new rule might miss discrimination that was "masked and concealed"[38], amended section 2 of the Voting Rights Act in 1982 to make it clear that a finding of discriminatory purpose was no longer required[39]. From then on, states were prohibited from imposing or applying any "standard, practice, and procedure" that abridges the right to vote on account of race or color.[40] Such abridgement is found when "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Voting Rights Act] (…) in that its members have less opportunity than other members of the electorate to participate in the political process *and to elect representatives of their choice*"[41].

As to how one was supposed to ascertain whether such a violation had been committed, a Congressional list of suggested "typical factors" relevant to judicial findings included several which would be nonsensical without a clear means of delineating population group boundaries with great precision: the presence of racially polarized voting **–** that is, a significant and systematic opposition between the electoral preferences of different racial groups[42] –, continuing minority disadvantages in various spheres, the unresponsiveness of elected officials to the particularized needs of minority groups, and the repeated electoral failure of the "chosen representative [s]" of a particular racial

[36] Public Law 94-171 (1975). While census data are not strictly mandated by other antidiscrimination provisions, they are generally considered to be the best source in practical terms, however, because of their complete coverage and data at low geographic levels.
[37] *City of Mobile v. Bolden*, 446 U.S. 55 (1980), at 66-68.
[38] H.R. Reporter No. 227, 97th. Congress, 1st Session 31 (1981).
[39] Voting Rights Act Amendments of 1982, Public Law No. 97-205, 96 Stat. 131.
[40] See *Thornburg v. Gingles*, 478 U.S. 30 (1986), at 36.
[41] 1982 Amendment to Section 2 of the Voting Rights Act (42 U.S.C. § 1973 (1994)).
[42] Measurements of polarized voting have been held to require the use of sophisticated statistical techniques, such as "Pearson coefficients", often analyzed with the help of expert witnesses. Persons coefficients are used to help measure the correlation of the percentage of a group registered in a precinct with the precinct vote for candidates from that group (see Barnes (1985), at 1238-1240).

group][43]. In order to assess the latter, one was to consider "*the extent to which members of the minority group have been elected to public office in the jurisdiction*"[44] and, more specifically, the potential existence of a *significant discrepancy* between the percentage of Blacks and Hispanics among the elected representatives and their proportion in the district's population (to be assessed on the basis of census data).[45] Thus, the post-1982 "results" standard of Voting Rights Act places a great burden upon classificatory procedures.

Moreover, in case there is evidence of such a « dilution », the remedy consists in a redistricting process specifically designed to increase the number of black and Hispanic representatives. And as far as that redistricting is concerned, racial data are necessary on at least two grounds. First, according to the *Thornburgh v. Gingles* decision, a minority group filing a complaint must show that it is large enough to form a numerical majority (>50%) in a redrawn district. Second, if this condition is met, some "minority-majority" districts will be drawn in which blacks and Hispanics will be concentrated so as to increase the probability that they will be in a position to elect "the candidate of their choice" – "concentration" meaning that members of these two groups will represent 65% of the population of the district.[46]

At the same time, it is worth emphasizing that the *only* data from the 2000 census that will be made available to the states in time for redistricting will be the data of the PL 94-171 Redistricting File on total population, voting age population, race and Hispanic origin[47]. The detailed socioeconomic data from the long form was not released until 2002 – well after the 2001 round of redistricting had been completed. Absent this additional demographic data, jurisdictions that are required to consider race in designing their districts, in order to comply with section 2 and /or section 5 of the Voting Rights Act, will have difficulty convincing courts that they have not made it the "predominant factor" in the process – as imposed by the 1995 Supreme Court decision *Miller v. Johnson*.[48] Thus, the greater availability of

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[43] *Thornburg v. Gingles*, 478 U.S. 30 (1986), at 68 (Brennan, J., plurality opinion). Another of those "typical factors" is whether some "racial appeals" were made during the electoral campaign by one or several of the competing candidates.

[44] *Thornburg v. Gingles*, at 36-37 (our emphasis).

[45] So far, the Supreme Court's case law has failed to provide an authoritative definition of how to balance such factors and/or establish a hierarchy among them that would be valid across the board and could be applied in a mechanical fashion. Yet, the number-of-black-and-Hispanic-elected-representatives criterion does seem to remain implicitly subordinate to the racial-polarization criterion: it is because feelings of racial solidarity apparently play a key role in accounting for the electoral preferences of a substantial fraction of African American voters that the statistical under-representation of blacks in legislative assemblies may be considered as evidence of a "dilution" of their voting power that the 1982 revision holds unlawful. As a matter of principle, the key point is whether black voters vote for a candidate other than the one for whom a majority of white voters vote, *regardless of these two candidates' racial features*: « It is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important » (*Thornburg v. Gingles*, at 68) ; for an extensive discussion of the relevance of the race of the "chosen representative", see Soni (1990).

[46] Even aside from the exclusion of non-naturalized Hispanic immigrants – the effect of which cannot be discounted ex ante, since the data included in the PL 94-171 Redistricting File do not enable one to assess the extent of the discrepancy between the voting age population and the *citizen* voting age population –, there are at least three reasons why a simple majority would not be enough : (1) the voting age population is typically a lower proportion of the total population among blacks and Hispanics than among whites, (2) registration rates are generally lower among blacks and Hispanics than among whites, and (3) turnout rates are lower for blacks and Hispanics than for whites; see Grofman, Handley and Lublin (2001), at 1391.

[47] See U.S. Census Bureau (2000b).

[48] *Miller v. Johnson*, 515 U.S. 900 (1995), at 916 (holding that the state cannot use race as the "predominant" factor in drawing a district's lines; *Bush v. Vera*, 517 U.S. 952 (1996), at 967 (holding that in considering whether the state made race the "predominant factor" in the linedrawing process, it is "evidentially significant" that the racial data compiled was "more detailed" than the data it claimed to have used to identify the non-racial "communities of interest".

statistical data on race and Hispanic origin may now count as a legal liability for some of the policies that use them.

Finally, given the undercount of ethnoracial minority members by the census (see Section III), there is still another kind of discrimination in the sphere of voting rights that goes on unchallenged. Indeed, while dilution is normally understood as the strategic cracking or packing of minority communities – breaking up a minority community into several districts so it cannot elect the candidate of its choice in any of them or creating a super majority-minority district that maximizes the minority's influence in one district but depletes it from all others –, a case can be made that a redistricting plan that uses unadjusted census data (i.e. data that do not correct for the undercount) dilutes minority votes in a different way: it ensures that districts containing a heavy concentration of minorities will have more people in them than predominantly white districts[49]. Assuming, for example, a 5% undercount of Hispanics, a district with a 100% Hispanic population will have approximately 5% more people in it than a 100% non-Hispanic white district[50]. And as the Supreme Court explained in *Reynolds v. Sims*[51]: "The effect of (…) districting schemes which give the same number of representatives to unequal numbers of constituents is identical [to laws that give some people more votes than others]. Overweighting and overevaluation of the votes of those living here has the certain effect of dilution and underevaluation of the votes of those living there".[52] The injustice of the traditional one-person, one-vote violation is all the more egregious in the context of the use of unadjusted data, however, given the fact that the size of the district will be determined, in part, by the race of the people who live in it[53].

[49] Yet, the reliability of the adjusted numbers in depicting the total population and its composition would increase along with the size of the jurisdiction analyzed. For example, the adjusted numbers may be more accurate for estimating the total population of a state or even a congressional district than they will for a county commission.
[50] In this hypothetical, for the sake of simplicity, we unrealistically assume that there is no undercount of whites. Of course, there is one, but it happens to be much lower than that of ethnoracial minorities.
[51] *Reynolds v. Sims*, 377 U.S. 533 (1964).
[52] *Reynolds v. Sims*, 377 U.S. 533 (1964), at 562-63.
[53] Persily (2001), at 919.

B/ Employment

Under Title VII of the Civil Rights Act of 1964, "every employer, employment agency, and labor organization subject to this title" had to "(1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order…"[54]. Federal district courts were given jurisdiction to enforce compliance upon the application of the EEOC or the U.S. Attorney General[55]. Yet, while it is now firmly established that "[s]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue"[56], historically, the first important step toward the development of statistical analysis in the enforcement of antidiscrimination law was the creation of a national reporting system providing for a single statistical framework that would allow to compare the data retrieved separately by the two main agencies in charge of antidiscrimination policy in employment – the EEOC and the OFCCP. In March 1966, a *Joint Reporting Committee* was set up by the two agencies with a view to rationalizing the collection of the statistical data needed to monitor the implementation of Title VII of the Civil Rights Act. The key element was the introduction of a standardized form (*Standard Form 100* or *Employer Information Report EEO-1*), to be sent by both the EEOC and the OFCCP to every employer in their jurisdiction. From then on, all firms with more than 50 employees and a contract with the federal government and all firms with more than 100 employees – regardless of whether they had a contract with the federal government – were asked to provide a document showing, on a yearly basis, the distribution of their workforce broken down by gender, by job group and by ethnoracial identity, the latter being defined in reference to what historian David Hollinger has called the "ethnoracial pentagon"[57]: the five relevant categories were black, white, Native Americans, "Orientals" – later to be renamed "Asians" – and "Spanish-surnamed individuals"

[54] Title VII, Civil Rights Act of 1964, Public Law No. 88-352, § 709 ©, 79 Stat. 241, 262.
[55] EEO record-keeping requirements expressly "supersede any provision of State or local law which may conflict with them. Any State or local laws prohibiting inquiries and record-keeping with respect to race, color, national origin, or sex, do not apply to inquiries required to be made under these regulations and under the instructions accompanying [EEO] reports…" (29 C.F.R. § 1602.29 (1993) (covering recordkeeping requirements for labor unions) ; 29 C.F.R. § 1602.30 (1993) (requiring similar record-keeping by state and local governments); 29 C.F.R. § 1602.39 (1993) (requiring similar record-keeping for public primary and secondary schools)).
[56] International Broterhood of Teamsters v. United States, 431 U.S. 324 (1977), at 324 (internal quote omitted).
[57] Hollinger (1995), at 19-50.

– later to be called "Hispanic".[58] That scheme was subsequently codified and extended to all federal agencies by the 1977 Directive 15.[59] It has remained in place ever since.[60]

For obvious reasons, choosing which racial and ethnic groups would be included in that scheme and thus receive affirmative action benefits and which would be excluded was not a decision Congress wanted to confront publicly. The key decisions took place in the recesses of federal bureaucracies when regulations and reporting forms were developed. There was no independent examination of whether the federally defined groups fit any theory of social justice or equity. Government officials simply categorized some groups as "minorities" – a never-defined term that basically meant "analogous to blacks" –, without ever spelling out what were the necessary and sufficient conditions or qualities for minorityhood[61].

There were hesitations, however. For instance, on December 29, 1971, the Office of Federal Contract Compliance Programs published in the Federal Register new affirmative action-rules for notice and comment. The proposed rules were directed at "promoting and insuring equal employment opportunity for all persons without regard to religion or national origin". They explained that "experience has indicated that members of various religious groups, primarily Jews and Catholics, and members of certain ethnic groups, primarily of Eastern, Middle, and Southern European ancestry, such as Italians, Greeks, and Slavik groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based on their religion/national origin. These guidelines are intended to remedy such unfair treatment".[62] Remedies included reviewing employment records to determine availability of members of that group for promotion, establishing "meaningful contacts with the appropriate religious and/or national origin-oriented organizations for purposes of referral of potential employees, advice, education, and technical assistance", using religious or ethnic press for advertising, and recruiting from educational institutions with large numbers of the underrepresented group. Moreover, the guidelines stated, "whenever an underutilization [to be defined below] of a religious or ethnic minority group is called to an employer's attention, the employer shall then make

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[58] Willfully making making a false statement on an EEO-1 form is defined as a violation of 18 U.S.C. § 1001. 29 C.F.R. § 1602. 8 (1993). It is punishable thereby by a fine of up to $ 10,000 and imprisonment for up to 5 years. Similar requirements for filing forms obtain for labor unions subject to Title VII (EEO-3) (29 C.F.R. §§ 1602.22-28), state and local governments (EEO-4) (29 C.F.R. §§ 1602. 30-38), public schools (EEO-5) (29 C.F.R. §§ 1602. 39-45), and institutions of higher education (EEO-6) (29 C.F.R. §§ 1602. 47-55). In the case of institutions of higher education, the EEO-6 form refers to the staff member employed by universities; there is no federal oversight of the group composition of the student body at such institutions. Yet, at least in the context of law school admissions, this does not mean that affirmative action programs are entirely "voluntary": the American Bar Association requires all law schools seeking accreditation (or wishing to keep their accredited status) to "demonstrate, (…) by concrete action, a commitment to providing full opportunities for the study of law and entry into the professions by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms" (American Bar Association (1992) (on file with authors).

[59] Actually, the Directive states that federal agencies may collect data that do not conform to these five categories as long as those data "shall be organized in such a way that the additional categories can be aggregated into these basic racial/ethnic categories" (OMB (1977), at 19269-70).

[60] As far as public contracting is concerned, the timing is somehow different: Asians and Pacific Islander were included in 1979 only, and Native American-owned firms have been dropped from "minority business enterprises" programs because their numbers are too small for statistical analysis and for garnering political support ; see generally LaNoue and Sullivan (2001).

[61] See generally Sktrentny (2002).

[62] *Federal Register*, vol. 36, n. 250, December 29, 1971.

available for compliance review such information as may be reasonably obtainable on the approximate [number] of the various religious and ethnic minorities employed at the job levels in which a question of underutilization has been raised".[63] Yet, these regulations came under immediate attack, both from within and without the government. In response, the OFCC retreated. On January 13, 1973, it published new regulations in the Federal Register. The primary difference between these and the previous set of regulations was that they completely excised the section that required an employer, in the event of "underutilization", to present data of ethnic and religious hiring for demonstrating compliance.

Why was this proposal ultimately abandoned? The answer is not because there was no mass mobilization behind it from the groups that would have stood to benefit. Actually, there was some, and anyway such mobilization was never a necessary condition for inclusion in the set of affirmative action beneficiaries, as evidenced from the example of Mexican Americans[64]. More important were the side effects of the identification procedure that had been chosen by the EEOC and OFCCP, namely observer-identification (see Section IV). As explained in various internal memorandums, "Current affirmative action programs (…) which apply to minority groups and women *concern people with unchanging physical attributes which are typically observable*. Identifying such persons as targets for affirmative action is relatively simple. (…) It would not require] invasions of privacy…".[65] White ethnics and members of religious minorities, however, could not be identified by a visual survey, and proceeding through self-identification would arguably jeopardize such "privacy" and infringe on the principle of the separation of church and state enshrined in the First Amendment. Besides, the extent of *interethnic* mixing would have made the extension of affirmative action to Poles or Slovaks an administrative nightmare – or so it was argued (no one thought that the same might be said of *interracial* mixing at some point). Also, constraints of time and resources reinforced the unspoken principle that there was a threshold of victimhood that a group was required to meet before policy recognition was available, that threshold being implicitly defined by the extent of the *still-perceptible, present effects* of past discrimination. Last but not least, according to the one major recent study on that topic, chance and sheer arbitrariness also played a significant part[66].

Once the "protected classes" were defined, in the employment field, the use of quantitative data emerged in relation to the legal theory of discrimination as "disparate impact" developed largely by attorneys at the EEOC and the OFCCP in the mid-1960s – as they sought to implement and enforce the new civil rights legislation (Blumrosen (1994); Blumrosen (1993)) – and eventually embraced by the Supreme Court in its unanimous 1971 decision, *Griggs v. Duke Power Company*.[67] In this milestone case, the Court declared that the Civil Rights Act of 1964 did not prohibit only *intentional* discrimination ; it also banned hiring practices that were "fair in form but discriminatory in operation" –

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[63] *Federal Register*, vol. 36, n. 250, December 29, 1971, at 25,165.
[64] Skrentny (2002), at 120-121.
[65] *Id.*, at 287, 298.
[66] See generally Skrentny (2002).
[67] *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). At issue was an ostensibly color-blind testing requirement designed to exclude black workers now that Title VII of the 1964 Civil Rights Act no longer permitted employers to do so openly.

such as tests which, "though facially neutral (...), would have the effect of freezing the *status quo* created by past discrimination".[68] Thus, the Court enlarged the meaning of the term "discrimination" so as to include within the purview of Title VII all forms of *indirect* discrimination, that is, hiring practices which do not rely on any of the unlawful grounds for employment decisions listed in the Civil Rights Act (race, color, religion, sex or national origin), but still work to the disadvantage of a *disproportionate* number of minority group members who were targeted for official, intentional discrimination in the past. In short, actual minority employment had become the measure of "discrimination", which meant that "antidiscrimination" was now officially conceived as a *group-centered*, *results-oriented* policy. From then on, while statistical evidence was only one ingredient, neither sufficient nor necessary, for a finding of (intentional) disparate *treatment*, statistical proof of unequal outcomes could be accepted as sufficient evidence of discrimination as disparate *impact*.[69]And since a statistical imbalance in the racial distribution of the workforce was now considered as evidence of "discrimination" (unless the recruitment procedure producing it could be justified as a matter of "business necessity"[70]), statistical data were obviously – if implicitly – required both to document the "disparate impact" of traditional employment practices and to devise an affirmative action program designed to correct it.

As for what "disparate impact" or "adverse impact" actually meant,[71] the next critical step came with the August 1978 *Uniform Guidelines on Employee Selection Procedures*, a document that was supposed to draw up operational prescriptions that the EEOC and the OFCCP could rely on in their enforcement activities. The key point was the following one:

> "For any hiring test used by a firm subject to Title VII requirements, if the success rate achieved by any racial, ethnic or gender group is less than four-fifths of the rate of the most successful group, the test will be considered to have an adverse impact on the first group".[72]

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[68] *Id.*, at. 430-431.

[69] For legal precedents of "disparate impact" theory (and the "business necessity" standard) in earlier voting, school desegregation, and employment cases, see Landsberg (1997), at 127-9). In addition, one should note that the pool of persons used for analysis in an impact proof is different from the pool used in a statistical disparate treatment proof. This is because the question being asked in each analysis is different. The question being asked in a statistical disparate treatment analysis is whether similarly situated (e.g. qualified) people of minority group status are being treated differently. In that case, the pool used for analysis consists of persons who meet the contractor's minimum objective qualifications. For example, if the contractor requires a high school diploma, only persons with high school diplomas are placed in a pool. The question being asked in an impact analysis is whether facially neutral, uniformly applied criteria are causing a disproportionately lower selection of women or minorities. Thus, in an impact analysis it is the effect of the high school diploma requirement in preventing minorities and women from even getting into the pool that is being examined. Therefore, the relevant pool for analysis in the disparate impact test is all applicants, since what is being examined is the proportion that were eliminated from further consideration by the facially neutral criteria/processes.

[70] *Id.*

[71] While in Title VII case law – and in the EEOC's internal documents – the terms disparate impact and adverse impact are used interchangeably, in OFCC's terminology, they are not: "A disparate impact analysis consists of two steps: (1) calculating the adverse impact of the criterion and the statistical significance of that impact; and (2) determining whether the contractor can justify use of the criterion based on job relatedness or business necessity. (…) "Adverse impact is used to refer to the results of the statistical analysis and disparate impact is used to refer to adverse impact that the contractor has not been able to justify on the basis of business necessity or job relatedness". In other words, "disparate impact is what is found when the contractor fails to adequately account for the adverse impact". (Office of Federal Contract Compliance Program, *Compliance Manual* (Undated a), chap. 3; chap. 7, at http://www.dol.gov/esa/regs/compliance/ofccp/fccm/ofcph7.htm).

[72] 28 CFR § 50. 14 (1978), First part, §4. Yet, "greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group". (*Id.*).

As a consequence, unless it could be justified as a matter of "business necessity", it was to be held unlawful. Under this "four-fifths rule", if, for instance, 50% of the white applicants and less than 40% of the black applicants succeeded on a given test, that test usually would have to be withdrawn and replaced by another test devoid of any adverse impact on women or ethnoracial minorities.[73] This standard remains in wide use today, particularly in the Office of Federal Contract Compliance Program's (OFCCP) monitoring of federal contractors.[74]

Since the 1971 *Griggs* ruling, the disparate impact theory has become widely established in U.S. antidiscrimination law, yet it has faced challenge as well. On one hand, the disparate impact interpretation of Title VII was upheld in subsequent employment discrimination cases like *Albemarle Paper Co. v. Moody* (422 U.S. 405, 1975), and it was incorporated into statutory law by way of the Civil Rights Act of 1991. On the other hand, adverse impact law had been circumscribed by the *Wards Cove* and *Price Waterhouse* decisions of 1989,[75] in which the Supreme Court made it more difficult to bring charges of discrimination, ruling that simple statistical comparisons were insufficient to make a *prima facie* case, and that the burden of proof lay with the plaintiff to prove illegitimate criteria behind employment practices (rather than employers being required to justify their practices). Although these 1989 rulings were subsequently and expressly invalidated by the Civil Rights Act of 1991, they reflected a broader political shift coinciding with the transition from Democratic to Republican administrations in the 1980s – a shift away from the class-based claims of institutional discrimination that typified disparate impact litigation, toward an enforcement focus on individual complaints of disparate treatment (Wasby 1995). Similarly, the Reagan administration curtailed the Justice Department's previous position that disparate impact theory was applicable beyond the realm of employment –for example, to fair housing law – limiting it instead to Title VII (employment) cases (Landsberg (1997)).

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[73] As indicated in the 1982 Supreme Court decision *Connecticut v. Teal* (457 U.S. 440 (1982)), this is so even when an employer has compensated for the disparate impact of the test by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory "bottom line". That "bottom line" may well assist an employer in rebutting the inference that particular action had been *intentionally* discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided". (*Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), at 580). Yet, when resolution of the factual question of intent is not what is at issue, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of [indirect] discrimination" (Id., at 579).

[74] In this context, the statistical tool most frequently used is the Job Area Acceptance Range (JAAR), a formula based on the "four-fifths" rule whose purpose is to determine whether a particular job area represents an area of concentration or underrepresentation for minorities and/or women: "For the JAAR, the assumption is that the percentage representation of minorities and/or women in a particular job area will normally fall in a range plus or minus 20% of their representation in the relevant base workforce sector. (…) To find this range, therefore, the percentage of minorities or women in the base sector is multiplied by .20 and the result is added to and subtracted from the percentage of minorities or women in the base sector. For example, if the broad sector had 50% minorities, the JAAR range would be found by multiplying 50% X .20, and the result, 10%, would be subtracted from and added to 50% for a JAAR range of 40% to 60%. (…) The minority/female percentage in each job area within the base sector is then compared to the range. If the percentage in a job area falls below the range (in the example, less than 40%), the area is considered underrepresented; if it exceeds the range (in the example, more than 60%), the job area is considered concentrated". The JAAR, however, "is only an indicator of a potential problem area and should not be confused with proof of employment discrimination" (OFCCP (Undated a), chap. 2, at http://www.dol.gov/esa/regs/compliance/ofccp/fccm/ofcph2.htm).

[75] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Furthermore, the Supreme Court clearly blocked the extension of adverse impact doctrine to the arena of constitutional law early on, in *Washington v. Davis*, 426 U.S. 229 (1976).[76] As a result, cases brought under the Equal Protection Clause of the Constitution require a showing of disparate treatment, or intentional discrimination (Landsberg 1997). This interpretation of the Constitution as requiring disparate treatment proof has implications for the litigation of race-related cases as opposed to religious ones. Although racial and religious discrimination are both prohibited by constitutional as well as statutory law, religion cases more frequently invoke constitutional protection, thereby forgoing disparate impact evidence. Similarly, charges of disability discrimination are more likely to revolve around individual claims of disparate treatment. As a result, cases alleging racial bias are somewhat unique among the forms of discrimination examined here in that they alone have extensively involved the demonstration of systemic adverse impacts.

Lastly, even if we consider race alone, the extension of the concept of discrimination so as to include the disparate impact of hiring practices is relevant only in those cases in which the total number of minority group members applying for a job is high enough for the potential discrepancies between their success rates on the tests involved and that of white applicants to be statistically significant. This condition is usually met as far as lower-middle class occupations are concerned (firefighters, policemen, truck-drivers…), but not for those more prestigious positions the access to which is often regulated by « subjective » recruitment procedures – interviews in particular –, which cannot always be translated into a quantified assessment. This is clearly one of the factors that accounts for the « glass ceiling » preventing those minority group members specifically protected against indirect discrimination by Title VII of the Civil Rights Act from reaching the upper levels of private sector management.

[76] « The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory [state] purpose » (*Washington v. Davis*, 426 U.S. 229 (1976), at 240 (holding that a facially neutral employment test imposed on potential police officers that excluded four times as many black as white applicants did not stand as a violation of the Equal Protection Clause) ; see also *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), at 272 (holding that a veterans preference in civil service employment did not violate equal protection in spite of its "disproportionately adverse effect" on women, because such disparate impact could not be "traced to a discriminatory purpose"). The *Davis* doctrine was subsequently reaffirmed in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) , at 264-265; *Mobile v. Bolden*, 446 U.S. 55 (1980), at 63 n. 10; *Hunter v. Underwood*, 471 U.S. 222 (1985).

Beyond the monitoring of *antidiscrimination law* strictly conceived, the collection of data on race and ethnicity is also required by the implementation of *affirmative action* programs in employment, university admissions and public procurement programs. Indeed, in November 1969, the OFCCP issued "Order n° 4", according to which any firm under contract with the federal government for an amount of above $ 50 000 and with more than 50 employees would have to devise an affirmative action program and set "goals and timetables" in order to remedy its « underutilization » of the minority workforce available in the recruitment area[77]. The failure of federal contractors to comply with that Order could result in termination of their federal contracts, and debarment from future contracts[78]. Thus, Order n° 4 marked a crucial departure from what had remained the prevailing approach to antidiscrimination until then, insofar as it did rely on an implicit standard of *racial proportionality*. Moreover, initially, this so-called "underutilization" did *not* refer to the gap between the proportion of (for example) blacks and Hispanics in the workforce of a given firm and their percentage in the relevant pool of qualified unemployed workers. The other term of the comparison was to be provided by the *total* number of unemployed black and Hispanic workers living in the vicinity of the firm's production unit – whether qualified or unqualified –, a number that was to be assessed by looking at census data[79]. And although what exactly needed to be done remained unspecified, "affirmative action" was now defined as "a set of specific and *result-oriented* procedures", in a context where "results" could not conceivably mean anything but a demonstrable rise in the percentage of blacks among the employees. That new requirement was all the more effective as the OFCCP, unlike the EEOC, did not have to wait for an individual complaint to scrutinize – and possibly sanction – an employer's hiring practices. Therefore, the credibility of the threat faced by a firm perceived to be guilty of discrimination and falling under OFCCP's jurisdiction was much higher. In short, while proportional representation was never accepted – and indeed was emphatically rejected – by Congress and by the Supreme Court as a legal *principle*[80], it began operating covertly at the policymaking level, by providing the benchmark against which "discrepancies" and "deficiencies" would be identified and compensated for.[81]

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[77] Generally, the scope of the reasonable recruitment area is closely related to pay, based on the assumption that the more a job pays, the farther people are willing to go to apply for it.
[78] Executive Order 11246 (1965), Section 209(a).
[79] Graham (1990), at 342-43.
[80] See, e.g., *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986), at 507 (describing as "completely unrealistic" the hypothesis that "minorities will choose a particular trade in lockstep proportion to their representation to the local population").
[81] OFCCP rules do not give precise standards for judging underutilization, but two basic approaches are possible and have been used in turn. One approach is the "any difference" standards. If there is *any* difference between relevant group proportions employed and those available in the local labor market, then the group is "underutilized". A second approach would be the "statistically significant" difference standard. If the discrepancy is statistically significant, underutilization is occurring. This approach is suggested in *Hazelwood School District v. United States* (*Hazelwood School District v. United States*, 433 U.S. 299 (1977), at 306-13).

In 1977, the Supreme Court partially endorsed these administrative developments while providing some information as to where boundaries should be drawn. First, in *International Brotherhood of Teamsters v. United States*,[82] the Court confirmed that proportional representation of blacks *in non-skilled jobs* could be considered as a reference point in the process of eradicating the discrimination held unlawful under Title VII; in that case, the Court approved the use of statistics comparing workforce data with the demographics of the surrounding metropolitan area to prove employment discrimination and identify the extent of the wrong to be remedied[83]. However, in *Hazelwood School District v. United States*, the Court also made clear that "when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value ".[84] In short, as explained in the current OFCCP's *Compliance Manual*,

"In determining the relevant sector of the contractor's workforce with which minority group or female representation in a particular job area is to be compared (e.g., blue collar, white collar, clerical, the entire workforce, or even job group), the EOS should remember that *there should be a reasonable expectation that, absent discrimination, minorities/women would be fairly evenly distributed among the job areas within the sector*. That expectation is high when (1) entry-level jobs in the sector share similar qualification requirements; and (2) jobs above entry-level in the sector are filled primarily by promotion. The expectation gets progressively lower as entry-level jobs in the sector become more differentiated in skill requirements (since it becomes more likely that minority/female availability[85] will differ) and/or jobs above entry are filled predominantly by hire".[86]

As for the underlying factors accounting for the evolution described above, a case can be made that this process mostly derives from what may be termed a *bureaucratic rationalization* of antidiscrimination law enforcement, from a kind of "administrative pragmatism"[87] that is all the more powerful as the very *survival* of institutions such as the EEOC and the OFCCP probably turns on the *results* that they will be able to claim credit for ; their *legitimacy* largely depends upon their *demonstrable effectiveness* in reaching their underlying goals. And reducing black unemployment was most certainly one of such goals. While the official mission of the EEOC was to stop discrimination,

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[82] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).
[83] Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired" (*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), at 339-40, n. 20).
[84] *Hazelwood School District v. United States*, 433 U.S. 299 (1977), at 308, n.13.
[85] "Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. The purpose of the availability determination is to establish a benchmark against which the demographic composition of the contractor's incumbent workforce can be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups" (OFCCP (1978)).
[86] OFCCP (undated a) (chap. 2), at http://www.dol.gov/esa/regs/compliance/ofccp/fccm/ofcph2.htm) (our emphasis). See also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), at 651-652 (required showing of data on labor pool "qualified" individuals); *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977 (1988), at 997 ("Statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value").
[87] Skrentny (1996), at 111-144.

Congressional debates over Title VII show that the new antidiscrimination law was generally expected to result in greater numbers of employed African-Americans.[88] And insofar as *improving black employment through the elimination of discrimination* could be conceived as the ultimate raison d'être of the two agencies, it was quite natural to expect that this same standard – the proportion of blacks in the workforce – would be used for assessing EEOC and OFCCP achievements. In order to raise that proportion, the only option that the agencies had at their disposal was to force the employers to set up "goals and timetables" to increase minority representation ; that was the only thing that would enable them to point toward the appearance of some *immediately measurable* progress. On the whole, because the very existence of these agencies probably depended on their ability to improve the economic predicament of black Americans *in a quantifiable, statistically perceptible way*, affirmative action did provide a solution to their most immediate concerns.

C/ The role of social science

Social scientists have contributed to the evolution of U.S. antidiscrimination law and procedures in numerous ways. One of the most widely celebrated instances occurred during the 1954 *Brown v. Board of Education* Supreme Court case, when a team of social researchers let by psychologist Kenneth Clark provided evidence of the negative impact of segregated schooling.[89] As antidiscrimination law has grown since then and come to revolve increasingly around comparisons between the outcomes of various groups, statistical evidence has gained greater currency in discrimination cases and social scientists are called upon more frequently to provide data analysis and interpretation.[90]

In their academic research, social scientists in varied fields have undertaken study of discrimination-related processes and phenomena. Labor economists have written extensively on the concept and modeling of discrimination (Becker (1957); Cain (1986)), while sociologists have sought to measure changing racial attitudes over time (e.g. Schuman *et al.* 1997) and they share with social demographers and economists an interest in gauging the impact of racial status on life outcomes such as education, income, wealth, and health (e.g. Smelser, Wilson and Mitchell 2001). A wide range of social researchers including political scientists have also demonstrated great interest in the evolution of the social categories that underpin contemporary civil rights law (Edmonston and Schultze (1995); Nobles (2000); Skerry (2000)).

[88] See generally Whalen and Whalen (1985).
[89] See Moody (2002).
[90] Giannelli and Imwinkelried (1986: 424) argue that changes in law and business school training as well as advances in computer technology have also contributed to the growing place of statistics in the courtroom more generally. Anderson and Twining (1991) describe the application of statistics in a wide range of legal matters.

Social scientists have also participated directly in the elaboration of antidiscrimination law as it pertains to the role of statistics. These advisory activities can be roughly divided into two types: those that bear on the data to be analyzed, and those that engage the statistical methodology to be used. In the former category, social scientists have been invited to submit opinions to government statistical agencies on how civil rights data should be collected, categorized, or tabulated. An important example of this took place in the 1990s, as the Office of Management and Budget (OMB) considered a wide range of input when formulating new racial classification standards.[91] Informal exchanges with social scientists also take place when officials from government agencies like the U.S. Census Bureau participate in academic meetings like those of the Population Association of America or the American Statistical Association.

The conduct of statistical analysis within the framework of antidiscrimination case law is the topic of considerable literature by economists, statisticians, and lawyers. In some cases, the texts aim to explain the relevant law to statisticians who are court-appointed experts or employed by parties to a case (e.g. DeGroot, Fienberg and Kadane 1986; Kaye and Aickin 1986); other texts provide statistical instruction for lawyers (e.g. David Barnes 1983; Morris 1978), and many attempt to do both (e.g. Baldus and Cole 1980; Gaughan and Hodson 1993). These examples focus largely on employment discrimination on the basis of race or sex, reflecting the predominance of these issues in U.S. antidiscrimination law more generally. However, statistical evidence is also sought and utilized in discrimination litigation involving such topics as housing, education, jury selection and vote redistricting (Baldus and Cole 1980; Kaye 1986). It is also important to note that the discrimination-related use of quantitative data is not limited to the courtroom setting; statistics are also used for planning purposes – for example, in drawing up affirmative action or redistricting plans – that represent another form of compliance with civil rights law. These uses of statistics will be described further in Section 4.

The scientific literature on quantitative analysis in antidiscrimination law addresses several fundamental issues. First is the need to outline the role or weight of statistical analyses in legal arguments concerning discrimination. In this connection, the underlying legal theory is of utmost importance; statistical evidence is generally accorded a lesser role in disparate treatment cases than in those based on disparate impact. Similarly, quantitative data are more central to class actions than individual suits (Rutherglen 1986). As a result, statistics may be sufficient to establish a *prima facie* case of discrimination, thus shifting the burden of proof otherwise to the defendant, or they may simply play an ancillary role as one piece of evidence among others.

Much of the scientific literature on legal statistical evidence, however, focuses on methodology. In particular, these texts address the questions: (a) what types of indicators furnish appropriate measures of discrimination? And (b) what types of inferential statistical tests are appropriate in the interpretation of these measures? As Morris (1978) has pointed out, such questions were moot in the early days of civil rights enforcement, when the exclusion of non-whites from various occupational,

[91] Some of the academic opinions on this issue can be found in Perlmann and Waters (2002).

educational, and political arenas was total. Under the "rule of exclusion," it was sufficient to demonstrate mathematically that blacks and others were effectively shut out from certain activities – for example, jury service – and more complex statistical formulations were unnecessary to demonstrate that the zero percent representation of minorities in such areas was the product of discrimination.[92]

Today litigators are unlikely to deal with such instances of total exclusion, and instead confront more complicated questions of whether the rates at which certain groups are hired, promoted, or fired are the same or different. As a result, the statistics that have become the stock in trade of antidiscrimination law – particularly in employment and particularly with respect to race – are proportions of subgroups relative to a larger population (e.g. an employer's entire workforce, or a school's student body); selection rates (e.g. number of whites hired relative to number of white applicants); and ratios of selection rates.[93] For example, if 50 percent of white applicants are hired by an employer, and only 30 percent of black applicants are hired, the black/white ratio of selection rates is 0.3/0.5 = 0.6 or 60 percent. The widespread application of such ratios of selection rates for civil rights purposes has been both cause and effect of the 1978 1978 Uniform Guidelines on Employee Selection Procedures, which institutionalized the "four-fifths rule" described above.

Despite the apparent simplicity of such descriptive statistics, two bases for their contestation are frequently introduced in social scientific literature. One problem has to do with the time period for which data is collected; the count in the numerator is not always taken at the same time as the tally in the denominator. Alternatively, plaintiffs or employers may argue that the period from which data are taken is not the appropriate one. An even more oft-mentioned dilemma, however, is that of selecting the appropriate base population for comparison (Meier, Sacks and Zabell 1986; Shoben 1986). Should the racial makeup of an employers' workforce be compared to that of the surrounding city, suburbs, metropolitan area, or county? And once the geographic boundaries are set, should the racial composition of the entire population be the benchmark for comparison, or only those in the labor force, or those in a specific occupational category? These issues ensure that even when relatively straightforward statistical indicators are used, their construction remains a potential point of contention.

Multivariate analyses, including correlation coefficients and regression models, are also used to demonstrate the presence of discrimination (David Barnes 1983; Conway and Roberts 1986; McCabe 1986). In such cases, the potential basis for discrimination, such as race or sex, is included as an independent variable in a model for a dependent variable like salary. The resulting regression (or correlation) coefficient is then interpreted as a measure of whether race or sex has played a role in the determination of wages.

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[92] See *Castaneda v. Partida*, 430 U.S. 482, (1977) at 1280, n.13 for the "rule of exclusion".

[93] A distinct but related field of discrimination statistics involves the analysis of the validity of employer tests (Morris (1978); Reilly (1986).

Perhaps the most challenging quantitative issue for lawyers, judges, and juries, however, is the recourse to statistical inference. Inferential tests are used to make a determination about the probability that the observed patterns would obtain even under random conditions – that is, if discrimination were ruled out as a factor. For example, binomial tests and chi-square tests are commonly used to ascertain how likely the observed makeup of an employer's workforce would be to randomly occur given the benchmark population composition (Gaughan and Hodson 1993; Meier, Sacks and Zabell 1986). Confidence intervals placed around proportion or coefficient estimates achieve the same purpose.

Despite statisticians' common application of such inferential tests to discrimination law, they have several drawbacks. First, they are difficult to explain briefly to juries or judges. Second, inferential statistics rely on assumptions that are not always justified. Small sample sizes, for example, may pose a problem; the data may not be randomly sampled; measurement error may arise, and regression models may be subject to specification error. Finally, such methodologies are employed in a context where courts may make varying judgments as to what confidence level constitutes significance (in *Hazelwood School District v. United States*,[94] the Supreme Court mentioned a "two to three standard deviation" cutoff), and what magnitude of disparity should be considered "substantial," regardless of the outcome of significance tests.[95] As a result, the use of statistical analysis in U.S. antidiscrimination law is not simply a product of the transfer of social scientific knowledge to the legal realm. Instead, quantitative data constitute one tool among others that are admitted as evidence to the courtroom, and their usage is shaped by the exigencies and judgments of the legal parties involved.

[94] *Hazelwood School District v. United States*, 433 U.S. 299 (1977).
[95] The term "statistical significance" relates to the likelihood a result occurred by chance. According to the OFCCP's Compliance Manual, "if that likelihood is 5% (.05) or less, the result is considered statistically significant". (OFCCP (Undated a), chap. 3).

III - THE LEGAL REGULATION OF STATISTICAL DATA

As with many aspects of census-taking and modern statistics, the concept of confidentiality of statistical data emerged only over time. Initially, individual census schedules were not considered confidential documents, and in fact, in the early 19th century, census results, complete with individual names, were posted in public places for the local citizenry to review to make sure they were complete and accurate.[96] Although in 1910 the first presidential census proclamation declared that "the census has nothing to do with taxation, with army or jury service… or with the enforcement of any national, State, or local law or ordinance, nor can any person be harmed in any way by furnishing the information required", over the years, many agencies, varying from the FBI to the Women's Bureau, attempted to gain access to individual census forms.[97] It thus seemed necessary to give statutory protection to the emerging concept of confidentiality through the enactment of Title 13 in 1929, which codified a set of legal and administrative practices already in place. In particular, Section 11 of the Act stated, "That the information furnished under the provision of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment or individual can be identified, not shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports".[98] Similarly, Section 18 of Title 13 stated that "in no case shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates". Thus, the Census Bureau is strictly prohibited from sharing individual records with others, including welfare agencies, the Immigration and Naturalization Service, the Internal Revenue Service, the Bureau of Indian Affairs, tribal officials, tribal courts, housing authorities, and the military. Completed census forms – which are the only way of connecting particular racial and ethnic classifications to individual names and addresses – are confidential for the first 72 years after their submission, after which time they may be released to the public by the National Archives and Records Administration.[99] As for the information from individual reports by employers collected by the EEOC on the EEO-1 forms, it is protected from public disclosure by the confidentiality provisions of section 706(b) and 709(e) of Title VII which are also incorporated by reference into the Americans with Disabilities Act at section 107(a). Only data aggregating information by industry or area, in such a way as not to reveal any particular employer's statistics, will be made public.[100]

[96] Anderson (1988).
[97] Anderson and Seltzer (2002), at 36.
[98] Public Law 13, 71st Congress, June 18, 1929.
[99] U.S. Bureau of the Census (2004), at 1. Census data on businesses can be released by NARA after 30 years.
[100] EEOC (2003), at 34965. The prohibition against disclosure mandated by Section 709(e) does not apply to the OFCCP and to the 86 State and local Fair Employment Practice Agencies (FEPAs).

In recent years, the Census Bureau became concerned that with the emergence of advanced computer technology that decodes information for areas by combining extremely detailed characteristics such as occupations with small geographic units, the possibility of revealing information on individual respondents would be greatly enhanced. With the advent of multiple-race reporting on the 2000 census, this concern grew more urgent: by triangulating data according to multiple detailed characteristics such as occupational code and race combination, at a low geographic level, it might become possible to identify specific individuals or households. To address this problem, the Census Bureau in 1995 created a Disclosure Review Board (DRB), specifically tasked with the responsibility to review specifications for all census data products made available to the public or other government agencies, and to determine that no product format is approved that contains any degree of disclosure risk. As a result, the Disclosure Review Board issued rules in 2000 concerning the Special Equal Employment Opportunity (EEO) Tabulation (see Section IV) that called for the combination of related occupational categories when a single occupational category contains less than 10,000 workers nationally, and prohibited showing detailed occupational categories cross-tabulated by 12 race/ethnicity categories in geographic areas of less than 50,000[101].

[101] U.S. Bureau of the Census (undated (a)). As a result of those rules, the Special EEO Tabulation is now configured in the following manner: "1. The number of detailed civilian occupational categories are reduced from 509 in the Census 2000 classification system to 472/471. 2. (…) approximately 70% of all U.S. counties are combined to create combinations of counties (referred to as County Sets) containing no fewer than 50,000 people. 3. No County Set combination is allowed to cross state lines. Otherwise, the risk (…) is unacceptably high that, by subtraction of particular counties across a state boundary, individual respondent information could be revealed" (Id.). As further protection, the DRB required that all cells in the Census 2000 Special EEO Tabulation be rounded. The rounding schematic is: 0 remains 0; 1-7 rounds to 4; 8 or greater rounds to nearest multiple of 5; any number that already ends in 5 or 0 stays as it is. For basic information on disclosure avoidance techniques used by the Census Bureau to protect Title 13 data – rounding, top-coding, data swapping, thresholds, random noise, cell suppression and complementary cell suppression, to name a few –, see OMB (1994).

However, while the introduction of multiple-race identification in Census 2000 did reinforce the Bureau's concern about *the identifiability of specific individuals through publicly accessible census data* for the reasons mentioned above, it is worth emphasizing that *data on race* apparently are not considered as particularly sensitive and therefore deserving of a specific, more protective confidentiality regime.[102]

As a general matter, the release of individually identifiable data in the custody of federal statistical agencies poses different sorts of threats to these agencies and the responding public. For the statistical agency, the threats include fears of loss of respondent confidence (leading to lower response rates) and the opprobrium of professional colleagues and possibly the public when policy and ethical norms related to confidentiality appear to be violated. For responding public, threats from disclosure of protected data range from simple embarrassment through annoyance if the disclosures result in privacy invasions, to placing respondents (and persons with similar characteristics) at jeopardy for administrative detention or criminal prosecution. The most serious threats to respondents are associated with two different kinds of potential misuse of statistical data systems. The first involves using the identifiable data files (paper or machine readable) to obtain additional information about named individuals. The second kind of misuse involves using a data file to identify all members of a targeted population sub-group.[103]

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[102] Interview with Laura Zayatz, Disclosure Review Board, U.S. Bureau of the Census, April 27, 2004. "Confidentiality" is often invoked by university admissions officers to justify their decision not to uncover the ethnoracial distribution of test scores among admitted students (Sabbagh (2003), at 389-390). However, in so doing, they are not complying with a *legal* requirement but act out of *strategic* considerations as to the need for anticipating and preventing the negative side effects potentially induced by the public acknowledgement of the weaker performance of blacks and Hispanics in this respect (Jencks et Phillips (1998), in particular the *additional* stigmatization of the individuals belonging to one of these two minority groups that may occur as a result. That risk is actually mentioned quite often in the Supreme Court's case law (see *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), at 398 (J. Powell), 360 (J. Brennan) ; *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (1977), at 173-174 (J.Brennan) ; *Fullilove v. Klutznick*, 448 U.S. 448 (1980), at 545 (J. Stevens) ; *City of Richmond v. Croson*, 488 U.S. 469 (1989), at 493 (J. O'Connor)). Indeed, in order for the elevation of minority group members in the economic and occupational hierarchy to be taken as evidence of how inaccurate those stereotypes are, one should not be able to dismiss their success as resulting from an antimeritocratic scheme specifically designed to that end. The fact that it is common knowledge that blacks and other disadvantaged minorities are receiving some kind of special treatment and are not selected only on their qualifications may well modify the social meaning of their gaining access to top-rank positions. To put it more bluntly, an assessment such as "He's an Ivy League graduate; he must be a very bright fellow" may turn into something like "He's a black Ivy League graduate; maybe he wouldn't have gotten where he is now but for affirmative action". Yet, the *object* of this non-disclosure requirement is not the statistical data on the race of members of a given population (in that case, the student body) but the *public connecting* of such data with another variable – namely, test scores and grade-point-averages.

[103] Anderson and Seltzer (2002), at 34.

Here, the role of the Census Bureau in the wartime internment of Japanese Americans is a case in point. Early in 1942 the War Department asked the bureau for the names and addresses of all Japanese and Japanese Americans enumerated in the 1940 census in the western United States. Although the archival record does not establish that unauthorized disclosure of microdata took place, the Bureau did provide tract-level tabulations of Japanese Americans to the Office of Naval Intelligence, had outposted one of the most senior members of the Bureau's technical staff, Calvert Dedrick, to San Francisco to assist the Western Defense Command in the evacuation and internment effort, and provided census block maps showing the number of Japanese Americans enumerated as residing in each block to assist round up operations. Military authorities thus knew where to concentrate their efforts.[104] Clearly, this was a major breach in spirit, if not in fact, of census confidentiality rules.[105]

While this notorious episode actually did not pave the way for subsequent violations of Title 13, distrust of the Census' confidentiality policy does contribute to the so-called "minority undercount".[106] Thus, according to a study by Mercer Sullivan, fear that Census Bureau information will be cross-checked with welfare records is probably the single largest source of error in counting adult young black males".[107] Similarly, those living in rental housing are likely to be concerned that reporting additional occupants could lead to rent increases or even eviction; so when they sublet portions of their apartments, they typically fail to report all the residents to the Census Bureau out of concern that the arrangement and especially the additional income will be revealed to the landlord or other government agencies[108].

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[104] As acknowledged by the Director of the Census, "if they knew there were 801 Japs in a community and only found 800 of them, then they [had] something to check up on…" (Quoted in Anderson and Seltzer (2000) (no page number), the key source on this important topic).

[105] As to the question of whether regardless of the extent to which data on the Japanese Americans from the 1940 Census was used by the Western Defense Command in the initial operational planning of the internment program – the availability of such data did influence *the very decision to launch that program*, it requires further investigation. It is certainly not implausible that the radical differences in the war-time experience of the Japanese Americans, German Americans and Italian Americans were somehow related to the fact that since 1890 "Japanese" had been used in the census both to denote a country of birth and as a racial category. In any case, on the morning of December 8, 1941 – less than twenty-four hours after the attack on Pearl Harbor –, the decision was made at the Bureau to produce tabulations of Japanese Americans based on the item on race rather than on country of birth or citizenship. As a consequence, historians Margo Anderson and William Seltzer have suggested that collection of data on race be limited to samples instead of proceeding on a full-count basis, in order to reduce the possible misuse of such data (*Id.*).

[106] In 1990 the undercount for non-Hispanic whites was 0.7 percent, compared with 2.33 percent for Asian and Pacifi Islanders, 4.43 percent for blacks, 4.96 percent for Hispanics, 4. 52 percent for American Indians/Eskimos/Aleuts, and 12.2 percent for American Indians living on reservations (Skerry (2000), at 82-83).

[107] Sullivan (1990), at 26.

[108] Skerry (2000), at 97.

Other motivational factors include concealment of criminal activities such as drug use or parole violation and fear by illegal immigrants that the information provided to census officials will be disclosed to the Immigration and Naturalization Service (in spite of the fact that the question on citizenship does not appear on the short form, precisely because of the idea that it would lower coverage).[109] Suspicion of (or lack of information on) the census' confidentiality regime thus leads to a disproportionate number of ethnoracial minority members being uncounted, which may in turn be conceptualized as another instance of *indirect discrimination*.

[109] Interview with Catherine Clark McCully, U.S. Bureau of the Census, April 27, 2004. Nonmotivational factors of this minority undercount include disproportionate rates of homelessness ; residential mobility (for those immigrants who have not yet secured a steady job and a place of their own, many of whom move as often as three times a year in search of larger apartments to accommodate newly-arrived family members); irregular housing (some households were not counted because their living quarters were not visible to postal clerks, being, for example, behind and above a commercial establishment); language problems and illiteracy (some non-English speaking immigrants routinely throw away mass mailings written in English, which may include census forms); and fear of outsiders (in some neighbourhoods, tenants would simply refuse to open the door to someone they did not know personally). (See generally Skerry (2000), at 86-101).

IV - PRODUCING STATISTICAL DATA

The Census Bureau is forbidden by law from collecting data on religion on a mandatory basis.[110] It does not collect data on sexual orientation either (as we saw, there is little law prohibiting discrimination on the basis of sexual orientation and hence little demand for statistical evidence).[111]

A/ Handicap

To begin with, it is worth emphasizing that strong antidiscrimination policies on behalf of the handicapped are commonly perceived as dealing with a specific issue, around which the degree of consensus is markedly higher. This may be related to the different degrees of *potential universalization* of their beneficiaries' distinctive features.[112] For no one stands immune from the risk of accidentally becoming part of the "group" of the handicapped. Undesirable as it is, that status does remain potentially accessible to every individual. In contrast, since the specific disadvantage that African Americans are still confronted with as a consequence of *racial identification*, by definition, is practically inseparable from their skin color[113] – *that is, from a physical characteristic impossible for any outsider to acquire* –, the task of eradicating such disadvantage – that affirmative action might perform – is hard to reconceptualize in a way that would make it compatible with the universalistic requirement typical of legal discourse.

Yet, although the Americans with Disabilities Act and other laws have extended antidiscrimination protection to individuals with disability, resulting litigation has focused on individual claims of disparate treatment rather than the detection of broader patterns of discrimination that would be substantiated by statistical analysis. Besides, the determination of whether a person has a disability must be made on a case-by-case basis.

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[110] Public Law 94-521 (1954). In the first half of the twentieth century, several proposals were made to count Jews as a race. All of them were ultimately rejected (see Schor (2001)). Then, just before the 1954 law was passed, the census director proposed that the 1960 questionnaire contain an item on religious background. This proposal was supported by various Catholic organizations as well as by the Population Association of America and the American Sociological Association. But it was opposed by the American Civil Liberties Union, the Christian Science Church, and various Jewish organizations. The bureau eventually relented and abandoned the proposal. On the 1980 self-administered census questionnaire, there were even instructions accompanying the ancestry question that warned, "A religious group should not be reported as a person's ancestry", in order to avoid respondents' declaring their "Jewish" identity as an answer. This contrasted with the (probably erroneous) inclusion of "Hindus" as one of the *racial* categories in the 1920 census, thus confusing a religion with a race.

[111] Should such law eventually emerge, it is still unclear whether large-scale collection of statistics on sexual orientation by the Census would infringe upon the "right to privacy" identified by the Supreme Court in cases such as *Griswold v. Connecticut* (381 U.S. 479 (1965)) and *Roe v. Wade* (410 U.S. 113 (1973)). In the meantime, however, social scientists have done surveys to determine the number of gay people in the United States. The most authoritative of these was published in 1994 by a team of researchers at the University of Chicago (Laumann *et. al.* (1994)). The study reported that 2.8 percent of men and 1.4 percent of women identified themselves either as homosexual or bisexual (table 8.2).

[112] As suggested also by the numerous preferences that veterans enjoy, whose consensual nature is also quite striking: see Skrentny (1996), at 41-45.

[113] Or rather from the set of phenotypical traits that lead to their being identified as "black".

This individualized basis for claim adjudication (as in the case of religion), limits use of statistical data in resolving discrimination charges. However, data are still needed for planning handicapped access (e.g., by school districts) to meet ADA requirements. Thus, disability information is now collected on the Census (but only on the long form, received by a roughly 1-in-6 sample of the total U.S. population): Item 16 asks about long-lasting conditions (e.g. blindness, deafness); Item 17 asks about conditions lasting more than 6 months and limiting certain activities.

B/ Race

Race has been a feature of the U.S. census since its inception in 1790, when its categories—"Free White Males", "Free White Females", "All Other Free Persons", and "Slaves"—doubled as markers of civil status. As a matter of fact, the inclusion of the race question was remarkably uncontroversial, in contrast with the proposal of classifying the population by occupation – a proposal that was initially rejected on the ground that such categories would undermine the notion of the common good, because they would inevitably encourage competition between groups[114]. Also, at that time, race was a necessary census item, not because the Constitution required it,[115] but because the March 1790 First Census Act demanded that "free persons" be classified by color. Even once slavery was abolished, racial classification remained a constant facet of U.S. census enumeration. Although the number and labels of census race categories varied greatly over this time (Bennett 2000; Lee 1993), their particulars provoked little public scrutiny or outcry, perhaps since the sole constant was the "White" category used and approved by the numerically and socially dominant majority.

The question on race contained in the census' short form that is sent to all American households now distinguishes the following racial groups: blacks, whites, Native Americans, Asians, Native Hawaiians and Other Pacific Islander, plus the residual category "Some Other Race"[116].

Although Hispanics are one of the main groups targeted by antidiscrimination policies in general and affirmative action programs in particular, they are not considered to be a racial group as far as the census is concerned: Hispanics are people of Mexican, Cuban, Puerto Rican, Central American and South American extraction, regardless of race. Since 1970, Hispanic origin has been the object of a separate question that was first included in the long form, and was then moved to the short form ten years later.[117] According to Census 2000 data, without taking into account the 6.8 million persons who

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[114] Anderson (1988).

[115] The Constitution only required that each *slave* be counted as three fifths of a person for the purposes of apportioning taxation and representation among the states – and even *that* remained implicit. Until altered by the 14th Amendment in 1868, section 2 of Article I of the Constitution read, "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 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*" (our emphasis).

[116] "Race" appeared on the census form only at the start of the twentieth century when it was included with "color" on the 1900 census. Until 1940, the most frequent label for that question remained "color or race". In 1950, the census form used only "race". From then on, the question was sometimes labelled as a question about race, and sometimes it was not. In 1990 and 2000 it was labelled but in 1960 and 1980 it simply asked "Is this person…?" and provided a list of categories. On the category "Other race", see generally Rodriguez (2000), at 129-152.

[117] In 1990, the Hispanic-origin question had the highest "allocation rate" of any item on the census questionnaire (the "allocation rate" being the technical term for the percentage of nonresponses to a specific question, for which

self-identified as belonging to more than one racial group, the U.S. population – a total of 281.4 million persons – now comprises 75.1% Whites, 12.3% Blacks, 3.6% Asians, 0.9% Native Americans – and 13% Hispanics.[118] An individual reluctant to choose any one of these options can still check the « Some Other Race » box, which has been on the questionnaire since 1910. In 2000, 15.4 million persons – that is, 5.5% of the U.S. population, out of which 97% were Hispanics – did make that choice.[119]

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missing values are then imputed). Fully 10 percent of those responses had to be imputed, which is substantially higher than the allocation rate for any other census questions. Most of those who failed to respond to the Hispanic-origin question were non-Hispanics who mistakenly assumed that it did not apply to them, even though the first listed response was "No (not Spanish/Hispanic)". But others were Hispanics who confounded race and ethnicity. They responded to the race question by turning to the "other race" category, where they wrote in "Hispanic" or, more likely, a national origin (for example, "Mexican"). When these individuals came to the Hispanic-origin question a few items later, they skipped over it, believing it to be superfluous. Therefore, in 2000, the question on Hispanic origin was asked immediately before the question on race, in hopes that Hispanics would then view the race question as a cross-cutting inquiry – instead of looking for « Hispanic » among the racial categories to be chosen from and massively checking the « Some Other Race » box as a result of not finding it. These expectations were unconfirmed, however, as the proportion of Hispanics marking "some other race" has increased, despite the change in format. Finally, in order to improve response rates, OMB also decided that the term used in the census question should be "Hispanic or Latino", thus taking into account differences in the regional usage of the terms ("Hispanic" is more commonly known in the Eastern portion of the United States, whereas "Latino" is more widespread in the western portion). The adjunction of "African American" as one of the terms juxtaposed within the label for the "Black" racial group in the 2000 form ("black, African Am, or Negro") was also meant to reduce the number of nonresponses.

[118] It is only in the « long form » sent by the Census Bureau to a sample of 17% of households that one finds an additional question on « ethnic origin », which although formally independent from the one on race can be understood as introducing a list of *subcategories* within each of the different racial groups: Whites can thus indicate if they are of Irish or Italian extraction, Asians if they are Chinese, Vietnamese or Indian, Blacks if their family comes from the West Indies, and so on.

[119] Approximately 40 percent of those who identified with a Hispanic origin in the 2000 census wrote a term denoting that origin for their race and were thereby classified by the Census Bureau as "some other race". As for *non-responses* to the race and Hispanic origin questions, their treatment is interesting in its own right. In general, when an item goes unanswered on an individual questionnaire, the Census Bureau imputes an answer on the basis of the response of some other member of the same household or of a comparable individual in a neighboring household. In particular, when race or Hispanic origin data are missing, responses are imputed from others within the same household who have reported race or Hispanic origin ("within-household imputation"); when race and Hispanic origin data are missing from all household records, responses are imputed from other Census records in surrounding blocks with similar characteristics as far as these two variables are concerned ("hot deck" imputation). Those standard imputation methods thus rely on the double assumption that individuals living in the same household (1) and individuals living in neighboring households (2) are of the same race and ethnic origin. In other words, *for statistical purposes*, the norm of residential segregation and ethnoracially homogeneous family units remains unchallenged.

Finally, since 2000, it is now possible for individuals to check more than one of the boxes listed on the questionnaire – and 2.4% of them have done so.[120] However, the possibility of adding a new, « mixed-race » category – initially advocated by several associations[121] – was eventually discarded, partly on account of the black leadership's (apparently ungrounded) fear that it would produce some major disturbances in the statistical infrastructure underlying antidiscrimination policy.

In 1977, the Office of Management and Budget (OMB) issued Statistical Policy Directive 15 establishing the racial and ethnic categories to be used by all federal agencies. Although technically limited to the activities of federal agencies, this schema has come to be adopted by state and local governments as well as private sector actors and academic researchers. In 1997, Directive 15 was amended to permit the classification of individuals in multiple racial groups (Office of Management and Budget 1997). It also revised the official racial categories to include "American Indian or Alaska Native", "Asian", "Black or African American", "Native Hawaiian or Other Pacific Islander", and "White" (these developments were later incorporated in the 2000 census). With the additional "Some other race" category, this brings the number of race options to 6. This makes for 63 potential single-and multiple race categories consisting of 6 monoracial categories and 57 categories for biracial and multiracial respondents. And since there are two ethnic categories – Hispanic and not Hispanic[122] –, the population can now be categorized into 126 unique racial and ethnic combinations. Given the potential complexity of the resultant record-keeping and tabulation for employers, not to mention analysis by enforcement agencies, in 2000 the OMB issued Bulletin 00-02, "Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement". This guidance gave enforcement agencies permission to collect data using a limited schedule of racial/ethnic classifications, namely the single-race categories named above plus four dual-race combinations (white/black; white/Asian; white/American Indian; and black/Indian) as well as any other multiple-race combination that surpassed one percent of the population under study[123].

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[120] This includes the « Some Other Race » category. Strangely enough, even though Hispanics are not considered as a distinct race, « respondents who had already checked a box for their race and then wrote a Hispanic term in the « Some Other Race » category were considered multiple by race. Thus persons who marked white or black for their race and then went on to write Dominicans or Puerto Rican in the « some other race » box were classified as multiracial. This explains why two of the most frequently reported combinations were white and « Some Other Race » and black and « Some Other Race ». On the other hand, if a person wrote a term in the « Some Other Race » box indicating an origin other than Hispanic, the Census Bureau may or may not have classified that individual into the « other race » category. The agency considered the word or phrase written on the 2000 census form and then examined data for persons who wrote that same word or phrase for their ancestry in the enumeration of 1990. If 70 percent or more of the persons reporting their ancestry in 1990 identified with a specific race, that race was assigned to the 2000 respondent. If less than 70 percent of those reporting that ancestry in 1990 had identified with a race, then the person was considered « other » by race in 2000 » (Farley (2002), at 44-45).

[121] Spencer (1997).

[122] For a historical review of the distinction between official "race" and "ethnic" categories, see Rodríguez (2000).

[123] OMB (2000b).

1) The political construction of ethno-racial categories: the case of "Hispanics"

The designation "Hispanic" was not in common usage prior to its adoption by the Bureau of the Census in 1970. True, "Mexican" had been introduced as a *racial* category in 1930,[124] in the context of a growing Mexican immigration all the more conspicuous as immigration from Europe had been severely restricted by the 1921 and 1924 laws and immigration from Asia entirely banned.[125] But that category had been suppressed ten years later, due to pressures from different organizations of Mexican Americans, primarily the League of United Latin American Citizens (LULAC) in Texas, supported by the Mexican Ambassador in Washington: the State Department then asked the Department of Commerce to withdraw the "Mexican" category, which was reluctantly done, as it had been by the Social Security Administration and other agencies for the same reasons. At that time, the organized Mexican-Americans who lobbied against their classification as a distinct, non-white race did so in the context of a struggle against growing school segregation in the Southwest on the ground, a context in which being recognized as white by the federal census mattered a great deal.

In 1970, however, at a time when the first affirmative action programs were being set up, the incentives run in the opposite direction. Without any substantial debate, a Hispanic-origin question was thus added to the census form. As a matter of fact, the finalized questionnaires were already at the printers when a Mexican American member of the U.S. Interagency Committee on Mexican American Affairs demanded that such question be included.[126] Over the opposition of Census Bureau officials, who argued against inclusion of an untested question so late in the process, President Nixon ordered the secretary of commerce and the census director to add the question. But the short form was already in production, so the Hispanic question was hastily added to the long form.[127] It was moved onto the short form ten years later, after Congress passed the 1976 Roybal Act, which required the bureau and other federal statistical agencies to produce separate counts of persons of Hispanic origin.[128]

After the 1990 census, one proposed improvement was to incorporate the separate Hispanic-origin question into the race question, making "Hispanic" one of several items listed under the race heading. This change had the virtue of making census categories consistent with everyday usage among many Hispanics who define race more in cultural than in biological terms. More to the point, it would make census categories consistent with the prevailing usage in law and politics, where Hispanics, along with other "racial" minorities, have become one of the main protected groups under the current

[124] It included "all persons born in Mexico, or having parents born in Mexico, who were not definitely white, Negro, Indian, Chinese or Japanese" (U.S. Bureau of the Census (2002a), at 59).
[125] Ngai (1999).
[126] This was before census director Vincent Barraba set up a system of racial and ethnic advisory committees to get input from minority organizations and leaders.
[127] Choldin (1986).
[128] Public Law 94-311 (1976).

antidiscrimination regime. And initially, most Hispanic advocacy organizations initially supported the proposed change.[129]

This lasted until the results of a massive federal survey were made public. Indeed, to shed some light on the issue, the Bureau of Labor Statistics undertook a special one-time supplement (in May 1995) to its monthly Current Population Survey. With a sample of about 100,000 individuals, the CPS presented a unique opportunity to see how revised racial and ethnic categories would affect the way all Americans identified themselves. Those results, released early in 1996, demonstrated that more individuals – from 18 to 30 percent more, depending on the specific format – identified themselves as "Hispanic" when "Hispanic" was a separate ethnic category than when it was one of several racial categories. Hispanics leaders, long concerned with documenting their growing numbers, realized that the proposed change would not work to their advantage, and their support for making "Hispanic" a racial category quickly eroded. Soon, there was a unanimous demand that "Hispanic" remained on the questionnaire as a separate ethnic category, and the Census Bureau quickly and quietly concurred.[130] Once again, politics prevailed.[131]

2) Ethnoracial statistics and antidiscrimination policies

The fit between antidiscrimination policies and the statistical framework provided by the ethnoracial pentagon is arguably problematic on several grounds. To begin with, the groups thus delineated are hardly homogeneous. When one Asian American group (Koreans) has the highest rate of business formation in the nation, and another (Laotians) has the lowest, the logic of grouping them together is certainly questionable[132]. Different rates of achievement among Latino Groups (Cuban relative to Puerto Ricans or Mexican Americans) and blacks (American-born relative to West Indian or African) can also be observed in education and income[133], not to mention the differences in the degree of discrimination suffered.

[129] See testimony of Sonia Perez, representing the National Council of La Raza in *Review of Federal Measurements of Race and Ethnicity*, Hearings before the Subcommittee on Census, Statistics, and Postal Personnel of the House Committee on Post Office and Civil Service, 103. Cong. 1 sess. (GPO, 1994), at 177.
[130] See OMB (1997b), at 36939.
[131] Skerry (2000), at 39-40.
[132] LaNoue and Sullivan (2001), at 81.
[133] Graham (2002), at 144, 192.

This inequality within categories may thus result in most preferences and opportunities going to the most advantaged ethnicities within each category : an employer required to implement an affirmative action program will usually consider the proportion of blacks, Hispanics and Asians within his workforce, but he remains perfectly free to recruit only West Indians and no native-born American black, only middle-class Cubans and no Puerto Rican, only Chinese and Japanese applicants and no individual from the Indochinese peninsula, and so and so forth[134]. Minority racial status per se, which brings presumptive eligibility for affirmative action preferences to remedy historic discrimination, makes no sense as a proxy for economic disadvantage. At the same time, one should note that the various issues raised by the erasing of differences on the basis of national origin within minority racial groups – itself a side-effect of the EEOC's choice to rely on visual identification by observers (see below) – were invisible in 1965, since massive discrimination against African Americans was such an obvious and urgent priority and immigration policy and global developments had not yet allowed great numbers of Latinos and Asians to come to the United States.

Such distributive concerns, in turn, played a major role in the recent debates over the 2000 census, in particular those pertaining to the division of the "Asian or Pacific Islander" (API) race category into two separate items. Here, the argument was that Asians and Pacific Islander were two distinct groups with divergent socioeconomic profiles. Specifically, with Pacific Islander constituting only 365,000 of the 7.3 millions Asian or Pacific Islander counted in 1990, it was argued that their relatively disadvantaged situation had been masked in the combined category.[135] In addition, around the same time, OMB was urged by the Hawaiian congressional delegation, the State of Hawaii departments and legislatures, various Hawaiian organizations and the 7,000 individuals who signed and sent preprinted yellow postcards to separate out Native Hawaiians from the "Asian or Pacific Islander" category and to include them in the "American Indian or Alaskan Native" category. Here again, the argument was that the socioeconomic plight of the smaller group (Hawaiians) was obscured by inclusion in the API category.[136] But the Office of Management and Budget rejected the notion of combining Native Hawaiians with American Indians and Alaskan Natives, largely because of the objection raised by Indian tribal organizations that such a change in classification would artificially enhance *their* socioeconomic profile.[137] Hence the creation of an independent "Native Hawaiian and Other Pacific Islander" race category as a compromise acceptable by all the groups involved.

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[134] Even more surprisingly, as a practical matter, the OFCCP does not disaggregate the "Black + Hispanic" ensemble: if the EEO-1 forms reveal no statistical underrepresentation of Blacks and Hispanics *considered jointly*, there will be no further control. That fact – which is known by the employers – is a function of two underlying beliefs on the part of the agency: first, the idea that the larger the sample, the greater the validity of the statistics produced as evidence of discrimination; second, the (arguably less convincing) notion that most of the employers who discriminate tend to exclude to all non-white applicants, without drawing internal distinctions among them (Interview with Michael D. Sinclair and William E. Doyle, Jr., Office of Federal Contract Compliance Programs, April 27, 2004).

[135] OMB (1997b), at 36923.

[136] OMB (1995), at 44683. This proposal was also based on a different claim: that Native Hawaiians were not immigrants but descendants of a conquered and indigenous people and therefore ought to be classified with American Indians, in spite of their location on the Asian and Pacific side of the globe. Thus, they were challenging the practice of using geographic origin to determine race.

[137] Edmonston et. al. (1996), at 31.

Besides, insofar as those in charge of designing affirmative action programs and of defining the proportions of members of each minority group in the workforce that employers should attempt to reach generally refer to census data – data related to the ethnoracial distribution of the population living in the surrounding area –, the uncertainty induced by *the significant variability of the results obtained through self-categorization* since 1970 may well jeopardize the reliability of the statistical infrastructure involved. To take but the most striking example, only about a third of the dramatic growth in the number of self-declared American Indians between 1970 and 1980 (73%) derived from births in excess of the number of deaths : the remainder was accounted for by what has come to be termed "ethnic [and racial] switching".[138] Then, in 1990, only 62.8 percent of those who identified as "American Indian", Eskimo, or Aleut" on the Census Bureau's Content Reinterpretation Survey (CRS) so identified on the census.[139] And there is an even wider gap between 1990 numbers based on the race question and on the census ancestry question: 1.8 million identified racially as "American Indian" while 8.8 million reported some "Indian" ancestry.[140] In short, the "reliability"[141] of census data on American Indian is notoriously poor, because "societal changes related to the perception of American Indian heritage (…) affect how individuals self-identify"[142].

These variations and the correlative statistical uncertainty threatening the antidiscrimination apparatus arguably result from the self-consciously subjectivistic wording of the question on race, which may be understood as implicitly encouraging respondents to consider the answer as a matter of choice: while questions on sex, age, marital status, but also ancestry and Hispanic origin are phased in a way that suggests the answer is simply a matter of fact ("What is this person's ancestry or ethnic origin ?" ; "Is this person of Spanish/Hispanic origin ?"), each respondent is asked to "*mark one or more races (…) that the person considers himself/herself to be*"[143].

[138] Harris (1994) ; Eschbach (1995) ; Passel (1997). See also Eschbach and Gomez (1998).
[139] Skerry (2000), at 61.
[140] Edmonston et. al. (1996), at 30; see generally Harris (1994).
[141] "Reliability" denotes the degree to which survey questions elicit the same response at different points in time.
[142] OMB (2000b), at 11.
[143] Bureau of the Census, U.S. Department of Commerce, Official 2000 U.S. Census Form (emphasis added).

In short, because of its eagerness to openly dissociate itself from a naturalistic conception of race as a scientifically grounded, anthropological category, the Census Bureau has deliberately embraced a relativist point of view leading to the explicit acknowledgement of the subjectively constructed character of racial identity, thus envisioned as resulting from a process of *individual affiliation*.[144] The statistical fluctuations that have been recorded arguably proceed from the conjunction of the self-categorization principle and of the assumption that such identity is the product of an autonomous, irreducibly personal assessment. To the extent that these racial categories are becoming more subjective, they are also becoming more volatile.

Despite an all-too-frequent misunderstanding, the problem is *not* that individuals may strategically check off a racial box in order to get the affirmative action benefits that this choice would bring them, for *at the individual level*, there is no direct connection between affirmative action and the census: unlike someone filling out a college application, an individual identifying himself on a census form as belonging to a protected minority group does not stand to benefit directly. There are simply no tangible incentives for individuals at play here. True, because judges and administrators rely on census data to determine affirmative action goals and quotas, higher census counts do translate, albeit indirectly, into more benefits to individuals *as members of designated 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.

However, quite independently of the *additional* distorsions resulting from the phrasing of question 4, it is far from clear that the self-classification at work in the census is indeed the most adequate method for delineating the group of individuals suffering from a specific disadvantage on account of their racial features that affirmative action would be intended to remedy. Whether someone is victim of discrimination turns on the way in which others perceive the color of the victim's skin, the ethnic origin of his or her last name, or the accent with which the victim speaks. Such issues do not depend generally on the ways in which a victim identifies the various components of his or her racial or ethnic

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[144] « The concept of race as used by the Census Bureau reflects self-identification; it does not denote any clear-cut scientific definition of biological stock. The data for race represent self-classification by people according to the race with which they most closely identify. Furthermore, it is recognized that the categories of the race item include both racial and national origin or sociocultural groups » (U.S. Census Bureau 1992, B-30). As Joel Perlmann and Mary Waters have pointed out, « this statement unequivocally rules out any need for government officials to believe that racial classification has a meaningful basis in biology or to define any objective meaning for a racial category at all: "race" is a term in popular usage and whatever it may mean, a person belongs to whatever category of race that person believed he or she belongs » (Perlmann and Waters (2002), « Introduction », at 10). This is not a recent development: at the time of the 1950 census, for example, "race" was already explained as follows: "The concept of race, as it has been used by the Bureau of the Census, is derived from that which is commonly accepted by the general public. (…) Although it lacks scientific precision, it is doubtful whether efforts toward a more scientifically acceptable definition would be appreciably productive, given the conditions under which census enumerations are carried out" (U.S. Bureau of the Census (1953), at 35). Similarly, according to the Office of Management and Budget's (1997a) revised *Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, "The [race] categories represent a social-political construct designed for collecting data on the race and ethnicity of broad population groups in this country, and are not anthropologically or scientifically based. (…) [They] should not be interpreted as being primarily biological or genetic in reference" (OMB (1997a), at 58782). In another document, the OMB also emphasizes that the federal government "does *not* establish criteria or qualifications (such as blood quantum levels) that are to be used in determining a particular individual's racial or ethnic classification. Directive No. 15 does *not* tell an individual who he or she is, or specify how an individual should classify himself or herself" (OMB (1997b)), at 36874).

background. Therefore, would it not be more logical that the possibility of benefiting from an affirmative action program depend on whether the individual involved is identified as a member of the stigmatized group by those who stand *outsid*e of the group and whose behavior may cumulatively reinforce that stigma, rather than from the individual's subjective feeling in this respect? Would someone deserve preferential treatment by virtue of believing oneself Black, even without being considered Black by the rest of the community – and thus presumably having suffered none of the disadvantages usually associated with that status? Since the distribution of racial disadvantage is presumably keyed to how the rest of society perceives a given individual, it would be more defensible to give preference to that individual, not according to Blacks' feelings of solidarity with her but rather according to whether or not the majority White population – the presumptive source of the wrong being done – perceives her to be Black. If group-specific preferences are supposed to remedy the ill effects of past and ongoing discrimination, pure self-reporting threatens to erase the necessary logical connection between disadvantage and remedial preferment: "…a person is not more likely to be denied a mortgage because he or she is black (…) but because another person believes that he or she is black (…) [T]reating race as an individual rather than a relational property almost certainly compromises the value of the data collected".[145] This lack of fit between what ought to be the ultimate goal of affirmative action and the data collection process on which the policy relies as a practical matter thus raises several problems that need to be considered in greater detail.

En effet, the data analyzed by enforcement agencies and other parties to antidiscrimination litigation comes largely from two sources.

The first major source is comprised of the regulated entities themselves, such as private-sector employers, federal contractors, universities and schools. These actors are legally required to maintain certain records and submit regular standardized reports (often online at present) to federal agencies on their workforce and/or student bodies. In particular, they may be required to classify individuals by race, national origin, or disability status.

[145] American Anthropological Association (1997), at 4-5.

This is true, for example, of the annual EEO-1 forms that all private employers with 100 or more employees and federal contractors with 50 or more employees must file under Title VII of the Civil Rights Act of 1964.[146] Classification by race is also a feature of the annual Integrated Postsecondary Education Data System (IPEDS) submissions filed by institutions of higher education with the U.S. Department of Education. In other words, employers' self-reporting is the underpinning of the monitoring system for detecting patterns of discrimination.

The second major source of data for antidiscrimination analysis is the Census Bureau, a branch of the U.S. Department of Commerce. It is not the nation's only statistical agency; the Bureau of Labor Statistics, for example, collects and analyzes national data as well. However, through its Constitutional mandate to conduct a full population enumeration every 10 years, the Census Bureau collects the small-area population data that is crucial for determining the characteristics of local labor force or school-age populations that serve as points of comparison when judging the practices and outcomes of particular employers or educational institutions. In particular, the Bureau currently provides two special data files developed expressly for use by enforcement agencies and other parties seeking to meet the requirements of antidiscrimination legislation: a) The "P.L. 94-171" file is named after the 1975 public law requiring the Census Bureau to provide small-area population totals for legislative redistricting. The Bureau makes it available, for a fee, in an easily accessible computer database form to state and local governments around the country, as well as to private individuals. The data are used to develop redistricting plans that are in accord with the requirements of the 1965 Voting Rights Act; b) The Special Equal Employment Opportunity (EEO) Tabulation similarly stems from the civil rights legislation of the 1960s, and has been provided by the Census Bureau beginning with the 1970 census. In its current form, the Special EEO file is constructed by the Bureau according to the specifications developed by a consortium of four federal agencies: the Equal Employment Opportunity Commission; the Department of Justice; the Department of Labor and the Office of Personnel Management. It provides race, ethnicity and gender data for all states, metropolitan statistical areas (MSAs) and counties irrespective of population size for 512 occupational categories[147].

[146] "EEO-1 forms must be filed by (A) All private employers who are: (1) subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees EXCLUDING State and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations. (…) ; (B) All federal contractors (…) who (…) have 50 or more employees, and (a) are prime contractors, or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to $ 50,000 or more; or (b) serve as a depository of Government funds in any amount, or (c) is a financial institution which is an issuing and paying agent for U.S. savings Bonds and Notes" (EEOC (undated (a), at 1).

[147] There is a good chance that disability will be introduced in the EEO file in the near future, at the request of the EEOC in particular (interview with Mai Anne Westmantle, April 27 2004).

This file differs from the regular Census by defining the "Black" and "White" groups to exclude persons of Hispanic origin and thus providing separate data for "White (not Hispanic)" and "Black, not Hispanic".[148] It "serves as the primary external benchmark for comparing the race, ethnicity, and sex composition of an organization's internal workforce, and the analogous external labor market, within a specified geography and job category".[149]

Not only are there several authorities responsible for collecting ethnoracial statistics; there are also several identification procedures at work at the same time. In fact, there exist two basic approaches to this classificatory task:

(1) Self-identification – individuals are asked to assign themselves a racial identity based upon the particular group with which they most closely identify ; and

(2) Observer-identification – individuals are placed into categories according to the perceptions of their racial identity held by a designated decision-making third party. In that case, an individual's membership in a particular group might thus be determined according either to

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[148] The change of Hispanic origin from a race-independent category into a race-displacing one may seem to presume that it is a more salient axis of employment discrimination than "color", a conclusion which is not intuitively obvious. It reflects the notion that the categories "should be comprehensive in coverage and produce compatible, *nonduplicative*, exchangeable data across Federal agencies" (OMB (1997a), at 58782 (our emphasis)).

[149] U.S. Census Bureau, "Census 2000 Special Equal Employment Opportunity (EEO) Tabulation: Introduction", at http://www.census.gov/hhes/www/eeoindex/intro.html (accessed February 27, 2004). One should emphasize that this statement is an observation, *not* a legal prescription. As a matter of fact, as explained in the OFCCP's *Compliance Manual*, employers "should use the best data available. While the most recent decennial census data normally provide the most detailed information on requisite skills, they become increasingly outdated the more years it has been since the census was conducted. Also, the decennial census shows only persons employed in a given occupation at the time the census was conducted, rather than those with the skills to be employed in that occupation. Therefore, the following adjustments to decennial census data are normally needed:
(1) Adjustment for Time Since the Last Decennial Census: Some State Divisions of Employment Security continue to publish periodic updates of decennial census data on occupations of persons employed in labor areas within their State. While these updates are often for fairly broad job categories, they provide a reliable means of update for job categories where skills are normally not very specialized (i.e. service workers, laborers, operatives, entry-level clerical, retail sales), and at least an indication of overall trends in job categories where skills often are specialized (…). Additionally, for job groups which do have legitimate specialized education requirements, *any available data on the percentage of minority and/or female graduates at the level (Associates, Bachelor's, etc.) and in the field involved may be used to update census data*. Since, in many fields, minority and female enrollment has risen since the last decennial census, these data are often considerably more accurate than the census (…)
(2) Adjustment for Employment vs. Requisite Skills: (…) Additionally (…), care must be taken to ensure that such census data do not, in effect, perpetuate past discrimination against minorities or women in certain occupations (…). This is particularly important for jobs in which, in terms of basic skill requirements, the availability of minorities and/or women has long been considerably better than their representation – for example, some management, professional and sales training programs in which the major legitimate requirement is a college degree. (…) [Therefore], contractors should contact those educational and training institutions with programs which match their employment needs. These can range from local high schools with business or vocational programs through local technical schools to colleges nationwide. Such institutions should be able to provide data on the number and percentage of minorities and women enrolled in programs appropriate to the contractor's employment needs" (OFCCP (undated a) (chap. 2), at dol.gov/esa/regs/compliance/ofccp/fccm/ofcph2.htm).

(a) *Member reference* – whether or not members of that group (however defined) consider her to be a fellow member[150], or

(b) *Nonmember reference* – whether or not nonmembers of that group (who may be prone to discriminate against group members) consider her to be a member[151].

The problem here lies in the *juxtaposition* of these two, sharply distinct classificatory procedures within the U.S. administrative apparatus and in there being no clear allocation of decision-making authority as far as racial identification is concerned.

In the employment field, affirmative action programs usually define a percentage that minority representation is supposed to reach within the workforce of a given firm, within a given time frame. And that percentage, as a practical matter, is determined following a comparative analysis of two different sets of quantitative data collected through these two classification procedures, whose interchangeability is thus wrongly assumed.

[150] An example of this variant of "other-ascription" in which the dispositive factor is perception of group membership by the already-defined members of the group is that of American Indians: see the 1974 Supreme Court decision *Morton v. Mancari* (417 U. S. 535 (1974)) and Ford (1994), at 1263-1266. As evident from that case, the "member-reference" system requires an identifiable "base-population" with a formal structure permitting collective in-group decision-making (here, the "federally-recognized tribes" whose sovereignty antecedent to their incorporation in the U.S. legal system can be held to grant them some legitimate right to participate in defining their own membership).

[151] This is the method that South African courts used to employ in order to ascertain the race of the litigants whenever that element remained a matter of dispute; in this respect, see Ford (1994), p. 1277-1280. As for contemporary U.S. case law, the most relevant decision is Malone v. Harley (No. 88-339 (Sup. Jud. Ct. Suffolk County, Massachussets, July 25, 1989)), an unreported single-justice opinion of the Supreme Judicial Court of Massachusetts. In that case, Paul and Philip Malone, two brothers who lived in Milton, Massachusetts, took part in 1975 in a city civil service competition for jobs with the Boston Fire Department. They scored poorly and were not accepted. The Malones, who were fair and light-skinned, had identified themselves as White in the 1975 test application. In 1977 they tried again, this time identifying themselves as Black. The Boston Fire Department had by that time become subject to a court-ordered affirmative action program, under which the city maintained separate minority candidate lists for fire-fighter vacancies. The Malones' 1977 test scores would not have qualified them for the job as White candidates, but based upon their self-identification as Black they were hired and served on the force for ten years. Then, a hearing officer within the Fire Department declared that they were not Black and had therefore falsified their 1977 application and examination materials. Judge Herbert Wilkins of the Supreme Judicial Court for Suffolk County, Massachusetts, used the following three-part test for adjudicating claims to racial identity: was the Malones' claim supported "(1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community"? (Malone v. Harley, at 16). Under this (loosely defined) standard – with no hierarchy or ponderation being established between the three different variables –, the Malones were declared not be "Black".

- On the one hand, information on the ethnoracial distribution of the unemployed working population with the adequate skill level for each job category in the relevant labor pool (*availability data*) that are *drawn from the census*, i.e. from the detailed education and occupational breakdown of the "long form" and the *self-reported* sex, race, and ethnicity responses of the "short form" questionnaire;[152]

- On the other hand, information on the ethnoracial distribution of the workforce in each job-group that the employer is required to submit to the EEOC on a yearly basis[153]. Now employer data is usually the product of *observer-identification* through informal, on-site "visual surveys" conducted by supervisors – a practice actually encouraged by federal regulators, since "eliciting information on the race/ethnic identity of an employee by direct inquiry" is considered too "sensitive"[154]. This is the legacy of a now mostly-forgotten mistrust by some major civil rights leaders of racial self-reporting in the employment context, reliance on a visual basis for minority categorization thus appearing as a reasonable compromise.[155]

[152] This is true only to the extent that the questionnaire is not filled out by one and only one member of the household – which is typically the case. On any number of items, including those pertaining to race and ethnicity, there may well be discrepancies between how the person filling out the questionnaire answers and how others in the household might respond for themselves. Under such conditions, self-identification is often a convenient fiction.

[153] U. S. Congress. *Civil Rights Act of 1964*, Titre VII. § 709 © (42 U. S.C. §2000^{e}-8©).

[154] Standard Form 100, at 4-5; EEOC Form 274, Local Union Report (EEO-3): Instructions for Filing and Recordkeeping Requirements (1993), at 2 (on file with authors). This is not always the case outside of the employment sphere. Thus, while lenders are required to report race information about mortgage applicants in order to monitor compliance with federal statutes that prohibit them from discriminating on the basis of race, only those applicants who do not wish to self-report are then assigned a designation based on observation (Home Mortgage Disclosure, 12 C.F.R. § 203-4 (1995), appendice B). The predominance of observer-identification in relation to the EEO-1 forms also contrasts with the OFCCP's requiring that "that covered contractors invite all applicants for employment and all employees to identify themselves as individuals with disabilities, special disabled veterans, or veterans of the Vietnam era", provided that invitation makes clear "that the information is provided voluntarily, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment" (OFCCP (Undated a), chap. 3).

[155] As recounted by Herbert Hammerman, the former EEOC's chief of reports, "[NAACP leader Clarence Mitchell] angrily declared that he had fought the tendency of employers to ask applicants for employment to state or write their race for several years and was not about to change his mind now. We were at a crossroads. With the opposition of the NAACP, the EEO-1 would be dead. It also seemed obvious to me that it made sense for employers to identify minorities in the same way that they were discriminated against, by observation. After all, employers were not sociologists" (in Skrentny (2002), at 108; see also Graham (1990), at 199).

> Moreover, since there is no official guideline on the criteria to be used for assigning individual members of the workforce to a given race[156] and no oversight of employer decisions in this respect, those responsible for conducting the "survey" are free to consider whatever factors they feel to be appropriate.[157]

In a nutshell, while firms and schools[158] – as well as the FBI[159] – produce numbers on minority students or employees based on observer-identification, these are typically compared with local demographic data from the census, which relies on self-identification.

Besides, the authorities in charge of supervising the implementation of affirmative action programs are not in a position to measure the distorsions potentially induced by this plurality of classification procedures, since the law prohibits the use of census data to connect employer responses to individual names (see Section III), thus making it impossible to compare, *for each individual*, the results of racial self-identification and external identification. In short, the uncertainty affecting the database on which the implementation and assessment of affirmative action policies rely is made greater still by the *comparative* use of figures obtained through two co-existing and radically distinct modes of racial categorization, delineating ensembles whose coterminous nature simply cannot be assumed. For these classification schemes may well produce different results. This might seem unlikely as far as sexual differentiation is concerned, because of its arguably more objective biological grounding and of the *unshifting* and *dichotomous* nature of the categories involved. Thus, the drawing of lines between men and women is comparatively nonproblematic: one would not, in most cases, expect divergence between someone's self-perceived identity as a male, on the one hand, and the agreement of either men or women about this fact of biological identity, on the other. With respect to racial and ethnic characterizations, however, this cannot so easily be held to be true. Thus, the fact

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[156] The EEOC only provides a general definition of the race/ethnic categories themselves. In that pre-Census 2000 document, the definition refers to ancestry – itself defined in reference to a geographic criterion –, coupled with color in the anomalous case of "Blacks" :
"White (not of Hispanic origin)__ All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East;
Black (not of Hispanic origin) __ All persons having origins in any of the Black racial groups of Africa
Hispanic __ All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race
Asian or Pacific Islander __ All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippines Islands, and Samoa.
American Indian or Alaskan Native __ All persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition" (EEOC (undated (a), at 5) .

[157] Federal equal employment opportunity compliance officials apparently have no way of "verifying" the figures employers submit in their EEO filings. Compliance audits may check employer EEO reports against the group-classified personnel records employers are required to keep, but federal auditors will not systematically attempt to "verify" individual classifications (interview with Michael D. Sinclair and William E. Doyle, Jr., Office of Federal Contract Compliance Programs, April 27, 2004).

[158] Generally, racial and ethnic enrollment data relied on by the Office of Civil Rights at the U.S. Department of Education are also based on observations by school officials (National Center for Education Statistics (1996)).

[159] See Ford (1994), at 1256. The "method" of racial classification used in the compilation of crime statistics is basically identically to the EEOC's stereotype-driven employer-reported "visual survey". The discretion of reporting officers is left entirely unquestioned. As explained by the Office of Management and Budget in a quasi-transparent argument in favour of racial profiling, "the data provide law enforcement a unique means by which (…) to plan strategically for the maximum use of limited law enforcement resources" (OMB (2000b), at 84).

that compliance is evaluated by comparing individually self-reported "availability" data with employer-reported group hiring and promotion figures is a problem worth taking seriously. It is hardly satisfactory for the foundation of federal equal employment opportunity enforcement to juxtapose the apples of self-reported race and ethnicity with the oranges of stereotyped group ascription.

That these methods may produce different results for the same individual – thus generating inconsistencies in the racial data that go largely unchallenged – is also suggested by several empirical studies comparing birth and death records. The interesting point here is that while on death certificates individuals tend to be racially classified by third-party observers, usually physicians, morticians or funeral home directors, on birth certificates – where the race of the child is created from information reported for the race(s) of the parents as entered on the certificate –, since 1989, the race and ethnicity of a newborn has been recorded as that of the mother on the basis of how she identified herself.[160] Although the latter is not a case of pure self-identification since the parents, not the infant, are doing the identifying, the discrepancies revealed by the studies comparing infant birth and death records provide a startling indication of what the extent of the problem might be. Of those infants whose parents both identified themselves as "black" on the birth certificate, only 3 percent were not classified as "black" at the time of their death. Yet, of those infants whose parents both identified as "Amerindian", almost 9.7 percent were not so classified at death. And of those whose two parents identified as "Chinese", the figure was 38.6 percent. For infants of mixed-race parentage, misclassifications are dramatically higher. In the same study, 37.9 percent of such infants identified as "black" at birth were classified otherwise at death. Among mixed-race infants identified) as "American Indian" at birth, 71.2 percent were subsequently classified otherwise. And for such infants identified as "Chinese", the figure was 78.3 percent.[161] Another study reports similar misclassifications of Hispanic

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[160] The procedures used in making birth certificate race-identification records are outlined in guidelines prepared for state and local governments by the National Center for Health Statistics (NCHS) in Washington. Since 1989, the NCHS has required the following system: "Birth data are tabulated by the race of the mother as reported directly on the birth certificate. If race of mother was not stated, it [is] imputed as that of the father, if known" (National Center for Health Statistics (1992a), at 29). From 1950 to 1989, however, within the frame of a racial classification scheme comprising 8 categories (White (including "Mexican, Puerto Rican, and other Caucasian"); Black; Indian (North, Central, and South American Indian, and Eskimo and Aleut) ; Chinese ; Japanese ; Hawaiian ; Filipino ; Other Asian or Pacific Islander), the rules were quite different: when the parents were of the same race, the child was assumed to be of the same race; if the parents were of different races *and one parent was white, the child was assigned the race of the parent who was not white*; when the parents were of different races, and neither parent was white, the child was assigned to the father's race, with one exception: if either parent was Hawaiian, the child was assigned to Hawaiian; if race was missing for one parent, the child was assigned the race of the parent for whom race was reported. (National Center for Health Statistics (NCHS) (1992b, at 50). Thus, any coupling between Whites and non-Whites was deemed to produce non-White children. White racial status could only be removed by inter-group parentage, never gained – arguably a legacy of former racist assumptions about race "pollution" that had been encapsulated in the "one-drop-rule" (Davis (1991)). Standing in stark contrast to this attribute of "White" status, Hawaiian status was defined so as to include any conceivable degree of "part-Hawaiian" descent, so that a Hawaiian parent always produced Hawaiian offspring no matter the race of the other parent. Thus, the status of "Hawaiian" was the morphological polar opposite of that of "White". Yet, in practice, since no attempt was made to ensure that the parents' racial self-identification corresponded to the race recorded on their own birth certificates – the race that they themselves had been assigned as infants –, each generation was effectively classified anew. This coding system was abandoned by NCHS in 1989 because of "the increasing incidence of interracial parentage" combined with "the growing proportion of births with race of father not stated" (14 percent in 1998) (NCHS (1993), at 49). Yet, the new system – in which racial status is rigidly matrilineal – has a much weaker connection to the sociological reality of race and discrimination: to take but the most striking example, irrespective of society's perception of him, the child of a Black man and a White woman is now classified as White on his birth certificate.

[161] Edmonston et. al. (1996), at 26-27.

infants. Of infants identified as "Mexican American" at birth, 11.4 percent were identified as "non-Hispanic white" on their death certificates. Of infants identified as "Puerto-Rican" at birth, 20 percent were subsequently identified as "non-Hispanic white". The comparable figure for those identified at birth as "Cuban" was 36.7 percent.[162] True, more studies are needed to assess the extent of the discrepancies between the results of self-identification and observer-identification *among adults*, but the likelihood that such discrepancies turn out to be insignificant is rather weak.

3) The issue of "multiple race" answers on the census and their potential side effects on antidiscrimination policy:

a) The origins of the reform

The growing effect of intermarriage on census race data[163] was already reflected in the fact that in the 1990 census, about half a million people ignored the instruction to mark only one race and selected more than one. In the following decade, opposition to that instruction was voiced by parents in interracial marriages who resented being told to choose only one race for their interracial children when they registered their children for school, arguing that this one-race restriction forced them to deny the racial heritage of one parent, thereby adversely affecting their self-esteem. In response to this (rather limited) mobilization,[164] the Office of Management and Budget eventually announced revised standards for federal data on race and ethnicity in October 1997, allowing for multiple-race responses in order to better reflect the diversity of the country's present population[165]. The revision was not undertaken because federal agencies saw a need for such data or for an ability to compare the characteristics and conditions of multiple-race populations in the United States with those of single race populations. Instead, the multiple-response data was collected primarily – and perhaps only – to allow respondents to report their race or races in accordance with the way they subjectively identified themselves: *expressive* considerations, not *distributive* ones, played a dominant role. The demand at play here was more for recognition of multiraciality than for any specific political or economic advantage for multiracials[166]. And to a certain extent, the multiracial proposal was undeniably consistent with the letter and spirit of self-identification: if respondents were to simply *choose* the race with which they identified, there wasn't any good reason why they shouldn't be allowed to express their multiraciality instead. Thus, the advocates of a multiracial question were merely extending the inherent logic of the existing regime.

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[162] Hahn et al. (1992). An important consequence of such misclassification is that reported mortality rates for Hispanics, American Indians, and Asians are to varying degrees underestimated.

[163] See generally U.S. Bureau of the Census (2002b), table 50, at 47.

[164] In July 1996, at the peak of the battle, multiracial advocates were able to turn out only two hundred people for their Multiracial Solidarity March on Washington (Nobles (2000), at 143).

[165] Although the category "mulatto" had been included in the 1890, 1910 and 1920 censuses, mulattoes were defined as "Negroes showing a perceptible trace of white blood", and thus were only a subgroup of the negro population: they were not considered as an intermediate racial and social group between white and black; see Schor (2001), at 172-190; 254-274.

[166] The 1997 standards did not introduce the "multiracial" category that some associations had been asking for; instead, they simply allowed individual to "mark one or more races" among those they were to choose from. Unlike the census, the standards do not include an "Other Race" category.

b) The results of the reform

As a general matter, the effects of multiple-race responses on the utility of race data in virtually all applications depends on the ratio of multiple- to single-race responses involving a given group.

From the results of the 2000 census, it appears that the percentage of a given racial group reporting as multiracial is related to the *relative size* of the group: numerically smaller populations tend to have higher intermarriages rates,[167] leading to a higher percentage of multiracial people. Thus, American Indians and Asians are the groups most sensitive to the opening of the new option: 2000 census data indicate that about 40 percent of American Indians are multiracial[168], while for Asians, that proportion is 14%, for Blacks, 5%,[169] and for Whites, 3%. And the relatively large number of Asians and American Indians who marked more than one race in the 2000 census makes it difficult to calculate the exact size of these groups. For example, the size of the American Indian and Alaska Native population could be as low as 2.5 million or as high as 4.1 million, depending on how the multiracial American Indian population is classified.

Unsurprisingly, multiraciality is also correlated with *age*, reflecting both an actual increase in interracial parentage among young people and an increasing willingness to acknowledge mixed-race ancestry: about 4.0 percent of children were identified as multiracial, compared with 1.9 percent of adults. Therefore, the actual impact of these differences between single-race and multiple-race counts might be mitigated considerably in some applications. In particular, since the multiple responses are disproportionately concentrated among children, one might find such smaller differences in equal employment opportunity applications, in measuring educational attainment for the adult population, and in efforts to assess the poverty or disability characteristics of the elderly population.

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[167] Quiang (1999) ;Lian and Ito (1998) ; Lee and Fernandez (1998) ; Heaton and Albrecht (1996) ; Eschbach (1995) ; Sandefur and McKinner (1986).

[168] That is probably the main reason why no federally recognized tribes have blood quantum levels for membership greater than one-half: see Snipp (1989).

[169] Thus, while the most vocal and sustained objections to the introduction of multiple-race identification were raised by black leaders and organizations, they turned out to be those who had the least to lose from the proposed change. This is all the more remarkable as the proportion of the population identifying as Black with some degree of White ancestry is at least three quarters and perhaps closer to 90% (Davis (1991)). The ratio of those Blacks who actively identify with multiple races to those who potentially could identify as such is thus quite small.

On the other hand, the age concentration of multiple-race responses might correspondingly increase the difficulty of assessing racial imbalances in schools, differential performance on academic proficiency tests, and teenage unemployment.[170]

c) Multiple-race answers and civil rights: an uneasy match[171]

The federal government's 1997 introduction of the multiple-race format in response to small-scale, grassroots mobilization[172] raised the question of how multiple-race statistics would be tabulated and used to monitor and enforce civil rights laws that had previously depended on a single-race classification system. In the past, classification systems had been formalized in response to legislation, but now the enforcement and monitoring of laws had to respond to a change in the statistical system. And in order to manage this disconnection between statistical policy governing the *collection* of racial data and the laws for *using* such data, whose implementation called for single-race categories that unequivocally distinguished between those who were members of minority groups and those who were not, some *allocation rules* were definitely needed. Whereas the old system put the burden of choosing a single race on individuals, the new system has shifted that burden on the government, institutions and users of racial data. The decision-making moment would now be located in the choice of tabulation procedures.

Accordingly, in 2000, the Office of Management and Budget issued guidelines for the use of multiple-race data by enforcement agencies, under which "if the enforcement action [was] in response to a

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[170] Although less closely related to antidiscrimination law and policy, debates among statisticians around the issue of *bridging* have been another major side effect of the move towards multiple-race identification. Indeed, data users who are primarily interested in trends and changes in economic, social, and health characteristics by race may need to consider bridging methods to help understand the new race data. The "bridge period" refers to a temporary period of time when data users may use two estimates: one based on the new race data, and a second "bridging estimate" based on a method of predicting what responses would have been if collected under the old racial categories. The idea here is to measure "real" or "true" change as opposed to change produced by the new methodology itself. Bridging essentially entails taking responses to the new racial categories and reclassifying them as closely as possible to the responses that would have been provided under the old racial categories. There are several bridging methods, however. The *whole assignment, smallest group* method assigns responses that include white and another group to the other group since white is always the larger group. If responses include two races other than white (for example, black and American Indian), then responses are assigned to the smallest group. The *whole assignment, largest group other than white* method assigns responses that include white with some other races to the largest minority group (for example, a white, Asian, and Hawaiian response is assigned to Asian), but if the responses include only minority races, responses are assigned to the largest group (for example, a response of black and Asian is assigned to black). The *whole assignment, largest group* approach allocates responses to the largest group mentioned. In this case, anyone who identified themselves as white and some other race would be assigned to white. The *fractional assignment, equal fractions* method assigns multiple responses in equal fractions to the races mentioned. For example, responses with two races are assigned half to each group, responses to three races are assigned one-third each, and so forth. The fractions must sum to 1. Lastly, there is also the *all inclusive allocation* method. This approach allocates multiracial respondents to every racial category that is mentioned. For example, someone who checks white, Asian, and Hawaiian would be allocated to all three categories. The distribution of the categories, for example Asian, would have both a minimum count (including people who checked single Asian race only) and a maximum count (including everyone who checked Asian race, singly or in combination with other races). If the user wants to examine change across the whole racial distribution, the Fractional Allocation method provides the closest approximations to a past distribution. The other methods produced a large increase in the American Indian and Alaska Native population and a corresponding decrease in the white population that could not be reasonably attributed to population change over time.

[171] This section mostly derives from Goldstein and Morning (2002).

[172] Susan Graham and her associates in Project RACE first worked at the state level, informing legislatures of the psychological damages suffered by multiracial children forced to identify with the race of only one parent. Their efforts persuaded legislatures in Georgia, Illinois, and Ohio to enact laws mandating the use of "multiracial" as a category in state statistical systems, before the momentum expanded onto the federal level.

complaint », one should « allocate to the race that the complainant alleges the discrimination was based on"[173]: as a practical matter, for civil and voting rights purposes, people who marked "white" and a nonwhite race should be counted as members of the nonwhite group. As for the mixed-race individuals without white ancestry, they were to be treated as having whichever racial affiliation they claimed was the basis for discrimination. In the unlikely event that a case turned on how the multiracial population was counted, the data should be presented in the light most favourable to the plaintiff in a civil rights action. Thus, a systematic reallocation of multiple responses back to single-race categories was in order.

This decision to allocate in favour of nonwhite populations was greeted with relief by representatives of traditional minority groups, who had been concerned that they might lose numbers because of the shift to the "one or more" format. Yet, it raises several difficulties.

First, a case can be made that the OMB approach reimplements, albeit in a civil rights context, the "one-drop-rule" associated with slavery, segregation, and the history of racial discrimination, thus further institutionalizing the divide between the white and nonwhite population. As a matter of fact, the reallocation guidelines *extend* that rule from African Americans to all of the official minority groups.

Second, the OMB allocation procedure effectively obscures potential differences in the treatment of mixed-race people and single-race people because the two groups are lumped together. Employers or landlors might well discriminate against (or in favor of) people with mixed backgrounds relative to those with single-race backgrounds, but it will not be possible to determine whether such a pattern exists if only allocated racial data is available.[174]

Also, the OMB guidelines may well work to extend the coverage of affirmative action programs and other race-based policies to a segment of the population – namely, mixed-race individuals with some white ancestry – who may not have qualified for such protection under past definitions.

[173] (OMB 2000b, Section II, at 161-162).
[174] On the extent of *skin color discrimination* as possible evidence of such differential treatment between single-race and mixed-race African Americans, see Keith and Herring (1991).

Indeed, the rule does not square with mixed-race persons' perceptions of themselves: some 60 to 80 percent of those likely to mark more than one race choose "white" when asked to mark only a single race.[175] Thus, although mixed-race people make up only 2.4 percent of the total population, reallocation can create dramatic increases in the size of single-race populations. For the country as a whole, allocation more than doubles the count of Native Hawaiians and increases the counts of Native Americans by more than half, Asians by nearly one-sixth, and African Americans by about one-twentieth. Employers and other institutions accused of discrimination may therefore argue that the malleability of racial identification implied by the new system makes statistical arguments less reliable and less convincing.[176] In this light, it is hard to imagine that a court case will not arise in which the eligibility of a mixed-race person will be challenged, particularly if it can be shown that that person had in the past identified himself as white. This might prompt civil rights agencies not to file or support complaints whose decision might depend on the choice of tabulation methods. In a nutshell, the proliferation of racial categories does introduces some uncertainty and complexity in the process of establishing the baseline against which to judge discriminatory impact by producing a new set of arguments as to "who counts as what": 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?[177]

Other difficulties may arise. What if a particular group has a fixed set of resources to distribute among its members – say, residence on an Indian reservation or revenues from oil production for Alaska Natives?

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[175] Insofar as the National Health Interview Survey (NHIS) – which included a follow-up question on *primary* racial identification – provides an indicator of how respondents would have reported their race on the census form in 2000 absent the revisions to the collection and tabulation methods, the minority assignment rule correctly assigns only about half of respondents reporting as black and white, 34.6 percent of those reporting as Asian and white, and only 12.4 percent of those who identified as American Indian and white (Harrison 2002). Besides, not only does the reallocation procedure not conform to the single races that respondents would self-identify; it does not necessarily map individuals to the closest single race in terms of socioeconomic characteristics either. Thus, while the allocation guidelines do place people in the group they most resemble in socioeconomic terms for those with mixed black and white or American Indian and white backgrounds, for those with both Asian and white backgrounds, allocation to the Asian group actually locates them in a category with people with whom they differ more on average in their socioeconomic characteristics than they would if they were placed in the white group. In other words, the appropriateness of the « one-drop » minority allocation rule depends on the specific racial combination involved. As for the *direction* of the statistical effects produced by that rule, allocation of mixed white-nonwhite individuals to the minority group tends to raise the socioeconomic profiles of the black and American Indian populations but to lower slightly the socioeconomic profile of Asian Americans.

[176] *Id.*

[177] « To make the point with the worst-case scenario, consider what would happen if a Hawaiian corporation were the defendant in an employment discrimination suit. One of the race categories on the 2000 census 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 impact of a Hawaiian corporation's employment practice? If the workforce is 10 percent "pure" 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 was no "pure" Hawaiian, would there be any claim? » (Persily (2002), at 167).

In that case, members of a group might not want to increase their numbers, especially with people who are partly nonmembers and who are likely to have a higher economic status and thus a normatively weaker claim to the group's resources. Thus, advocates for Native Americans or Alaska Natives may well find themselves at odds with advocates for blacks and Hispanics about whether or not to support the present allocation rule for people with multiple identifications.

In the field of voting rights in particular – and even aside from interminority strife –, that rule will have conflicting side effects.[178] Indeed, in proving vote dilution under Section 2 of the Voting Rights Act, plaintiffs must demonstrate that the voting patterns of racial groups as channelled 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".[179] Thus, at the first stage of the litigation, it is usually in the plaintiff's interest to count multiracials as members of the minority community in order to prove that the community is sufficiently large. Yet, the same cannot be said for fulfilling the second and third *Gingles* factors. Cohesion and block 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. And if the community is not cohesive, then one cannot argue that their votes are being diluted by a given set of district lines. In short, 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.

[178] The following argument is borrowed from Persily (2002), at 172-173.
[179] *Thornburg v. Gingles*, 478 U.S. 30 (1986), at 50-51.

d) Limiting the extent of the expected upheaval

First, one should remember that the process of racial classification employed by the census does not raise any significant legal issues by itself. No individual has a legal claim against a federal agency for being reallocated into a single-race category he or she would not have chosen. Legal issues arise, if ever, when the census race data become evidence used to prove an argument in court. Even in that case, the reallocation rule does not apply to private citizens or federal courts but only to government agencies, and only to those agencies, such as the Department of Justice or the EEOC, that are responsible for enforcing civil rights laws.[180] Thus, if a woman sues her employer for racial discrimination on a disparate impact theory, the rule does not bind the court in adjudicating her claim.

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 how multiple-race respondents are counted will be few and relatively weak. This is so because 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. 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 unlikely to prevail anyway. 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. A plaintiff whose case depends on upping his racial group's numbers to the maximum probably has a weak case in any event.

[180] Office of Management and Budget (2000b), at 61. 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 (Persily (2001), at 931-933).

CONCLUSION

That racial membership was – and still remains to a large extent – a basic and taken-for-granted dimension of Americans' social identity is probably one of the most distinctive features of the U.S. political configuration. Even at the peak of the Civil Rights movement, most African American leaders did not address racial classifications directly. In large part, the categories were taken as they were. They had been the basis of discrimination, and it was presumed that they would be the basis of remedy. It did not seem to matter whether they were real or not in a scientific sense. They remained politically, socially, and economically salient. Moreover, civil rights advocates had to secure enduring victories within a slightly opened, but still resistant, political environment. Southern segregation had to be broken; southern black enfranchisement enforced and protected. The federal government had to be compelled to protect black political rights and made to stop deferring to southern states' rights. With this agenda, there was neither much evident need nor much room for thinking about race as an idea. Only recently did one begin to witness an emerging tendency toward advocating the end of race-based *classifications* by the state, whether or not these can be conceptualized as a form of *discrimination*. Hence California's "Racial Privacy Initiative" to eliminate the collection of race data by state authorities that was defeated in a 2003 vote – in a context where public-sector affirmative action programs had already been removed in November 1996.[181] A few years earlier, noting correctly that "today's ethnicities are yesterday's races" and that "in the early 20th century (…), Italians, the Irish, and Jews were all thought to be racial (not ethnic) groups whose members were inherently and irredeemably distinct from the majority white population",[182] the American Anthropological Association (AAA) had also argued in favor of withdrawing the question on race from the census and replacing it with one on "ethnicity", in order to acknowledge the "overlapping of [these two] semantic categories".[183] It wasn't any more successful.

More than a political challenge to the very principle of race classifications of individuals by state agents, what *did* emerge powerfully in recent years is the awareness of the existing tension between the requirements of bureaucratic rationality and the vagaries of personal identity, the needs of the civil rights enforcement machinery and the emerging claim of a "right" of Americans to self-define racially as they see fit, in short, between the *politics of distribution* and the *politics of recognition*. As Kenneth Prewitt, the former Director of the Census Bureau, has put it, "The current [post-2000] classification has too many categories for practices using statistical proportionality yet too few to accommodate the

[181] See Chavez (1999).
[182] See Frye Jacobson (1998) ; Ignatiev (1995); Roediger (1991).
[183] American Anthropological Association (1997), at 4, 6. Arguing that "the research findings that many respondents conceptualize "race" and "ethnicity" as one in the same underscore[d] the need to consolidate these terms into one category, using a term that is more meaningful to the American people", the AAA recommended the combination of the terms "race/ethnicity" in the census question to serve "as a "bridge" to the elimination of the term "race" by the Census 2010" (*Id.*, at 8). The American Sociological Association (ASA) has taken the opposite stance, however: see ASA (2003).

pressures of identity politics and the desire for separate recognition. A taxonomy that has both few and too many categories is inherently unstable".[184]

If that conflict be resolved, it is not at all unlikely that the politics of recognition should ultimately prevail. At least that much was intimated by a recent, June 2003 EEOC document published in the Federal Register in which the agency, without providing any specific explanation for this abrupt policy reversal, announced the new following rule: "Self-identification is the preferred method of identifying the race and ethnic information necessary for the EEO-1 report. Employers are strongly encouraged to rely on employee self-identification to obtain this information. If self-identification is not feasible, (…) observer identification may be used to obtain this information".[185]

Technically speaking, the EEOC is only following the lead of the Office of Management and Budget, which had taken the position several years earlier that since "respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity (…), ideally, respondent self-identification should be facilitated to the greatest extent possible" [186] –while acknowledging that "in some data collection systems observer identification is more practical".[187] Yet, that very position is in large part a side-effect of the introduction of multiple-race identification in the 1997 standards, which is (quite reasonably) held to be incompatible with a system of observer-identification: as a practical matter, asking third parties to guess whether a person is mixed-race, and if so, what the person's component races are, is asking an impossible task.[188] So much had been demonstrated by the unfortunate introduction of a "mulatto" category in the census race question from 1850 to 1920. Indeed, that category was finally removed, on account of the "considerable uncertainty" of the figures obtained, which varied greatly depending on the race of the enumerator: white enumerators employed in 1920 tended to return substantially less mulattoes than black enumerators, employed in 1910 in the same counties.[189] There is no reason to believe that the data collected by the EEOC through contemporary "visual surveys" would prove any more reliable. Although it will take time for the new rule to be implemented, it seems like the rationalization and uniformization of the ethnoracial data collection system is finally under way, even though the direction taken – that of self-classification across the board – is arguably the least satisfactory one as far as the antidiscrimination project is concerned.

[184] Prewitt (2001), at 9.
[185] EEOC (2003), at 34967.
[186] OMB (1995), at 44692.
[187] EOM (1997a), at 58782.
[188] See OMB (2000b), at 7.
[189] U.S. Bureau of the Census (1921), at 16-17. See generally Schor (2001), at 254-275.

APPENDICES

Appendix 1 : Office of Management and Budget (OMB) (1997a). *1997 Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, *Federal Register*, vol. 62, No. 210, 30 October 1997: 58781-58790.

Appendix 2: American Sociological Association (2003). « The Importance of Collecting Data and Doing Social Scientific Research on Race ». Washington, D.C.: American Sociological Association.

Appendix 3: Extrait de Daniel Sabbagh, *L'Égalité par le droit: les paradoxes de la discrimination positive aux États-Unis*, Paris, Économica, 2003, p. 221-225.

Appendix 1

Federal Register Notice - October 30, 1997

OFFICE OF MANAGEMENT AND BUDGET

Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity

AGENCY: Executive Office of the President, Office of Management and Budget (OMB), Office of Information and Regulatory Affairs

ACTION: Notice of decision.

SUMMARY: By this Notice, OMB is announcing its decision concerning the revision of Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting. OMB is accepting the recommendations of the Interagency Committee for the Review of the Racial and Ethnic Standards with the following two modifications: (1) the Asian or Pacific Islander category will be separated into two categories -- "Asian" and "Native Hawaiian or Other Pacific Islander," and (2) the term "Hispanic" will be changed to "Hispanic or Latino."

The revised standards will have five minimum categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. There will be two categories for data on ethnicity: "Hispanic or Latino" and "Not Hispanic or Latino."

The Supplementary Information in this Notice provides background information on the standards (Section A); a summary of the comprehensive review process that began in July 1993 (Section B); a brief synopsis of the public comments OMB received on the recommendations for changes to the standards in response to the July 9, 1997, *Federal Register* Notice (Section C); OMB's decisions on the specific recommendations of the Interagency Committee (Section D); and information on the work that is underway on tabulation issues associated with the reporting of multiple race responses (Section E).

The revised standards for the classification of Federal data on race and ethnicity are presented at the end of this notice; they replace and supersede Statistical Policy Directive No. 15.

EFFECTIVE DATE: The new standards will be used by the Bureau of the Census in the 2000 decennial census. Other Federal programs should adopt the standards as soon as possible, but not later than January 1, 2003, for use in household surveys, administrative forms and records, and other data collections. In addition, OMB has approved the use of the new standards by the Bureau of the Census in the "Dress Rehearsal" for Census 2000 scheduled to be conducted in March 1998.

ADDRESSES: Please send correspondence about OMB's decision to: Katherine K. Wallman, Chief Statistician, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10201 New Executive Office Building, 725 17th Street, N.W., Washington, D.C. 20503; fax: (202) 395-7245.

ELECTRONIC AVAILABILITY AND ADDRESSES: This *Federal Register* Notice and the related OMB Notices of June 9, 1994, August 28, 1995, and July 9, 1997, are available electronically from the OMB Homepage on the World Wide Web: <</OMB/fedreg/>>.

Federal Register Notices are also available electronically from the U.S. Government Printing Office web site: <<http://www.access.gpo.gov/su_docs/aces/aces140.html>>. Questions about accessing the *Federal Register* online via GPO Access may be directed to telephone (202) 512-1530 or toll free at (888) 293-6498; to fax (202) 512-1262; or to E-mail <<gpoaccess@gpo.gov>>.

This Notice is available in paper copy from the OMB Publications Office, 725 17th Street, NW, NEOB, Room 2200, Washington, D.C. 20503; telephone (202) 395-7332; fax (202) 395-6137.

FOR FURTHER INFORMATION CONTACT: Suzann Evinger, Statistical Policy Office, Office of Information and Regulatory Affairs, Office of Management and Budget, NEOB, Room 10201, 725 17th Street, N.W., Washington, D.C. 20503; telephone: (202) 395-3093; fax (202) 395-7245.

SUPPLEMENTARY INFORMATION:

A. Background

For more than 20 years, the current standards in OMB's Statistical Policy Directive No. 15 have provided a common language to promote uniformity and comparability for data on race and ethnicity for the population groups specified in the Directive. They were developed in cooperation with Federal agencies to provide consistent data on race and ethnicity throughout the Federal Government. Development of the data standards stemmed in large measure from new responsibilities to enforce civil rights laws. Data were needed to monitor equal access in housing, education, employment, and other areas, for populations that historically had experienced discrimination and differential treatment because of their race or ethnicity. The standards are used not only in the decennial census (which provides the data for the "denominator" for many measures), but also in household surveys, on administrative forms (e.g., school registration and mortgage lending applications), and in medical and other research. The categories represent a social-political construct designed for collecting data on the race and ethnicity of broad population groups in this country, and are not anthropologically or scientifically based.

B. Comprehensive Review Process

Particularly since the 1990 census, the standards have come under increasing criticism from those who believe that the minimum categories set forth in Directive No. 15 do not reflect the increasing diversity of our Nation's population that has resulted primarily from growth in immigration and in interracial marriages. In response to the criticisms, OMB announced in July 1993 that it would undertake a comprehensive review of the current categories for data on race and ethnicity.

This review has been conducted over the last four years in collaboration with the Interagency Committee for the Review of the Racial and Ethnic Standards, which OMB established in March 1994 to facilitate the participation of Federal agencies in the review. The members of the Interagency Committee, from more than 30 agencies, represent the many and diverse Federal needs for data on

race and ethnicity, including statutory requirements for such data. The Interagency Committee developed the following principles to govern the review process:

1. The racial and ethnic categories set forth in the standards should not be interpreted as being primarily biological or genetic in reference. Race and ethnicity may be thought of in terms of social and cultural characteristics as well as ancestry.

2. Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible, recognizing that in some data collection systems observer identification is more practical.

3. To the extent practicable, the concepts and terminology should reflect clear and generally understood definitions that can achieve broad public acceptance. To assure they are reliable, meaningful, and understood by respondents and observers, the racial and ethnic categories set forth in the standard should be developed using appropriate scientific methodologies, including the social sciences.

4. The racial and ethnic categories should be comprehensive in coverage and produce compatible, nonduplicative, exchangeable data across Federal agencies.

5. Foremost consideration should be given to data aggregations by race and ethnicity that are useful for statistical analysis and program administration and assessment, bearing in mind that the standards are not intended to be used to establish eligibility for participation in any federal program.

6. The standards should be developed to meet, at a minimum, Federal legislative and programmatic requirements. Consideration should also be given to needs at the State and local government levels, including American Indian tribal and Alaska Native village governments, as well as to general societal needs for these data.

7. The categories should set forth a minimum standard; additional categories should be permitted provided they can be aggregated to the standard categories. The number of standard categories should be kept to a manageable size, determined by statistical concerns and data needs.

8. A revised set of categories should be operationally feasible in terms of burden placed upon respondents; public and private costs to implement the revisions should be a factor in the decision.

9. Any changes in the categories should be based on sound methodological research and should include evaluations of the impact of any changes not only on the usefulness of the resulting data but also on the comparability of any new categories with the existing ones.

10. Any revision to the categories should provide for a crosswalk at the time of adoption between the old and the new categories so that historical data series can be statistically adjusted and comparisons can be made.

11. Because of the many and varied needs and strong interdependence of Federal agencies for racial and ethnic data, any changes to the existing categories should be the product of an interagency collaborative effort.

12. Time will be allowed to phase in any new categories. Agencies will not be required to update historical records.

13. The new directive should be applicable throughout the U.S. Federal statistical system. The standard or standards must be usable for the decennial census, current surveys, and administrative records, including those using observer identification.

The principal objective of the review has been to enhance the accuracy of the demographic information collected by the Federal Government. The starting point for the review was the minimum set of categories for data on race and ethnicity that have provided information for more than 20 years for a variety of purposes, and the recognition of the importance of being able to maintain this historical continuity. The review process has had two major elements: (1) public comment on the present standards, which helped to identify concerns and provided numerous suggestions for changing the standards; and (2) research and testing related to assessing the possible effects of suggested changes on the quality and usefulness of the resulting data.

Public input, the first element of the review process, was sought through a variety of means: (1) During 1993, Congressman Thomas C. Sawyer, then Chairman of the House Subcommittee on Census, Statistics, and Postal Personnel, held four hearings that included 27 witnesses, focusing particularly on the use of the categories in the 2000 census. (2) At the request of OMB, the National Academy of Sciences' Committee on National Statistics (CNSTAT) conducted a workshop in February 1994 to articulate issues surrounding a review of the categories. The workshop included representatives of Federal agencies, academia, social science research institutions, interest groups, private industry, and a local school district. (A summary of the workshop, Spotlight on Heterogeneity: The Federal Standards for Racial and Ethnic Classification, is available from CNSTAT, 2101 Constitution Avenue, N.W., Washington, D.C. 20418.) (3) On June 9, 1994, OMB published a *Federal Register* (59 FR 29831-29835) Notice that contained background information on the development of the current standards and requested public comment on: the adequacy of current racial and ethnic categories; the principles that should govern any proposed revisions to the standards; and specific suggestions for change that had been offered by individuals and interested groups over a period of several years. In response, OMB received nearly 800 letters. As part of this comment period and to bring the review closer to the public, OMB also heard testimony from 94 witnesses at hearings held during July 1994 in Boston, Denver, San Francisco, and Honolulu. (4) In an August 28, 1995, *Federal Register* (60 FR 44674-44693) Notice, OMB provided an interim report on the review process, including a summary of the comments on the June 1994 *Federal Register* Notice, and offered a final opportunity for comment on the research to be conducted during 1996. (5) OMB staff have also discussed the review process with various interested groups and have made presentations at numerous meetings.

The second element of the review process involved research and testing of various proposed changes. The categories in OMB's Directive No. 15 are used not only to produce data on the demographic characteristics of the population, but also to monitor civil rights enforcement and program implementation. Research was undertaken to provide an objective assessment of the data quality issues associated with various approaches to collecting data on race and ethnicity. To that end,

the Interagency Committee's Research Working Group, co-chaired by the Bureau of the Census and the Bureau of Labor Statistics, reviewed the various criticisms and suggestions for changing the current categories, and developed a research agenda for some of the more significant issues that had been identified. These issues included how to collect data on persons who identify themselves as "multiracial"; whether to combine race and Hispanic origin in one question or have separate questions on race and Hispanic origin; whether to combine the concepts of race, ethnicity, and ancestry; whether to change the terminology used for particular categories; and whether to add new categories to the current minimum set.

Because the mode of data collection can have an effect on how a person responds, the research agenda proposed studies both in surveys using in-person or telephone interviews and in self-administered questionnaires, such as the decennial census, which are filled out by the respondent and mailed back. Cognitive interviews were conducted with various groups to provide guidance on the wording of the questions and the instructions for the tests and studies.

The research agenda included several major national tests, the results of which are discussed throughout the Interagency Committee's Report to the Office of Management and Budget on the Review of Statistical Policy Directive No. 15: (1) In May 1995, the Bureau of Labor Statistics (BLS) sponsored a Supplement on Race and Ethnicity to the Current Population Survey (CPS). The findings were made available in a 1996 report, Testing Methods of Collecting Racial and Ethnic Information: Results of the Current Population Survey Supplement on Race and Ethnicity, available from BLS, 2 Massachusetts Avenue, N.E., Room 4915, Postal Square Building, Washington, D.C. 20212, or by calling 202-606-7375. The results were also summarized in an October 26, 1995, news release, which is available electronically at <<http://stats.bls.gov/news.release/ethnic.toc.htm>>. (2) The Bureau of the Census, as part of its research for the 2000 census, tested alternative approaches to collecting data on race and ethnicity in the March 1996 National Content Survey (NCS). The Census Bureau published the results in a December 1996 report, Findings on Questions on Race and Hispanic Origin Tested in the 1996 National Content Survey; highlights of the report are available at <<http://www.census.gov/population/www/socdemo/96natcontentsurvey.html>>. (3) In June 1996, the Census Bureau conducted the Race and Ethnic Targeted Test (RAETT), which was designed to permit assessments of the effects of possible changes on smaller populations not reliably measured in national samples, including American Indians, Alaska Natives, detailed Asian and Pacific Islander groups (such as Chinese and Hawaiians), and detailed Hispanic groups (such as Puerto Ricans and Cubans). The Census Bureau released the results in a May 1997 report, Results of the 1996 Race and Ethnic Targeted Test; highlights of the report are available at <<http://www.census.gov/population/www/documentation/twps0018.html>>. Single copies (paper) of the NCS and RAETT reports may be obtained from the Population Division, U.S. Bureau of the Census, Washington, D.C. 20233; telephone 301-457-2402.

In addition to these three major tests, the National Center for Education Statistics (NCES) and the Office for Civil Rights in the Department of Education jointly conducted a survey of 1,000 public schools to determine how schools collect data on the race and ethnicity of their students and how the

administrative records containing these data are maintained to meet statutory requirements for reporting aggregate information to the Federal Government. NCES published the results in a March 1996 report, Racial and Ethnic Classifications Used by Public Schools (NCES 96-092). The report is available electronically at <<http://nces.ed.gov/pubs/96092.html>>. Single paper copies may be obtained from NCES, 555 New Jersey, NW, Washington, D.C. 20208-5574, or by calling 202-219-1442.

The research agenda also included studies conducted by the National Center for Health Statistics, the Office of the Assistant Secretary for Health, and the Centers for Disease Control and Prevention to evaluate the procedures used and the quality of the information on race and ethnicity in administrative records such as that reported on birth certificates and recorded on death certificates.

On July 9, 1997, OMB published a *Federal Register* Notice (62 FR 36874 - 36946) containing the Interagency Committee's Report to the Office of Management and Budget on the Review of Statistical Policy Directive No. 15. The Notice made available for comment the Interagency Committee's recommendations for how OMB should revise Directive No. 15. The report consists of six chapters. Chapter 1 provides a brief history of Directive No. 15, a summary of the issues considered by the Interagency Committee, a review of the research activities, and a discussion of the criteria used in conducting the evaluation. Chapter 2 discusses a number of general concerns that need to be addressed when considering any changes to the current standards. Chapters 3 through 5 report the results of the research as they bear on the more significant suggestions OMB received for changes to Directive No. 15. Chapter 6 gives the Interagency's Committee's recommendations concerning the various suggested changes based on a review of public comments and testimony and the research results.

C. Summary of Comments Received on the Interagency Committee's Recommendations

In response to the July 9, 1997, *Federal Register* Notice, OMB received approximately 300 letters (many of them hand written) on a variety of issues, plus approximately 7000 individually signed and mailed, preprinted postcards on the issue of classifying data on Native Hawaiians, and about 500 individually signed form letters from members of the Hapa Issues Forum in support of adopting the recommendation for multiple race reporting. Some of the 300 letters focused on a single recommendation of particular interest to the writer, while other letters addressed a number of the recommendations. The preponderance of the comments were from individuals. Each comment was considered in preparing OMB's decision.

1. Comments on Recommendations Concerning Reporting More Than One Race

The Interagency Committee recommended that, when self-identification is used, respondents who wish to identify their mixed racial heritage should be able to mark or select more than one of the racial categories originally specified in Directive No. 15, but that there should not be a "multiracial" category. This recommendation to report multiple races was favorably received by most of those commenting on it, including associations and organizations such as the American Medical Association, the National Education Association, the National Council of La Raza, and the National Committee on Vital and

Health Statistics, as well as all Federal agencies that responded. Comments from some organizations, such as the NAACP Legal Defense and Educational Fund, the Lawyers' Committee for Civil Rights Under Law, and the Equal Employment Advisory Council, were receptive to the recommendation on multiple race responses, but expressed reservations pending development of tabulation methods to ensure the utility of these data. The recommendation was also supported by many of the advocacy groups that had earlier supported a "multiracial" (box) category, such as the Association of MultiEthnic Americans and its affiliates nationwide. Several individuals wrote in support of "multiple race" reporting, basing their comments on a September 1997 article, "What Race Am I?" in Mademoiselle magazine, which urged its readers "to express an opinion on whether or not a 'Multiracial' category should be included in all federal record keeping, including the 2000 census." A few comments specifically favoring multiple race responses suggested that respondents should also be asked to indicate their primary racial affiliation in order to facilitate the tabulation of responses. A handful of comments on multiple race reporting suggested that individuals with both Hispanic and non-Hispanic heritages be permitted to mark or select both categories (see discussion below).

A few comments, in particular some from state agencies and legislatures, opposed any multiple race reporting because of possible increased costs to collect the information and implementation problems. Comments from the American Indian tribal governments also were opposed to the recommendation concerning reporting more than one race. A number of the comments that supported multiple race responses also expressed concern about the cost and burden of collecting the information to meet Federal reporting requirements, the schedule for implementation, and how the data would be tabulated to meet the requirements of legislative redistricting and enforcement of the Voting Rights Act. A few comments expressed support for categories called "human," or "American"; several proposed that there be no collection of data on race.

2. Comments on Recommendation for Classification of Data on Native Hawaiians

The Interagency Committee recommended that data on Native Hawaiians continue to be classified in the Asian or Pacific Islander category. This recommendation was opposed by the Hawaiian congressional delegation, the 7,000 individuals who signed and sent preprinted yellow postcards, the State of Hawaii departments and legislature, Hawaiian organizations, and other individuals who commented on this recommendation. Instead, the comments from these individuals supported reclassifying Native Hawaiians in the American Indian or Alaska Native category, which they view as an "indigenous peoples" category (although this category has not been considered or portrayed in this manner in the standards). Native Hawaiians, as the descendants of the original inhabitants of what is now the State of Hawaii, believe that as indigenous people they should be classified in the same category as American Indians and Alaska Natives. On the other hand, the American Indian tribal governments have opposed such a reclassification, primarily because they view the data obtained from that category as being essential for administering Federal programs for American Indians. Comments from the Native Hawaiians also noted the Asian or Pacific Islander category provides inadequate data for monitoring the social and economic conditions of Native Hawaiians and other Pacific Islander groups. Because the Interagency Committee had recommended against adding

categories to the minimum set of categories, requesting a separate category for Native Hawaiians was not viewed as an option by those who commented.

3. Comments on Recommendation Concerning Classification of Data on Central and South American Indians

The Interagency Committee recommended that data for Central and South American Indians be included in the American Indian or Alaska Native category. Several comments from the American Indian community opposed this recommendation. Moreover, comments from some Native Hawaiians pointed out what they believed to be an inconsistency in the Interagency Committee's recommendation to include in the American Indian or Alaska Native category descendants of Central and South American Indians -- persons who are not original peoples of the United States -- if Native Hawaiians were not to be included.

4. Comments on Recommendation Not to Add an Arab or Middle Eastern Ethnic Category

The Interagency Committee recommended that an Arab or Middle Eastern ethnic category should not be added to the minimum standards for all reporting of Federal data on race and ethnicity. Several comments were received in support of having a separate category in order to have data viewed as necessary to monitor discrimination against this population.

5. Comments on Recommendations for Terminology

Comments on terminology largely supported the Interagency Committee's recommendations to retain the term "American Indian," to change "Hawaiian" to "Native Hawaiian," and to change "Black" to "Black or African American." There were a few requests to include "Latino" in the category name for the Hispanic population.

D. OMB's Decisions

This section of the Notice provides information on the decisions taken by OMB on the recommendations that were proposed by the Interagency Committee. The Committee's recommendations addressed options for reporting by respondents, formats of questions, and several aspects of specific categories, including possible additions, revised terminology, and changes in definitions. In reviewing OMB's decisions on the recommendations for collecting data on race and ethnicity, it is useful to remember that these decisions:

retain the concept that the standards provide a minimum set of categories for data on race and ethnicity;

permit the collection of more detailed information on population groups provided that any additional categories can be aggregated into the minimum standard set of categories;

underscore that self-identification is the preferred means of obtaining information about an individual's race and ethnicity, except in instances where observer identification is more practical (e.g., completing a death certificate);

do not identify or designate certain population groups as "minority groups";

continue the policy that the categories are not to be used for determining the eligibility of population groups for participation in any Federal programs;

do not establish criteria or qualifications (such as blood quantum levels) that are to be used in determining a particular individual's racial or ethnic classification; and

do not tell an individual who he or she is, or specify how an individual should classify himself or herself.

In arriving at its decisions, OMB took into account not only the public comment on the recommendations published in the *Federal Register* on July 9, 1997, but also the considerable amount of information provided during the four years of this review process, including public comments gathered from hearings and responses to two earlier OMB Notices (on June 9, 1994, and August 28, 1995). The OMB decisions benefited greatly from the participation of the public that served as a constant reminder that there are real people represented by the data on race and ethnicity and that this is for many a deeply personal issue. In addition, the OMB decisions benefited from the results of the research and testing on how individuals identify themselves that was undertaken as part of this review process. This research, including several national tests of alternative approaches to collecting data on race and ethnicity, was developed and conducted by the professional statisticians and analysts at several Federal agencies. They are to be commended for their perseverance, dedication, and professional commitment to this challenging project.

OMB also considered in reaching its decisions the extent to which the recommendations were consistent with the set of principles (see Section B of the Supplementary Information) developed by the Interagency Committee to guide the review of this sensitive and substantively complex issue. OMB believes that the Interagency Committee's recommendations took into account the principles and achieved a reasonable balance with respect to statistical issues, data needs, social concerns, and the personal dimensions of racial and ethnic identification. OMB also finds that the Committee's recommendations are consistent with the principal objective of the review, which is to enhance the accuracy of the demographic information collected by the Federal Government by having categories for data on race and ethnicity that will enable the capture of information about the increasing diversity of our Nation's population while at the same time respecting each individual's dignity.

As indicated in detail below, OMB accepts the Interagency Committee's recommendations concerning reporting more than one race, including the recommendation that there be no category called "multiracial," the formats and sequencing of the questions on race and Hispanic origin, and most of the changes to terminology.

OMB does not accept the Interagency Committee's recommendations concerning the classification of data on the Native Hawaiian population and the terminology for Hispanics, and it has instead decided to make the changes that follow.

Native Hawaiian classification.--OMB does not accept the recommendation concerning the continued classification of Hawaiians in the Asian or Pacific Islander category. Instead, OMB has decided to break apart the Asian or Pacific Islander category into two categories -- one called "Asian" and the

other called "Native Hawaiian or Other Pacific Islander." As a result, there will be five categories in the minimum set for data on race.

The "Native Hawaiian or Other Pacific Islander" category will be defined as "A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands." (The term "Native Hawaiian" does not include individuals who are native to the State of Hawaii by virtue of being born there.) In addition to Native Hawaiians, Guamanians, and Samoans, this category would include the following Pacific Islander groups reported in the 1990 census: Carolinian, Fijian, Kosraean, Melanesian, Micronesian, Northern Mariana Islander, Palauan, Papua New Guinean, Ponapean (Pohnpelan), Polynesian, Solomon Islander, Tahitian, Tarawa Islander, Tokelauan, Tongan, Trukese (Chuukese), and Yapese.

The "Asian" category will be defined as "A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam."

The Native Hawaiians presented compelling arguments that the standards must facilitate the production of data to describe their social and economic situation and to monitor discrimination against Native Hawaiians in housing, education, employment, and other areas. Under the current standards for data on race and ethnicity, Native Hawaiians comprise about three percent of the Asian and Pacific Islander population. By creating separate categories, the data on the Native Hawaiians and other Pacific Islander groups will no longer be overwhelmed by the aggregate data of the much larger Asian groups. Native Hawaiians will comprise about 60 percent of the new category.

The Asian, Native Hawaiian, and Pacific Islander population groups are well defined; moreover, there has been experience with reporting in separate categories for the Native Hawaiian and Pacific Islander population groups. The 1990 census included "Hawaiian," "Samoan," and "Guamanian" as response categories to the race question. In addition, two of the major tests conducted as part of the current review (the NCS and the RAETT) used "Hawaiian" and/or "Native Hawaiian," "Samoan," "Guamanian," and "Guamanian or Chamorro" as response options to the race question. These factors facilitate breaking apart the current category.

Terminology for Hispanics.--OMB does not accept the recommendation to retain the single term "Hispanic." Instead, OMB has decided that the term should be "Hispanic or Latino." Because regional usage of the terms differs -- Hispanic is commonly used in the eastern portion of the United States, whereas Latino is commonly used in the western portion -- this change may contribute to improved response rates.

The OMB decisions on the Interagency Committee's specific recommendations are presented below:

(1) OMB accepts the following recommendations concerning reporting more than one race:

When self-identification is used, a method for reporting more than one race should be adopted.

The method for respondents to report more than one race should take the form of multiple responses to a single question and not a "multiracial" category.

When a list of races is provided to respondents, the list should not contain a "multiracial" category.

Based on research conducted so far, two recommended forms for the instruction accompanying the multiple response question are "Mark one or more ..." and "Select one or more...."

If the criteria for data quality and confidentiality are met, provision should be made to report, at a minimum, the number of individuals identifying with more than one race. Data producers are encouraged to provide greater detail about the distribution of multiple responses.

The new standards will be used in the decennial census, and other data producers should conform as soon as possible, but not later than January 1, 2003.

(2) OMB accepts the following recommendations concerning a combined race and Hispanic ethnicity question:

When self-identification is used, the two question format should be used, with the race question allowing the reporting of more than one race.

When self-identification is not feasible or appropriate, a combined question can be used and should include a separate Hispanic category co-equal with the other categories.

When the combined question is used, an attempt should be made, when appropriate, to record ethnicity and race or multiple races, but the option to indicate only one category is acceptable.

(3) OMB accepts the following recommendations concerning the retention of both reporting formats:

The two question format should be used in all cases involving self-identification.

The current combined question format should be changed and replaced with a new format which includes a co-equal Hispanic category for use, if necessary, in observer identification.

(4) OMB accepts the following recommendation concerning the ordering of the Hispanic origin and race questions:

When the two question format is used, the Hispanic origin question should precede the race question.

(5) OMB accepts the following recommendation concerning adding Cape Verdean as an ethnic category:

Cape Verdean ethnic category should not be added to the minimum data collection standards.

(6) OMB accepts the following recommendation concerning the addition of an Arab or Middle Eastern ethnic category:

An Arab or Middle Eastern ethnic category should not be added to the minimum data standards.

(7) OMB interprets the recommendation not to add any other categories to mean the expansion of the minimum set to include new population groups. The OMB decision to break apart the "Asian or Pacific Islander" category does not create a category for a new population group.

(8) OMB accepts the following recommendation concerning changing the term "American Indian" to "Native American":

The term American Indian should not be changed to Native American.

(9) OMB accepts the following recommendation concerning changing the term "Hawaiian" to "Native Hawaiian":

The term "Hawaiian" should be changed to "Native Hawaiian."

(10) OMB does not accept the recommendation concerning the continued classification of Native Hawaiians in the Asian or Pacific Islander category.

OMB has decided to break apart the Asian or Pacific Islander category into two categories -- one called "Asian" and the other called "Native Hawaiian or Other Pacific Islander." As a result, there are five categories in the minimum set for data on race.

The "Native Hawaiian or Other Pacific Islander" category is defined as "A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands."

he "Asian" category is defined as "A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam."

(11) OMB accepts the following recommendations concerning the use of "Alaska Native" instead of "Eskimo" and "Aleut":

"Alaska Native" should replace the term "Alaskan Native."

Alaska Native should be used instead of Eskimo and Aleut.

The Alaska Native response option should be accompanied by a request for tribal affiliation when possible.

(12) OMB accepts the following recommendations concerning the classification of Central and South American Indians:

Central and South American Indians should be classified as American Indian.

The definition of the "American Indian or Alaska Native" category should be modified to include the original peoples from Central and South America.

In addition, OMB has decided to make the definition for the American Indian or Alaska Native category more consistent with the definitions of the other categories.

(13) OMB accepts the following recommendations concerning the term or terms to be used for the name of the Black category:

The name of the Black category should be changed to "Black or African American."

The category definition should remain unchanged.

Additional terms, such as Haitian or Negro, can be used if desired.

(14) OMB decided to modify the recommendations concerning the term or terms to be used for Hispanic:

The term used should be "Hispanic or Latino."

The definition of the category should remain unchanged.

In addition, the term "Spanish Origin," can be used if desired.

Accordingly, the Office of Management and Budget adopts and issues the revised minimum standards for Federal data on race and ethnicity for major population groups in the United States which are set forth at the end of this Notice.

Topics for further research

There are two areas where OMB accepts the Interagency Committee's recommendations but believes that further research is needed: (1) multiple responses to the Hispanic origin question and (2) an ethnic category for Arabs/Middle Easterners.

Multiple Responses to the Hispanic Origin Question.--The Interagency Committee recommended that respondents to Federal data collections should be permitted to report more than one race. During the most recent public comment process, a few comments suggested that the concept of "marking more than one box" should be extended to the Hispanic origin question. Respondents are now asked to indicate if they are "of Hispanic origin" or "not of Hispanic origin." Allowing individuals to select more than one response to the ethnicity question would provide the opportunity to indicate ethnic heritage that is both Hispanic and non-Hispanic.

The term "Hispanic" refers to persons who trace their origin or descent to Mexico, Puerto Rico, Cuba, Central and South America, and other Spanish cultures. While there has been considerable public concern about the need to review Directive No. 15 with respect to classifying individuals of mixed racial heritage, there has been little comment on reporting both an Hispanic and a non-Hispanic origin. On many Federal forms, Hispanics can also express a racial identity on a separate race question. In the decennial census, individuals who consider themselves part Hispanic can also indicate additional heritages in the ancestry question.

On one hand, it can be argued that allowing individuals to mark both categories in the Hispanic origin question would parallel the instruction "to mark (or select) one or more" racial categories. Individuals would not have to choose between their parents' ethnic heritages, and movement toward an increasingly diverse society would be recognized.

On the other hand, because the matter of multiple responses to the Hispanic ethnicity question was not raised in the early phases of the public comment process, no explicit provisions were made for testing this approach in the research conducted to inform the review of Directive No. 15. While a considerable amount of research was focused on how to improve the response rate to the Hispanic origin question, it is unclear whether and to what extent explicitly permitting multiple responses to the Hispanic origin question would affect nonresponse to the race question or hamper obtaining more detailed data on Hispanic population groups.

Information on the possible impact of any changes on the quality of the data has been an essential element of the review. While the effects of changes in the Hispanic origin question are unknown, they could conceivably be substantial. Thus, OMB has decided not to include a provision in the standards that would explicitly permit respondents to select both "Hispanic origin" and "Not of Hispanic Origin" options. OMB believes that this is an item for future research. In the meantime, the ancestry question on the decennial census long form does provide respondents who consider themselves part Hispanic to write in additional heritages.

Research on an Arab/Middle Easterner category.--During the public comment process, OMB received a number of requests to add an ethnic category for Arabs/Middle Easterners so that data could be obtained that could be useful in monitoring discrimination. The public comment process indicated, however, that there was no agreement on a definition for this category. The combined race, Hispanic origin, and ancestry question in the RAETT, which was designed to address requests that were received from groups for establishing separate categories, did not provide a solution.

While OMB accepted the Interagency's Committee recommendation not to create a new category for this population group, OMB believes that further research should be done to determine the best way to improve data on this population group. Meanwhile, the write-ins to the ancestry question on the decennial census long form will continue to provide information on the number of individuals who identify their heritage as Arab or Middle Easterner.

E. Tabulation Issues

The revised standards retain the concept of a minimum set of categories for Federal data on race and ethnicity and make possible at the same time the collection of data to reflect the diversity of our Nation's population. Since the Interagency Committee's recommendation concerning the reporting of more than one race was made available for public comment, the focus of attention has been largely on how the data would be tabulated. Because of the concerns expressed about tabulation methods and our own view of the importance of this issue, OMB committed to accelerate the work on tabulation issues when it testified in July 1997 on the Interagency Committee's recommendations.

A group of statistical and policy analysts drawn from the Federal agencies that generate or use these data has spent the past few months considering the tabulation issues. Although this work is still in its early stages, some preliminary guidance can be shared at this time. In general, OMB believes that, consistent with criteria for confidentiality and data quality, the tabulation procedures used by the agencies should result in the production of as much detailed information on race and ethnicity as possible.

Guidelines for tabulation ultimately must meet the needs of at least two groups within the Federal Government, with the overriding objective of providing the most accurate and informative body of data. The first group is composed of those government officials charged with carrying out constitutional and legislative mandates, such as redistricting legislatures, enforcing civil rights laws, and monitoring progress in antidiscrimination programs. (The legislative redistricting file produced by the Bureau of the Census, also known as the Public Law 94-171 file, is an example of a file meeting such legislative

needs.) The second group consists of the staff of statistical agencies producing and analyzing data that are used to monitor economic and social conditions and trends.

Many of the needs of the first group can be met with an initial tabulation that provides, consistent with standards for data quality and confidentiality, the full detail of racial reporting; that is, the number of people reporting in each single race category and the number reporting each of the possible combinations of races, which would add to the total population. Depending on the judgment of users, the combinations of multiple responses could be collapsed. One method would be to provide separate totals for those reporting in the most common multiple race combinations and to collapse the data for other less frequently reported combinations. The specifics of the collapsed distributions must await the results of particular data collections. A second method would be to report the total selecting each particular race, whether alone or in combination with other races. These totals would represent upper bounds on the size of the populations who identified with each of the racial categories. In some cases, this latter method could be used for comparing data collected under the old standards with data collected under the new standards. It is important that users with the same or closely related responsibilities adopt the same tabulation method. Regardless of the method chosen for collapsing multiple race responses, the total number reporting more than one race must be made available, if confidentiality and data quality requirements can be met, in order to ensure that any changes in response patterns resulting from the new standards can be monitored over time.

Meeting the needs of the second group (those producing and analyzing statistical data to monitor economic and social conditions and trends), as well as some additional needs of the first group, may require different tabulation procedures. More research must be completed before guidelines that will meet the requirements of these users can be developed. A group of statistical and policy experts will review a number of alternative procedures and provide recommendations to OMB concerning these tabulation requirements by Spring 1998. Four of the areas in which further exploration is needed are outlined below.

Equal employment opportunity and other antidiscrimination programs have traditionally provided the numbers of people in the population by selected characteristics, including racial categories, for business, academic, and government organizations to use in evaluating conformance with program objectives. Because of the potentially large number of categories that may result from application of the new standards, many with very small numbers, it is not clear how this need for data will be best satisfied in the future.

The numbers of people in distinct groups based on decennial census results are used in developing sample designs and survey controls for major demographic surveys. For example, the National Health Interview Survey uses census data to increase samples for certain population groups, adjust for survey non-response, and provide weights for estimating health outcomes at the national level. The impact of having data for many small population groups with multiple racial heritages must be explored.

Vital statistics data include birth and death rates for various population groups. Typically the numerator (number of births or deaths) is derived from administrative records, while the denominator comes from

intercensal population estimates. Birth certificate data on race are likely to have been self reported by the mother. Over time, these data may become comparable to data collected under the new standards. Death certificate data, however, frequently are filled out by an observer, such as a mortician, physician, or funeral director. These data, particularly for the population with multiple racial heritages, are likely to be quite different from the information obtained when respondents report about themselves. Research to define comparable categories to be used in both numerators and denominators is needed to assure that vital statistics are as accurate and useful as possible.

More generally, statistical indicators are often used to measure change over time. Procedures that will permit meaningful comparisons of data collected under the previous standards with those that will be collected under the new standards need to be developed.

The methodology for tabulating data on race and ethnicity must be carefully developed and coordinated among the statistical agencies and other Federal data users. Moreover, just as OMB's review and decision processes have benefited during the past four years from extensive public participation, we expect to discuss tabulation methods with data users within and outside the Federal Government. OMB expects to issue additional guidance with respect to tabulating data on race and ethnicity by Fall 1998.

Sally Katzen *Administrator, Office of Information and Regulatory Affairs.*

Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity

This classification provides a minimum standard for maintaining, collecting, and presenting data on race and ethnicity for all Federal reporting purposes. The categories in this classification are social-political constructs and should not be interpreted as being scientific or anthropological in nature. They are not to be used as determinants of eligibility for participation in any Federal program. The standards have been developed to provide a common language for uniformity and comparability in the collection and use of data on race and ethnicity by Federal agencies.

The standards have five categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. There are two categories for data on ethnicity: "Hispanic or Latino," and "Not Hispanic or Latino."

1. Categories and Definitions

The minimum categories for data on race and ethnicity for Federal statistics, program administrative reporting, and civil rights compliance reporting are defined as follows:

-- American Indian or Alaska Native. A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

-- Asian. A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

-- Black or African American. A person having origins in any of the black racial groups of Africa. Terms such as "Haitian" or "Negro" can be used in addition to "Black or African American."

-- Hispanic or Latino. A person of Cuban, Mexican, Puerto Rican, Cuban, South or Central American, or other Spanish culture or origin, regardless of race. The term, "Spanish origin," can be used in addition to "Hispanic or Latino."

-- Native Hawaiian or Other Pacific Islander. A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

-- White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Respondents shall be offered the option of selecting one or more racial designations. Recommended forms for the instruction accompanying the multiple response question are "Mark one or more" and "Select one or more."

2. Data Formats

The standards provide two formats that may be used for data on race and ethnicity. Self-reporting or self-identification using two separate questions is the preferred method for collecting data on race and ethnicity. In situations where self-reporting is not practicable or feasible, the combined format may be used.

In no case shall the provisions of the standards be construed to limit the collection of data to the categories described above. The collection of greater detail is encouraged; however, any collection that uses more detail shall be organized in such a way that the additional categories can be aggregated into these minimum categories for data on race and ethnicity.

With respect to tabulation, the procedures used by Federal agencies shall result in the production of as much detailed information on race and ethnicity as possible. However, Federal agencies shall not present data on detailed categories if doing so would compromise data quality or confidentiality standards.

a. Two-question format

To provide flexibility and ensure data quality, separate questions shall be used wherever feasible for reporting race and ethnicity. When race and ethnicity are collected separately, ethnicity shall be collected first. If race and ethnicity are collected separately, the minimum designations are:

Race:

-- American Indian or Alaska Native

-- Asian

-- Black or African American

-- Native Hawaiian or Other Pacific Islander

-- White

Ethnicity:

-- Hispanic or Latino

-- Not Hispanic or Latino

When data on race and ethnicity are collected separately, provision shall be made to report the number of respondents in each racial category who are Hispanic or Latino.

When aggregate data are presented, data producers shall provide the number of respondents who marked (or selected) only one category, separately for each of the five racial categories. In addition to these numbers, data producers are strongly encouraged to provide the detailed distributions, including all possible combinations, of multiple responses to the race question. If data on multiple responses are collapsed, at a minimum the total number of respondents reporting "more than one race" shall be made available.

b. Combined format

The combined format may be used, if necessary, for observer-collected data on race and ethnicity. Both race (including multiple responses) and ethnicity shall be collected when appropriate and feasible, although the selection of one category in the combined format is acceptable. If a combined format is used, there are six minimum categories:

-- American Indian or Alaska Native

-- Asian

-- Black or African American

-- Hispanic or Latino

-- Native Hawaiian or Other Pacific Islander

-- White

When aggregate data are presented, data producers shall provide the number of respondents who marked (or selected) only one category, separately for each of the six categories. In addition to these numbers, data producers are strongly encouraged to provide the detailed distributions, including all possible combinations, of multiple responses. In cases where data on multiple responses are collapsed, the total number of respondents reporting "Hispanic or Latino and one or more races" and the total number of respondents reporting "more than one race" (regardless of ethnicity) shall be provided.

3. Use of the Standards for Record Keeping and Reporting

The minimum standard categories shall be used for reporting as follows:

a. Statistical reporting

These standards shall be used at a minimum for all federally sponsored statistical data collections that include data on race and/or ethnicity, except when the collection involves a sample of such size that the data on the smaller categories would be unreliable, or when the collection effort focuses on a

specific racial or ethnic group. Any other variation will have to be specifically authorized by the Office of Management and Budget (OMB) through the information collection clearance process. In those cases where the data collection is not subject to the information collection clearance process, a direct request for a variance shall be made to OMB.

b. General program administrative and grant reporting

These standards shall be used for all Federal administrative reporting or record keeping requirements that include data on race and ethnicity. Agencies that cannot follow these standards must request a variance from OMB. Variances will be considered if the agency can demonstrate that it is not reasonable for the primary reporter to determine racial or ethnic background in terms of the specified categories, that determination of racial or ethnic background is not critical to the administration of the program in question, or that the specific program is directed to only one or a limited number of racial or ethnic groups.

c. Civil rights and other compliance reporting

These standards shall be used by all Federal agencies in either the separate or combined format for civil rights and other compliance reporting from the public and private sectors and all levels of government. Any variation requiring less detailed data or data which cannot be aggregated into the basic categories must be specifically approved by OMB for executive agencies. More detailed reporting which can be aggregated to the basic categories may be used at the agencies' discretion.

4. Presentation of Data on Race and Ethnicity

Displays of statistical, administrative, and compliance data on race and ethnicity shall use the categories listed above. The term "nonwhite" is not acceptable for use in the presentation of Federal Government data. It shall not be used in any publication or in the text of any report.

In cases where the standard categories are considered inappropriate for presentation of data on particular programs or for particular regional areas, the sponsoring agency may use:

a. The designations "Black or African American and Other Races" or "All Other Races" as collective descriptions of minority races when the most summary distinction between the majority and minority races is appropriate;

b. The designations "White," "Black or African American," and "All Other Races" when the distinction among the majority race, the principal minority race, and other races is appropriate; or

c. The designation of a particular minority race or races, and the inclusion of "Whites" with "All Other Races" when such a collective description is appropriate.

In displaying detailed information that represents a combination of race and ethnicity, the description of the data being displayed shall clearly indicate that both bases of classification are being used.

When the primary focus of a report is on two or more specific identifiable groups in the population, one or more of which is racial or ethnic, it is acceptable to display data for each of the particular groups

separately and to describe data relating to the remainder of the population by an appropriate collective description.

5. Effective Date

The provisions of these standards are effective immediately for all new and revised record keeping or reporting requirements that include racial and/or ethnic information. All existing record keeping or reporting requirements shall be made consistent with these standards at the time they are submitted for extension, or not later than January 1, 2003.

Appendix 2

Statement Of The American Sociological Association On The Importance Of Collecting Data And Doing Social Scientific Research On Race About The American Sociological Association

The American Sociological Association (ASA), founded in 1905, is a non-profit membership association dedicated to serving sociologists in their work, advancing sociology as a scientific discipline and profession, and promoting the contributions and use of sociology to society. As the national organization for 13,000 sociologists, the ASA is well positioned to provide a unique set of benefits to its members and to promote the vitality, visibility, and diversity of the discipline. Working at the national and international levels, the Association aims to articulate policy and implement programs likely to have the broadest possible impact for sociology now

and in the future.

William T. Bielby	President
Barbara F. Reskin	Past-President
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Sally T. Hillsman	Executive Officer

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The Importance of Collecting Data and Doing Social Scientific Research on Race

The question of whether to collect statistics that allow the comparison of differences among racial and ethnic groups in the census, public surveys, and administrative databases is not an abstract one. Some scholarly and civic leaders believe that measuring these differences promotes social divisions and fuels a mistaken perception that race is a biological concept. California voters are likely to face a referendum in 2004 to prohibit the collection of racial data by most state government agencies. As the leading voice for 13,000 academic and practicing sociologists, the ASA takes the position that calls to end the collection of data using racial categories are ill advised, although racial categories do not

necessarily reflect biological or genetic categories. The failure to gather data on this socially significant category would preserve the status quo and hamper progress toward understanding and addressing inequalities in primary social institutions. The ASA statement highlights significant research findings on the role and consequences of race relations in social institutions such as schools, labor markets, neighborhoods, and health care scholarship that would not have been possible without data on racial categories. The longstanding debate over racial classification in the United States is certain to generate greater public interest as our population becomes more diverse. The ASA hopes to continue to play a meaningful role in that important dialogue.

The following statement was adopted by the elected Council of the American Sociological Association (ASA) on August 9, 2002, acting on a document prepared by a Task Force of ASA members. Council believes that this statement summarizes the views of sociologists with expertise in matters related to race in America.

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EXECUTIVE SUMMARY

Race is a complex, sensitive, and controversial topic in scientific discourse and in public policy. Views on race and the racial classification system used to measure it have become polarized. At the heart of the debate in the United States are several fundamental questions: What are the causes and consequences of racial inequality? Should we continue to use racial classification to assess the role and consequences of race? And, perhaps most significantly, under what conditions does the classification of people by race promote racial division, and when does it aid the pursuit of justice and equality? The answers to these questions are important to scientific inquiry, but they are not merely academic. Some scholarly and civic leaders have proposed that the government stop collecting data on race altogether. Respected voices from the fields of human molecular biology and physical anthropology (supported by research from the Human Genome Project) assert that the concept of race has no validity in their respective fields. Growing numbers of humanist scholars, social anthropologists, and political commentators have joined the chorus in urging the nation to rid itself of the concept of race. However, a large body of social science research documents the role and consequences of race in primary social institutions and environments, including the criminal justice, education and health systems, job markets, and where people live. These studies illustrate how racial hierarchies are embedded in daily life, from racial profiling in law enforcement, to 'red-lining' communities of color in mortgage lending, to sharp disparities in the health of members of different population groups. Policymakers, in fact, have recognized the importance of research into the causes of racial disparities. For example, the 2000 Minority Health and Health Disparities Research and Education Act directed the National Institutes of Health to support continued research on health gaps between racial groups, with the ultimate goal of eliminating such disparities. Moreover, growth among some racial and ethnic groups (notably, Asians and Hispanics) and the diversification of the nation's racial and ethnic composition underscore the need for expanded research on the health and socio-economic status of these groups. Sociologists have long examined how race.a social concept that changes over time.has been used to place people in categories. Some scientists and policymakers now contend that research using the concept of race perpetuates the negative consequences of thinking in racial terms. Others argue that measuring differential experiences, treatment, and outcomes across racial categories is necessary to track disparities and to inform policymaking to achieve greater social justice. The American Sociological Association (ASA), an association of some 13,000 U.S. and international sociologists, finds greater merit in the latter point of view. Sociological scholarship on "race" provides scientific evidence in the current scientific and civic debate over the social consequences of the existing categorizations and perceptions of race; allows scholars to document how race shapes social ranking, access to resources, and life experiences; and advances understanding of this important dimension of social life, which in turn advances social justice. Refusing to acknowledge the fact of racial classification, feelings, and actions, and refusing to measure their consequences will not eliminate racial inequalities. At best, it will preserve the status quo.

When a concept is central to societal organization, examining how, when, and why people in that society use the concept is vital to understanding the organization and consequences of social relationships.

The following statement sets forth the basis for ASA's position, and illustrates the importance of data on race to further scientific investigation and informed public discourse. ASA fully recognizes the global nature of the debate over race, racial classification, and the role of race in societies; this statement focuses attention on the treatment of race in the United States and the scholarly and public interest in continuing to measure it.

RACIAL CLASSIFICATIONS AS THE BASIS FOR SCIENTIFIC INQUIRY

Race is a complex, sensitive, and controversial topic in scientific discourse and in public policy. Views on race and the racial classification system used to measure it have become polarized. In popular discourse, racial groups are viewed as physically distinguishable populations that share a common geographically based ancestry. "Race" shapes the way that some people relate to each other, based on their belief that it reflects physical, intellectual, moral, or spiritual superiority or inferiority. However, biological research now suggests that the substantial overlap among any and all biological categories of race undermines the utility of the concept for scientific work in this field. How, then, can it be the subject of valid scientific investigation at the social level? The answer is that social and economic life is organized, in part, around race as a social construct.

When a concept is central to societal organization, examining how, when, and why people in that society use the concept is vital to understanding the organization and consequences of social relationships. Sociological analysis of the family provides an analogue. We know that families take many forms; for example, they can be nuclear or extended, patrilineal or matrilineal. Some family categories correspond to biological categories; others do not. Moreover, boundaries of family membership vary, depending on a range of individual and institutional factors. Yet regardless of whether families correspond to biological definitions, social scientists study families and use membership in family categories in their study of other phenomena, such as well-being. Similarly, racial statuses, although not representing biological differences, are of sociological interest in their form, their changes, and their consequences.1

The federal government defines race categories for statistical policy purposes, program administrative reporting, and civil rights compliance, and sets forth minimum categories for the collection and reporting of data on race. The current standards, adopted in October 1997, include five race categories: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White. Respondents to federal data collection activities must be offered the option of selecting one or more racial designations. Hispanics or Latinos, whom current standards define as an ethnic group, can be of any race. However, before the government promulgated standard race categories in 1977, some U.S. censuses designated Hispanic groups as race categories (e.g., the 1930 census listed Mexicans as a separate race).

Yet refusing to employ racial categories for administrative purposes and for social research does not eliminate their use in daily life, both by individuals and within social and economic institutions.

THE SOCIAL CONCEPT OF RACE

Individuals and social institutions evaluate, rank, and ascribe behaviors to individuals on the basis of their presumed race. The concept of race in the United States.and the inevitable corresponding taxonomic system to categorize people by race.has changed, as economic, political, and historical contexts have changed (19). Sociologists are interested in explaining how and why social definitions of race persist and change. They also seek to explain the nature of power relationships between and among racial groups, and to understand more fully the nature of belief systems about race.the dimensions of how people use the concept and apply it in different circumstances.

SOCIAL REALITY AND RACIAL CLASSIFICATION

The way we define racial groups that comprise "the American mosaic" has also changed, most recently as immigrants from Asia, Latin America, and the Caribbean have entered the country in large numbers. One response to these demographic shifts has been the effort (sometimes contentious) to modify or add categories to the government's official statistical policy on race and ethnicity, which governs data collection in the census, other federal surveys, and administrative functions. Historically, changes in racial categories used for administrative purposes and self-identification have occurred within the context of a polarized biracialism of Black and White; other immigrants to the United States, including those from Asia, Latin America, and the Caribbean, have been "racialized" or ranked in between these two categories (26). Although racial categories are legitimate subjects of empirical sociological investigation, it is important to recognize the danger of contributing to the popular conception of race as biological. Yet refusing to employ racial categories for administrative purposes and for social research does not eliminate their use in daily life, both by individuals and within social and economic institutions. In France, information on race is seldom collected officially, but evidence of systematic racial discrimination remains (31, 10). The 1988 Eurobarometer revealed that, of the 12 European countries included in the study, France was second (after Belgium) in both anti-immigrant prejudice and racial prejudice (29). Brazil's experience also is illustrative: The nation's then-ruling military junta barred the collection of racial data in the 1970 census, asserting that race was not a meaningful concept for social measurement. The resulting information void, coupled with government censorship, diminished public discussion of racial issues, but it did not substantially reduce racial inequalities. When racial data were collected again in the 1980 census, they revealed lower socioeconomic status for those with darker skin. (38).

Projections…suggest that intermarriage …is likely to increase, although most marriages still occur within socially designated racial groupings. Race serves as a basis for the distribution of social privileges and resources.

THE CONSEQUENCES OF RACE AND RACE RELATIONS IN SOCIAL INSTITUTIONS

Although race is a social construct (in other words, a social invention that changes as political, economic, and historical contexts change), it has real consequences across a wide range of social and economic institutions. Those who favor ignoring race as an explicit administrative matter, in the hope that it will cease to exist as a social concept, ignore the weight of a vast body of sociological research that shows that racial hierarchies are embedded in the routine practices of social groups and institutions. Primary areas of sociological investigation include the consequences of racial classification as:

- A sorting mechanism for mating, marriage and adoption.
- A stratifying practice for providing or denying access to resources.
- An organizing device for mobilization to maintain or challenge systems of racial stratification.
- A basis for scientifically investigating proximate causes.

Race as a sorting mechanism for mating, marriage, and adoption----------

Historically, race has been a primary sorting mechanism for marriage (as well as friendship and dating). Until anti-miscegenation laws were outlawed in the United States in 1967, many states prohibited interracial marriage. Since then, intermarriage rates have more than doubled to 2.2 percent of all marriages, according to the latest census information (14, 28). When Whites (the largest racial group in the United States) intermarry, they are most likely to marry Native Americans/American Indians and least likely to marry African Americans. Projections to the year 2010 suggest that intermarriage and, consequently, the universe of people identifying with two or more races is likely to increase, although most marriages still occur within socially designated racial groupings (7).

Race as a stratifying practice----------

Race serves as a basis for the distribution of social privileges and resources. Among the many arenas in which this occurs is education. On the one hand, education can be a mechanism for reducing differences across members of racial categories. On the other hand, through "tracking" and segregation, the primary and secondary educational system has played a major role in reproducing race and class inequalities. Tracking socializes and prepares students for different education and career paths. School districts continue to stratify by race and class through two-track systems (general and college prep/advanced) or systems in which all students take the same courses, but at different levels of ability. African Americans, Hispanics, American Indians, and students from low socioeconomic backgrounds, regardless of ability levels, are over-represented in lower level classes and in schools with fewer Advanced Placement classes, materials, and instructional resources (11, 13, 20, 23).

The American civil rights movement was similarly successful in mobilizing resistance to segregation, but it also provoked some White citizens into organizing their own power base... Systematic

investigation is necessary to uncover and distinguish what social forces, including race, contribute to disparate outcomes.

Race as an organizing device for mobilization to maintain or challenge systems of racial stratification----------

Understanding how social movements develop in racially stratified societies requires scholarship on the use of race in strategies of mobilization. Racial stratification has clear beneficiaries and clear victims, and both have organized on racial terms to challenge or preserve systems of racial stratification. For example, the apartheid regime in South Africa used race to maintain supremacy and privilege for Whites in nearly all aspects of economic and political life for much of the 20th century. Blacks and others seeking to overthrow the system often were able to mobilize opposition by appealing to its victims, the Black population. The American civil rights movement was similarly successful in mobilizing resistance to segregation, but it also provoked some White citizens into organizing their own power base (for example, by forming White Citizens' Councils) to maintain power and privilege (2, 24).

Race and ethnicity as a basis for the scientific investigation of proximate causes and critical interactions----------

Data on race often serve as an investigative key to discovering the fundamental causes of racially different outcomes and the "vicious cycle" of factors affecting these outcomes. Moreover, because race routinely interacts with other primary categories of social life, such as gender and social class, continued examination of these bases of fundamental social interaction and social cleavage is required. In the health arena, hypertension levels are much higher for African Americans than other groups. Sociological investigation suggests that discrimination and unequal allocation of society's resources might expose members of this racial group to higher levels of stress, a proximate cause of hypertension (40). Similarly, rates of prostate cancer are much higher for some groups of men than others. Likewise, breast cancer is higher for some groups of women than others. While the proximate causes may appear to be biological, research shows that environmental and socio-economic factors disproportionately place at greater risk members of socially subordinated racial and ethnic groups. For example, African Americans' and Hispanics' concentration in polluted and dangerous neighborhoods result in feelings of depression and powerlessness that, in turn, diminish the ability to improve these neighborhoods (35, 40, 41). Systematic investigation is necessary to uncover and distinguish what social forces, including race, contribute to disparate outcomes.

Ostensibly neutral practices can advantage some racial groups and adversely affect others. Whites and African Americans tend to live in substantially homogenous communities, as do many Asians and Hispanics.

RESEARCH HIGHLIGHTS: RACE AND ETHNICITY AS FACTORS IN SOCIAL INSTITUTIONS

The following examples highlight significant research findings that illustrate the persistent role of race in primary social institutions in the United States, including the job market, neighborhoods, and the health care system. This scientific investigation would not have been possible without data on race.

Job Market----------

Sociological research shows that race is substantially related to workplace recruitment, hiring, firing, and promotions. Ostensibly neutral practices can advantage some racial groups and adversely affect others. For example, the majority of workers obtain their jobs through informal networks rather than through open recruitment and hiring practices. Business-as-usual recruitment and hiring practices include recruiting at predominantly White schools, advertising only in suburban newspapers, and employing relatives and friends of current workers. Young, White job seekers benefit from family connections, studies show. In contrast, a recent study revealed that word-of-mouth recruitment through family and friendship networks limited job opportunities for African Americans in the construction trades. Government downsizing provides another example of a "race neutral" practice with racially disparate consequences: Research shows that because African Americans have successfully established employment niches in the civil service, government workforce reductions displace disproportionate numbers of African American-and increasingly, Hispanic-employees. These and other social processes, such as conscious and unconscious prejudices of those with power in the workplace, affecting the labor market largely explain the persistent two-to-one ratio of Black to White unemployment (4, 5, 9, 15, 32, 39, 42, 43).

Neighborhood Segregation----------

For all of its racial diversity, the highly segregated residential racial composition is a defining characteristic of American cities and suburbs. Whites and African Americans tend to live in substantially homogenous communities, as do many Asians and Hispanics. The segregation rates of Blacks have declined slightly, while the rates of Asians and Hispanics have increased. Sociological research shows that the "hyper-segregation" between Blacks and Whites, for example, is a consequence of both public and private policies, as well as individual attitudes and group practices. Sociological research has been key to understanding the interaction between these policies, attitudes, and practices. For example, according to attitude surveys, by the 1990s, a majority of Whites were willing to live next door to African Americans, but their comfort level fell as the proportion of African Americans in the neighborhood increased. Real estate and mortgage-industry practices also contribute to neighborhood segregation, as well as racially disparate homeownership rates (which, in turn, contribute to the enormous wealth gap between racial groups). Despite fair housing laws, audit studies show, industry practices continue to steer African American homebuyers away from White

... social and economic factors, uneven treatment, public health policy, and health and coping behaviors play a large role in these unequal health outcomes.

neighborhoods, deny African Americans information about available loans, and offer inferior property insurance. Segregation profoundly affects quality of life. African American neighborhoods (even relatively affluent ones) are less likely than White neighborhoods to have high quality services, schools, transportation, medical care, a mix of retail establishments, and other amenities. Low capital investment, relative lack of political influence, and limited social networks contribute to these disparities (1, 6, 8, 9, 17, 21, 22, 25, 30, 35, 36, 37, 42, 44).

Health----------

Research clearly documents significant, persistent differences in life expectancy, mortality, incidence of disease, and causes of death between racial groups. For example, African Americans have higher death rates than Whites for eight of the ten leading causes of death. While Asian-Pacific Islander babies have the lowest mortality rates of all broad racial categories, infant mortality for Native Hawaiians is nearly three times higher than for Japanese Americans. Genetics accounts for some health differences, but social and economic factors, uneven treatment, public health policy, and health and coping behaviors play a large role in these unequal health outcomes. Socio-economic circumstances are the strongest predictors of both life span and freedom from disease and disability. Unequal life expectancy and mortality reflect racial disparities in income and incidence of poverty, education and, to some degree, marital status. Many studies have found that these characteristics and related environmental factors such as over-crowded housing, inaccessibility of medical care, poor sanitation, and pollution adversely impact life expectancy and both overall and cause-specific mortality for groups that have disproportionately high death rates. Race differences in health insurance coverage largely reflect differences in key socio-economic characteristics. Hispanics are least likely to be employed in jobs that provide health insurance and relatively fewer Asian Americans are insured because they are more likely to be in small low-profit businesses that make it hard to pay for health insurance. Access to affordable medical care also affects health outcomes. Sociological research shows that highly segregated African American neighborhoods are less likely to have health care facilities such as hospitals and clinics, and have the highest ratio of patients to physicians. In addition, public policies such as privatization of medicine and lower Medicaid and Medicare funding have had unintended racial consequences; studies show a further reduction of medical services in African American neighborhoods as a result of these actions. Even when health care services are available, members of different racial groups often do not receive comparable treatment. For example, African Americans are less likely to receive the most commonly performed diagnostic procedures, such as cardiovascular and orthopedic procedures. Institutional discrimination, including racial stereotyping by medical professionals, and systemic barriers, such as language difficulties for newer immigrants (the majority of whom are from Asia and Latin America), partly explain differential treatment patterns, stalling health improvements for some racial groups.

All of these factors interact to produce poorer health outcomes, indicating that racial stratification remains an important explanation for health disparities (3, 12, 16, 18, 21, 27, 33, 34, 40, 41).

As long as Americans routinely sort each other into racial categories and act on the basis of those attributions, research on the role of race and race relations in the United States falls squarely within this scientific agenda.

SUMMARY: THE IMPORTANCE OF SOCIOLOGICAL RESEARCH ON RACE

A central focus of sociological research is systematic attention to the causes and consequences of social inequalities. As long as Americans routinely sort each other into racial categories and act on the basis of those attributions, research on the role of race and race relations in the United States falls squarely within this scientific agenda. Racial profiling in law enforcement activities, "redlining" of predominantly minority neighborhoods in the mortgage and insurance industries, differential medical treatment, and tracking in schools, exemplify social practices that should be studied. Studying race as a social phenomenon makes for better science and more informed policy debate. As the United States becomes more diverse, the need for public agencies to continue to collect data on racial categories will become even more important. Sociologists are well qualified to study the impact of "race".and all the ramifications of racial categorization.on people's lives and social institutions. The continuation of the collection and scholarly analysis of data serves both science and the public interest. For all of these reasons, the American Sociological Association supports collecting data and doing research on race.

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Appendix 3

L'*affirmative action* comme forme de compensation et la proportionnalité ethno-raciale : une articulation problématique[190]

La *conjonction* des deux éléments que sont, d'une part, l'exigence proclamée de l'annulation complète des effets de la discrimination passée, d'autre part, la focalisation de l'intervention correctrice sur une norme de représentation proportionnelle des groupes raciaux dans les différents secteurs socioprofessionnels, conjonction à laquelle l'arrêt *Griggs* de 1971 a donné une première forme de consécration juridique, repose cependant sur un ensemble de propositions empiriques dont l'exactitude est rigoureusement indémontrable, et dont la plausibilité même est douteuse.[191]

En effet, quelle que soit l'ampleur des pratiques discriminatoires préalablement intervenues, on ne trouve nulle part l'exemple d'une société dans laquelle les positions professionnelles se répartiraient proportionnellement entre les différentes collectivités définies sur une base ethnique ou raciale avec une exactitude mathématique. Ainsi Frederick Douglass[192] raille-t-il à bon escient, dans une lettre adressée à Martin Delany qui acquiert rétrospectivement une résonance prophétique, l'idée selon laquelle « la population de couleur des États-Unis devrait inclure le huitième des poètes, des hommes d'État, des universitaires, des écrivains et des philosophes du pays ».[193] Parce que « l'égalité des chiffres n'a rien à voir avec la distribution des talents »,[194] l'attribution implicite aux effets de l'oppression raciste de *l'ensemble* des disparités statistiques observables à cet égard équivaut à une réduction arbitraire de l'éventail des causes envisageables, laquelle rend l'*affirmative action* « épistémologiquement problématique »[195] – puisque « l'établissement par le pouvoir judiciaire de l'existence d'un rapport de causalité entre la discrimination antérieure et une portion du résultat indésiré suffit [en pratique] à déclencher une injonction visant à éliminer l'intégralité dudit résultat ».[196] Certes, il est indéniable que le profil ethno-racial de l'ensemble des personnes exerçant des fonctions susceptibles d'être ordonnées sur une échelle de revenu et de prestige constitue une indication de première importance pour se faire une idée de la gamme des opportunités effectivement accessibles aux membres des différents groupes en présence, lesquelles opportunités, en pratique, ne peuvent être qu'inférées à partir de l'observation empirique de leur position objective. Néanmoins, on ne saurait présumer que tout écart socio-économique repérable entre les groupes en question ne ferait que refléter la discrimination dont certains d'entre eux auraient fait l'objet. Plutôt que de s'en remettre

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[190] Cette section est une version légèrement modifiée de Sabbagh (2003), p. 221-225.
[191] Parmi les nombreux auteurs qui conçoivent apparemment cette norme de proportionnalité raciale comme une base de référence appropriée pour l'entreprise compensatoire, voir, par exemple, Laurence Tribe, *American Constitutional Law*, New York, Foundation Press, 1988 [1978], p. 1532, n. 44 ; Kenneth Karst, *Belonging to America : Equal Citizenship and the Constitution*, New Haven, Yale University Press, 1989, p. 135.
[192] Ancien esclave et orateur d'exception, Frederick Douglass est l'une des grandes figures du mouvement abolitionniste.
[193] Frederick Douglass, « Lettre à Martin Delany » ; citée *in* Denis Lacorne, *La Crise de l'identité américaine*, *op.cit.*, p. 321-322.
[194] *Ibid*.
[195] Brian Barry, *Justice as Impartiality*, Oxford, Clarendon Press, 1995, p. 270.
[196] Owen Fiss, « The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after *Brown v. Board of Education* », *University of Chicago Law Review*, 41 (4), 1974, p. 779.

à la sélection d'un unique facteur explicatif supposé rendre compte de l'intégralité de ce décalage, il conviendrait au moins d'examiner – et, si possible, d'évaluer quantitativement – l'influence éventuelle d'autres variables sans rapport immédiat avec le degré de discrimination subi, mais statistiquement corrélées avec l'appartenance ethno-raciale. Or, à en croire l'économiste Thomas Sowell, il existerait en réalité de nombreuses variables de ce type, à commencer par l'âge, le lieu de résidence et le niveau d'éducation.

Concernant le premier de ces facteurs, alors même que l'âge moyen des membres des différents groupes considérés a des répercussions évidentes sur leur salaire et, surtout, sur leur niveau de représentation dans les échelons supérieurs de la hiérarchie socioprofessionnelle – indicateur régulièrement invoqué par les partisans de l'*affirmative action* à l'appui du dispositif –, on constate effectivement que la plupart de ses bénéficiaires appartiennent à des groupes relativement jeunes : ainsi, en 1980, l'âge moyen des Noirs, des Amérindiens et des personnes d'origine mexicaine ou portoricaine était respectivement de 22 ans, 20 ans et 18 ans, tandis qu'il était de 28 ans pour la population nationale considérée dans son ensemble, de 36 et 37 ans pour les Américains d'origine italienne et ceux d'origine irlandaise, et de 46 ans pour les Juifs.[197] Deuxièmement, on observe encore aujourd'hui une relative concentration des Noirs dans les États du Sud, où les revenus demeurent globalement faibles comparé au reste du territoire américain. Troisièmement, si l'on prend en considération le niveau d'éducation, en plus de l'âge et de l'emplacement géographique, on s'aperçoit que le salaire moyen des Noirs de sexe masculin, qui, en 1992, représentait 82,9% de celui des hommes blancs lorsque les effets propres de ces trois facteurs n'étaient pas préalablement décomptés, atteint désormais 87,7% de ce dernier. Lorsque l'on intègre de surcroît le décalage qui subsiste entre les performances moyennes obtenues aux tests d'embauche par les membres des deux groupes raciaux, le différentiel en question s'amenuise encore, puisque le rapport entre les deux variables s'élève désormais à 95,5%.[198] En somme, l'étendue de la discrimination exercée à l'encontre d'une collectivité donnée ne peut être inférée de son degré de sous-représentation statistique au sein de l'ensemble des détenteurs de positions et de revenus relativement élevés que dans la mesure où ces collectivités ne diffèrent pas globalement au regard d'*autres* déterminants éventuels, ce qui n'est jamais le cas dans la réalité.[199]

En effet, au-delà même des facteurs quantifiables évoqués par Sowell, d'autres auteurs se sont efforcés de mettre en évidence l'existence d'*attitudes* propres aux différents groupes ethno-raciaux par rapport à l'éducation et au choix d'une orientation professionnelle qui seraient en rapport avec la distribution ultérieure des bénéfices sociaux entre leurs membres, avec l'idée que leurs trajectoires systématiquement divergentes refléteraient moins la prégnance inégale de la discrimination dans leur

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[197] Cf. Thomas Sowell, « *Weber* and *Bakke* and the Presuppositions of "Affirmative Action" », *Wayne Law Review*, 26, 1980, p. 1314-1315.
[198] Cf. June O'Neill, Dave O'Neill, « Affirmative Action in the Labor Market », *Annals of the American Academy of Political and Social Science*, 523, 1992, p. 102; June O'Neill, « The Role of Human Capital in Earnings Difference Between Black and White Men », *Journal of Economic Perspectives*, 4 (4), 1990, p. 24-45. Ceci dit, il va de soi que la définition du salaire n'est pas la seule opération au niveau de laquelle une discrimination est susceptible d'intervenir.
[199] Pour des illustrations complémentaires, voir Thomas Sowell, *Civil Rights: Rhetoric or Reality ?*, New York, Morrow, 1984, p. 42-43 ; *Ethnic America* : *A History*, New York, Basic Books, 1981, p. 65-66.

environnement immédiat que l'influence d'éléments d'ordre « culturel »[200]. Ainsi, si l'on prend comme point de repère l'évolution des revenus, on constate effectivement que les membres de certaines minorités définies à raison de la religion ou de l'origine nationale et antérieurement soumises à des pratiques discriminatoires d'ampleur significative surpassent désormais – et parfois largement – les représentants de la composante anglo-saxonne et protestante de la population américaine. Ainsi, en 1990, le revenu des ménages comprenant au moins une personne d'origine juive représentait 155% du revenu moyen des ménages calculé à l'échelle nationale, la proportion correspondante s'élevant à 127% pour les Américains d'origine asiatique, et 118% pour ceux d'origine irlandaise.[201] Par conséquent, que l'on adhère ou non à cette conception réificatrice de la culture comme déterminant ultime de l'écart économique *résiduel* entre les groupes en présence – soit l'écart qui subsisterait après qu'auraient été neutralisés les effets imputables aux variables initialement prises en compte –, il n'en demeure pas moins que, dans la mesure où l'existence de cet écart ne serait pas due exclusivement à la discrimination passée ou présente, la focalisation de l'intervention « correctrice » sur un objectif de proportionnalité risque bien d'apparaître à la fois irréaliste et illégitime.

[200] Voir en premier lieu Nathan Glazer, *Ethnic Dilemmas*. *1964-1982*, Cambridge (Mass.), Harvard University Press, 1983, p. 57, 186-208, et, pour un point de vue voisin émanant d'un économiste de formation, Glenn Loury, « Why Should We Care About Group Inequality ? », *Social Philosophy and Policy*, 5 (1), 1987. Pour se limiter à un exemple particulièrement spectaculaire, les Juifs, qui, en 1983, comptaient pour environ 3% de la population des États-Unis, représenteraient cependant près de 25% des membres du corps professoral dans les facultés de droit (cf. Nathan Glazer, *Ethnic Dilemmas*, *op.cit.*, p. 191).
[201] Cf. Christopher Jencks, *Rethinking Social Policy*, Cambridge (Mass.), Harvard University Press, 1992, p. 28.

Certes, il est théoriquement possible d'appréhender les différences « culturelles » qui se répercuteraient sur le niveau de qualification atteint – et influeraient de ce fait sur la distribution des positions valorisées entre les membres des diverses collectivités ethno-raciales – comme étant *elles-mêmes* le résultat indirect d'une discrimination antérieure, ce qui leur conférerait ainsi le statut de variables *intermédiaires*. Si l'on considère, à l'instar du constitutionnaliste Ronald Fiscus, que les différences en question procèdent nécessairement soit d'un racisme institutionnalisé au regard duquel elles apparaîtraient comme le produit cristallisé des *ajustements* que les membres des groupes discriminés auraient été contraints d'opérer, soit de l'existence d'une inégalité naturelle des aptitudes et des talents des individus qui serait en rapport avec la race elle-même, dès lors que l'on écarte cette dernière hypothèse, la proportionnalité raciale se présente effectivement, d'un point de vue strictement logique, comme la finalité évidente de la compensation restauratrice.[202] Toutefois, celle-ci demeure confrontée à une difficulté conceptuelle majeure, relative à l'identification de l'entité de référence : il semble bien que l'existence même des Noirs *en tant que groupe saillant* soit rigoureusement indissociable de l'injustice commise à leur encontre, de sorte que le projet de rétablissement de la situation dans laquelle ces derniers se seraient trouvés en l'absence de la discrimination initiale bute sur l'impossibilité ontologique, *de l'intérieur de cette représentation fictive que l'on s'efforce d'acquérir*, de concevoir encore la collectivité distincte dont on ambitionne de restaurer la position, puisque la race, dans le cadre de l'univers ainsi parfaitement recréé, n'aurait alors pas davantage de pertinence sociale que la couleur des yeux des individus.[203]

[202] Cf. Ronald Fiscus, *The Constitutional Logic of Affirmative Action*, Durham, Duke University Press, 1992, p. XI, 24.

[203] Cette analogie est un lieu commun des débats sur la « déracialisation » de la société américaine et ses modalités ; voir, par exemple, Richard Wasserstrom, *Philosophy and Social Issues : Five Studies*, Notre Dame, University of Notre Dame, 1980, p. 15.