

## SENSE AND CENSUS BUILDING: CAPTURING TRIBAL REALITIES IN THE U.S. CENSUS

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### INTRODUCTION

In the politically charged space between America's 2018 midterm elections and the 2020 general elections, the upcoming decennial Census looms. A seemingly unassuming bureaucratic process, it has enormous implications for the country's social, economic, and political realities for years to come. Citizens of American Indian and Alaska Native (AI/AN) tribes burst into the national spotlight as key voting populations in several close midterm races<sup>1</sup> and have been mobilizing with unprecedented unity around issues of disenfranchisement, environmental protection, and Missing and Murdered Indigenous Women (MMIW).<sup>2</sup> The 2020 Census comes at a historic moment when the stakes are high for AI/AN communities, but its failure to adequately capture the realities of Indian Country<sup>3</sup> has already begun, even before the first survey response has been

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1. See, e.g., Acee Agoyo, *Native Vote Once Again Propels Jon Tester to Victory in Close Senate Race*, INDIANZ.COM (Nov. 7, 2018), <https://www.indianz.com/News/2018/11/07/native-vote-once-again-propels-jon-teste.asp> [<https://perma.cc/G7X3-UZVR>] (discussing the role of Native voters in Montana senator Jon Tester's 2018 win); Simon Romero, *Native Americans Score Historic Wins in Midterms After Years of Efforts*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/elections/native-americans-congress-haaland-davids.html> [<https://perma.cc/NMA3-R2XV>] (citing the power of the Native vote in North Dakota senator Heidi Heitkamp's 2018 loss).

2. See Massoud Hayoun, *Native American Rights Groups Are Targeting Six States to Fight Voter Suppression in 2020*, PAC. STANDARD MAG. (Feb. 15, 2019), <https://psmag.com/social-justice/native-american-rights-groups-are-gearing-up-to-fight-voter-suppression-in-2020> [<https://perma.cc/93YB-AUZU>]; Tara Houska & Yasmin Belkhyr, *Native American Activism After Standing Rock: Where Is It Now?*, IDEAS.TED.COM (Nov. 15, 2018), <https://ideas.ted.com/native-american-activism-after-standing-rock-where-is-it-now/> [<https://perma.cc/X9E6-SC8P>].

3. As used in this note, "Indian Country" refers to the statutory definition:  
(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original

recorded. Historically, AI/AN people have been one of the most undercounted groups in the Census: the U.S. Census Bureau estimates that the 2010 Census undercounted at least 4.9% of people living on tribal lands.<sup>4</sup> Each uncounted tribal citizen cost their tribal government up to \$3,000 in federal support for services annually and skewed the apportionment of representation in their state.<sup>5</sup>

But census problems in Indian Country run deeper than the methodologies used for counting and processing data. The very conceptions of political boundaries and property reflected in the geographic entities used by the U.S. Census Bureau are, in some areas, not only at odds with traditional cultural understandings<sup>6</sup> but also with realities of migration,<sup>7</sup> services,<sup>8</sup> and community affiliation.<sup>9</sup> Because each *statistical* entity in the complicated system of geographic terms and concepts currently used by the U.S. Census Bureau in Indian Country interacts differently with its respective *legal* entity,<sup>10</sup> variations arise in who actually gets counted as part of AI/AN Census areas. Statistically created entities used for some tribes without land bases, like the Oklahoma Tribal Statistical Areas, end up including many individuals who are not tribal members. But counts for

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or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2018).

4. *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census*, U.S. CENSUS BUREAU (May 22, 2012), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb12-95.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html) [<https://perma.cc/X9E6-SC8P>].

5. Mark Trahant, *The 2020 Census Is in 'Deep Trouble' and Tribes Will Lose Big*, INDIAN COUNTRY TODAY (Sept. 12, 2018), <https://newsmaven.io/indiancountrytoday/news/the-2020-census-is-in-deep-trouble-and-tribes-will-lose-big-N0A29WMaUEO1QNVzTF76Mg/> [<https://perma.cc/FJW8-KFNM>]; see also *2020 Census Especially Important for Tribes*, NATIONAL INDIAN COUNCIL ON AGING (July 26, 2019), <https://www.nicoa.org/2020-census-especially-important-for-tribes/> [<https://perma.cc/U572-ZCAY>] (estimating a loss of \$1,838 per person annually for the sixteen largest federal programs).

6. See discussion *infra* Section I.A., Part II.

7. See discussion *infra* Section I.E., Part II.

8. See discussion *infra* Section I.F., Part II.

9. See discussion *infra* Section I.A., Part II.; see also Natalie Hand, *Constitutional Reform: People v. Council*, INDIANZ (May 30, 2018), <https://www.indianz.com/News/2018/06/04/native-sun-news-today-oglala-sioux-task.asp> [<https://perma.cc/Z8EN-HFXQ>]. For example, the government of the Oglala Sioux Tribe in Pine Ridge, South Dakota, is entertaining a proposed constitutional amendment that would create voting districts for off-reservation areas in Rapid City, South Dakota, acknowledging the strong community ties to the reservation held by many individuals living there. *Id.*

10. *Geography Program: Glossary*, U.S. CENSUS BUREAU, [https://www.census.gov/programs-surveys/geography/about/glossary.html#par\\_textimage\\_1](https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_1) [<https://perma.cc/WJ35-J22W>].

tribes whose census tracts align with legal reservation lines are limited to tribal members within the reservation.<sup>11</sup> Because allocations of some federal agencies' funding flow proportionally from Census data,<sup>12</sup> the Census can actively deepen the injustices faced by some of the most vulnerable populations of AI/AN people. The 2020 Census, already in the final phases of pre-implementation, uses this complicated system of entities<sup>13</sup> and will not serve the best interests of many tribes. But it can be a catalyst for new innovations in the future.

For future Censuses to better represent Indian Country, the U.S. Census Bureau must work with tribal communities to redefine all AI/AN statistical entities as Tribal Designated Statistical Areas (TDSAs), eliminating the distinction in census designations between tribes with legal federal land bases and those without legal federal land bases. The simplification of geographic and statistical categories does not imply that community differences must be ignored. On the contrary, the flexibility of this TDSA category will allow the nuances of migration, service provision, and community affiliation to be better captured by the U.S. Census. It will divorce the ideas of legal boundaries and statistical boundaries, preserving the former with the utmost respect for tribal sovereignty while utilizing the latter for the scientific collection and processing of demographic data.

Part I of this note examines the historical relationship of AI/AN tribes to the U.S. Census, as well as the development of modern geographic categories and population counting tools used by the Bureau. This history shows that, as bureaucratic as the counting may seem, it is connected to

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11. *The Geospatial Dimensions on Tribal Data*, NAT'L CONG. OF AM. INDIANS POL'Y RES. CTR. 1 (Oct. 2017) [hereinafter NCAI REPORT], [http://www.ncai.org/policy-research-center/initiatives/Tribal\\_Data\\_Capacity\\_Geospatial\\_Data\\_\\_10\\_31\\_2017\\_FINAL.pdf](http://www.ncai.org/policy-research-center/initiatives/Tribal_Data_Capacity_Geospatial_Data__10_31_2017_FINAL.pdf) [https://perma.cc/DR8H-B7WW].

12. *Id.* at 3. Funding formulas vary by federal agency, demonstrating the further layers of complication for AI/AN communities and population measurement. For example, the Bureau of Indian Affairs includes reservations, "near reservations," and other geographic locations in its service area. *See* 25 C.F.R. § 20.100 (2019). The Department of Housing and Urban Development defines its service area for Indian Housing Block Grants as "federal reservations, trust lands, DOI [Department of the Interior] near-reservation service areas, Oklahoma Tribal Statistical Areas, Congressionally mandated service areas, State Tribal Areas as defined by the U.S. Census as State Designated Tribal Statistical Areas, Tribal Designated Statistical Areas, California Tribal Jurisdictional Areas established or reestablished by federal court judgment" as well as Alaska Native Villages. *See* NCAI REPORT, *supra* note 11, at 10.

13. JESSICA IMOTICHEY, ROAD TO 2020 DECENNIAL U.S. CENSUS BUREAU 16 [hereinafter TRIBAL PARTNERSHIP PRESENTATION], [https://www.atmitribes.org/sites/default/files/Road.to\\_.2020.Decennial.U.S.Census.Bureau.pdf](https://www.atmitribes.org/sites/default/files/Road.to_.2020.Decennial.U.S.Census.Bureau.pdf) [https://perma.cc/X84A-RA2P].

human stories and should be considered an issue of social justice. Part II analyzes the demographic realities of Indian Country not captured by current Census procedures and the implications of the complicated Census system for service programs and tribal sovereignty. Finally, Part III proposes increasing accurate Census data for tribes through a streamlined application of TDSAs for all AI/AN communities. This note concludes by situating this proposal's scope within the broader realm of AI/AN Census-related issues and emphasizing the importance of U.S. Census Bureau collaboration with tribes in designing an action plan that more effectively addresses census issues identified by tribes.

## I. THE HISTORICAL DIMENSIONS OF PEOPLE, PLACE, TRIBES, AND THE U.S. CENSUS

### *A. Tribal Conceptions of Place and Sovereignty*

Underlying the difficulties in ensuring a just Census count for AI/AN people is a historically different understanding of place, property, and government. Among the hundreds of indigenous people groups in what is now the United States, many have traditionally conceptualized land and their connections to it through landmarks and events that happened in particular locations.<sup>14</sup> Especially for nomadic tribes, territory was fluid and not bound by fixed lines.<sup>15</sup> In the past five centuries, this relationship with boundaries has often been at odds with that of Europeans who arrived in the Americas looking to acquire land for personal ownership.<sup>16</sup> The imposition

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14. NCAI REPORT, *supra* note 11, at 1.

15. *See id.*

16. *See* Julian Brave NoiseCat, *The Western Idea of Private Property Is Flawed. Indigenous Peoples Have It Right*, THE GUARDIAN (Mar. 27, 2017, 6:00 AM), <https://www.theguardian.com/commentisfree/2017/mar/27/western-idea-private-property-flawed-indigenous-peoples-have-it-right> [https://perma.cc/32DL-3J3K]; *see also* Carpenter v. Murphy, 139 S. Ct. 626 (2018); Earchiel Johnson, *Carpenter v. Murphy: Supreme Court Case Could Restore Reservation Lands, Re-Draw Oklahoma*, PEOPLE'S WORLD (July 18, 2019, 12:25 PM), <https://www.peoplesworld.org/article/carpenter-v-murphy-supreme-court-case-could-restore-reservation-lands-re-draw-oklahoma/> [https://perma.cc/AU93-YQ6A]. This case was heard by the Supreme Court in 2019 but will be re-argued during the 2020 term. Its final decision, which turns on the jurisdictional definition of reservation land in Oklahoma, could affect the fate of Indian Country everywhere and criminal convictions issued therein. *See* Garrett Epps, *Could a Supreme Court Decision Entitle 2,000 Oklahoma Inmates to New Trials?*, THE ATLANTIC (Dec. 18, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/carpenter-v-murphy-could-reopen-2000-oklahoma->

of European—and then American—property law, which accompanied the violence and trickery of conquest and genocide, forced tribes to adapt their geospatial definitions over time.<sup>17</sup> Treaties signed between Indian tribes and the early American government reflect the emerging importance of boundary lines in the nineteenth century,<sup>18</sup> but the idea of areas without fixed boundaries persisted even as tribes were confined to reservations.

Interacting with these ideas about land were ideas about the political sovereignty of tribes. Tribes themselves have always maintained their status as distinct nations with inherent sovereign jurisdiction over both their members and the spaces they occupy.<sup>19</sup> Noting the impossibility of creating one unanimous definition of tribal sovereignty, lawyer John Fredericks III asserts that “[t]ribal sovereignty . . . essentially means freedom. An independence which allows Indian people to make and be governed by their own laws, to control the social, economic and political forces within the territory they occupy, to practice their religion and sustain their culture free of constraints.”<sup>20</sup> For tribes, sovereignty springs from their ancient and unique social, cultural, and political systems, which many believe have been practiced on the North American continent since “time immemorial.”<sup>21</sup>

### *B. The Development of Federal Indian Law*

Despite constant tribal affirmation of the right to self-governance, shifting rulings by the United States Supreme Court have cyclically narrowed and widened the American government’s understanding of tribal sovereignty.<sup>22</sup> Before the formation of the United States, European powers in the Americas made treaties with indigenous groups as they did with other

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trials/578308/ [https://perma.cc/YAS3-8CF5]. The debate surrounding this case highlights the challenges in fitting traditional tribal lands into American legal definitions. *Id.* Ironically, the treaty boundary the Muscogee Creek are fighting to reclaim is not even in keeping with how tribal land would have traditionally been conceptualized. *Id.*

17. See NoiseCat, *supra* note 16.

18. NCAI REPORT, *supra* note 11, at 2.

19. John Fredericks III, *America’s First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL’Y 347, 386 (1999).

20. *Id.* at 349.

21. *Id.* at 347.

22. Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court’s Changing Stance on Tribal Sovereignty*, 12 COMPLEAT LAW. 14, 14 (1995).

foreign nations, on a government-to-government basis.<sup>23</sup> The United States Constitution, though it does not expressly recognize tribal sovereignty, does include implicit acknowledgment of this state of affairs in the Treaty Clause, which gives the President the power to make treaties with the advice and consent of the Senate and was understood to apply to treaties with Indian tribes.<sup>24</sup>

In the early decades of United States history, the Supreme Court decided three important cases concerning Indian law that have become known as the *Marshall Trilogy* for their primary authorship by Chief Justice John Marshall.<sup>25</sup> In 1823, in *Johnson v. M'Intosh*, the Court established federal supremacy in Indian affairs by adopting the "Doctrine of Discovery" as the origin of American property title, holding that Indians' original title cannot be sold to individuals or states, only to the United States government.<sup>26</sup> The Court reaffirmed federal supremacy in Indian affairs in 1831 with the *Cherokee Nation v. Georgia* decision in which Marshall created the term "domestic dependent nation" and described the relationship between Indian tribes and the United States government as that of a "ward to its guardian."<sup>27</sup> In 1832, *Worcester v. Georgia*, the final case in the *Marshall Trilogy*, held that state laws have no force in Indian country, invalidating a Georgia statute that prohibited all white men from living on Indian land without a state license.<sup>28</sup> In addition to forming the basis for federal Indian law and American understandings of tribal sovereignty, these three cases established special canons of construction for judicial interpretation in cases relating to Indian law.<sup>29</sup> The Indian canons instruct judges to interpret treaty language based on the tribe's perspective,

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23. Fredericks, *supra* note 19, at 352.

24. *Id.*

25. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 1, 2014),

[https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol\\_40-no--1--tribal-sovereignty/short\\_history\\_of\\_indian\\_law/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40-no--1--tribal-sovereignty/short_history_of_indian_law/) [<https://perma.cc/6MVF-G48C>].

26. *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The case concerned a property dispute over the ownership of land parcels in the Ohio River Valley, with one party tracing title to a purchase from the Piankeshaw tribe and one tracing title to a federal land grant. *Id.* at 543. Marshall ruled that "discovery" of a land gave a European power the exclusive title, subject only to indigenous occupants' "right of occupancy," which the European power had the exclusive right to extinguish. *Id.* at 587–88.

27. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

28. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

29. Jacob Schuman, Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1100 (2013).

acknowledging many tribes' different conceptions of legally binding agreements.<sup>30</sup>

In the second half of the nineteenth century, federal Indian policy and Court cases alike represented a movement toward wholesale removal of Indian nations from their homelands, the confinement of tribes to reservations, and the expansion of federal power over Indian people.<sup>31</sup> Suppression of tribal resistance in the West furthered the congressional goal of forced removal to reservations and paved the way for the devastating policies of assimilation and allotment.<sup>32</sup> The absolute failure of allotment and assimilation led to the 1934 Indian Reorganization Act, which ended allotment policies and allowed tribes to make their own constitutions, albeit subject to the Secretary of the Interior's approval.<sup>33</sup> This nod to tribal sovereignty was quickly reversed with the commencement of the Termination Era in the 1940s, which saw Congressional attempts to dissolve tribal entities under the guise of freeing them from federal supervision and control.<sup>34</sup>

Following increased activism by AI/AN communities in the 1960s and 1970s, courts began to circle back to the understanding that tribes are inherently sovereign.<sup>35</sup> The so-called Self-Determination Era of recent decades has tended to affirm tribal rights to self-governance through legislation like the Indian Self-Determination and Education Assistance Act of 1975 (ISEAA),<sup>36</sup> the Indian Child Welfare Act of 1978 (ICWA),<sup>37</sup> and the 2013 provision of the Violence Against Women Reauthorization Act (VAWRA) that creates special criminal jurisdiction for tribes over non-

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30. *Id.* at 1102.

31. Fletcher, *supra* note 25; *see, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (declaring that Congress has plenary power to unilaterally abrogate treaties between the United States and tribes); United States v. Kagama, 118 U.S. 375 (1886) (departing from the *Marshall Trilogy*'s Indian canons of construction to uphold the Major Crimes Act, giving federal jurisdiction over major crimes in Indian Country).

32. Fredericks, *supra* note 19, at 373.

33. *Id.* at 376.

34. *Id.* In termination cases like *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the conceptualization of land boundaries was front and center. In that case, the Supreme Court ruled that the Menominee Indian Tribe kept their historical hunting and fishing rights despite the 1954 Termination Act that ended federal recognition of the tribe. *Id.* at 412.

35. Fredericks, *supra* note 19, at 380.

36. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5302 (2018)).

37. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. § § 1901-1963 (2018)).

tribal members in instances of domestic violence.<sup>38</sup> This modern progression toward increased tribal self-determination is reflected in the policies and practices of federal agencies like the U.S. Census Bureau, but it is threatened by contemporary courts that have shown disdain for tribal rights, like the United States District Court for the Northern District of Texas, which recently argued for overturning ICWA.<sup>39</sup>

### *C. The U.S. Census and AI/AN Communities Throughout History*

Against this backdrop of fluctuating tribal sovereignty and federal relations with Indian tribes, the U.S. Census has historically aligned its policies and methodologies in Indian Country with the prevailing attitudes of the times.<sup>40</sup> The constitutional origins of the U.S. Census highlight its purposes of government representation and taxation—two concepts that had little precedent in tribal political systems.<sup>41</sup> These purposes are evident from the Constitution's text:

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

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38. 25 U.S.C. § 1304 (2018).

39. *Brackeen v. Zinke*, 338 F.Supp.3d 514 (2018) (holding that ICWA's mandatory placement preferences violated equal protection); see Meagan Flynn, *Court Strikes Down Native American Adoption Law, Saying It Discriminates Against Non-Native Americans*, WASH. POST (Oct. 10, 2018, 7:07 AM), [https://www.washingtonpost.com/news/morning-mix/wp/2018/10/10/court-strikes-down-native-american-adoption-law-saying-it-discriminates-against-non-native-americans/?utm\\_term=.dfa074d91a3e](https://www.washingtonpost.com/news/morning-mix/wp/2018/10/10/court-strikes-down-native-american-adoption-law-saying-it-discriminates-against-non-native-americans/?utm_term=.dfa074d91a3e). The Fifth Circuit reversed the District Court, finding that ICWA's placement preferences were based on political, not racial, classifications, thus upholding the constitutionality of ICWA. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019). On November 7, 2019, the Fifth Circuit granted a rehearing en banc. 942 F.3d 287; see also *Brackeen v. Bernhardt—Indian Child Welfare Act: Case Updates*, NATIVE AM. RIGHTS FUND (Nov. 7, 2019), <https://www.narf.org/cases/brackeen-v-bernhardt/> [<https://perma.cc/F9VR-QRRU>].

40. See U.S. CENSUS BUREAU, AMERICAN INDIAN AND ALASKA NATIVE AREAS 5-6 to 5-8, <https://www2.census.gov/geo/pdfs/reference/GARM/Ch5GARM.pdf> [<https://perma.cc/AE99-X63R>].

41. See Elizabeth Prine Pauls, *The Difference Between a Tribe and a Band*, ENCYCLOPAEDIA BRITANNICA (Mar. 6, 2008), <https://www.britannica.com/topic/Difference-Between-a-Tribe-and-a-Band-1673365> [<https://perma.cc/5K4C-5WAU>] (discussing the general political features of tribes, including unelected councils of elders). It is important to note that traditional tribal political systems varied widely. See *id.*



other Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.<sup>42</sup>

Per this mandate, the Census has been conducted every ten years since 1790.<sup>43</sup> The Census Act of 1840 established a central Census Office, which, after several revisions and reauthorizations, was ultimately renamed the Census Bureau under the Department of Commerce and Labor in 1903.<sup>44</sup>

As early as the Census of 1790, the U.S. government identified Indian settlement areas, but this constituted a form of “reverse recognition,” because the identification’s purpose was to exclude those areas from the enumeration process due to the non-taxability of Indians.<sup>45</sup> The 1860 Census was the first to directly count the Indian population, enumerating only those individuals living outside reservation lines since these Indian people were considered taxable.<sup>46</sup> In 1870, the U.S. Census Bureau created a separate category for “Indians.”<sup>47</sup> For the following century, the Bureau used various

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42. U.S. CONST. art. I, § 2, cl. 3.

43. *Overview: History of the U.S. Census Through the Decades*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/overview/](https://www.census.gov/history/www/through_the_decades/overview/) [https://perma.cc/6SJT-CLB5].

44. *Overview: History of the U.S. Census Through the Decades: 1840*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/overview/1840.html](https://www.census.gov/history/www/through_the_decades/overview/1840.html)

[https://perma.cc/YG4H-74QS]. The Census Bureau’s main undertaking remains the organization and execution of the decennial Census, but the agency also conducts dozens of other economic and population surveys, including the American Community Survey, the U.S. Economic Census, and the Current Population Survey. *About the Bureau*, U.S. CENSUS BUREAU, <https://www.census.gov/about/what.html> [https://perma.cc/5LN9-L843].

45. U.S. CENSUS BUREAU, *supra* note 40, at 5-6.

46. *Id.* at 5-7.

47. *Id.* In 2010, the race question on the Census included a checkbox for “American Indian or Alaska Native” and a space to “[p]rint name of enrolled or principal tribe.” U.S. CENSUS BUREAU, TRIBAL CONSULTATION HANDBOOK: BACKGROUND MATERIALS FOR TRIBAL CONSULTATIONS ON THE 2020 CENSUS 24 (2015) [hereinafter TRIBAL CONSULTATION HANDBOOK], <https://www2.census.gov/library/publications/decennial/2020/tribal-program/2020-tribal-consultation-handbook.pdf> [https://perma.cc/DR4E-S3BS]. Responses are based on self-identification. *Id.* The

enumeration techniques for AI/AN communities in its decennial Census but did not have a unified system for special AI/AN geographic entities.<sup>48</sup>

As AI/AN tribes fought for increased sovereignty and self-determination, they became interested in better Census data, and in 1970 the Census included data for 115 AI/AN reservations identified by the Bureau using reservation boundaries shown on its enumeration maps.<sup>49</sup> Inaccuracies in these maps and the resulting data led to more collaboration with tribes and the Bureau of Indian Affairs (BIA) to improve geographic tools for AI/AN communities in the 1980 Census.<sup>50</sup> In the same year, the Census Bureau first recognized the Historic Areas of Oklahoma.<sup>51</sup>

*D. The Census in Indian Country Today:  
Modern Statistical Entities for AI/AN Communities*

In 1990, the system of geographic programs used for AI/AN communities in the Census went through an overhaul that resulted in the patchwork of terminology and legal and statistical inconsistencies that exist today.<sup>52</sup> In the spirit of increased attention on tribal self-determination, preparations for the 1990 Census included an American Indian and Alaska Native Task Force as well as the Tribal Liaison Program, which gave AI/AN tribes the opportunity to review the reservation and trust land<sup>53</sup> boundaries the Bureau intended to recognize, even though the BIA still initially

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Census Bureau does not define the meaning of AI/AN. *Id.* at 23. It has also been consulting with tribes about the possibility of using more write-in lines for the race question in the 2020 Census. *Id.* at 23–24.

48. U.S. CENSUS BUREAU, *supra* note 40, at 5-7.

49. *Id.* at 5-7.

50. *Id.* at 5-8.

51. *Id.*

Oklahoma has a very high percentage of the Nation's American Indian population, but has only one reservation, the Osage Reservation. Discussions with over 30 tribal governments and organizations led the Census Bureau to delineate a single geographic entity [the Historic Areas of Oklahoma] that included all lands associated with former reservations elsewhere in the State.

*Id.*

52. *Id.*

53. Trust land is land that has been taken into trust by the Secretary of the Interior for use by Indian tribes. 25 U.S.C. § 5108 (2018). Trust land may be off-reservation but is not subject to state or local taxation. *Id.*; see also *Trust Land*, NAT'L CONF. OF ST. LEGISLATURES (2012), <http://www.ncsl.org/research/state-tribal-institute/trust-land-overview.aspx> [https://perma.cc/V5PN-AXEJ].

delivered boundary information to the Bureau.<sup>54</sup> The 1990 Census also saw more precision in boundaries for tribes without a land base, narrowly defining the Historic Areas of Oklahoma as Tribal Jurisdiction Statistical Areas (subsequently renamed Oklahoma Tribal Statistical Areas (OTSA)) and introducing Alaska Native Village Statistical Areas (ANVSAs) for Alaska Native villages.<sup>55</sup> For state-recognized tribes without a land base, the Bureau created State Designated Tribal Statistical Areas (SDTSAs),<sup>56</sup> and for federally recognized tribes without a legal land base, the agency came up with Tribal Designated Statistical Areas (TDSAs).<sup>57</sup>

According to the Census Bureau, a TDSA “generally encompasses a compact and contiguous area that contains a concentration of individuals who identify with a federally recognized American Indian tribe and in which there is structured or organized tribal activity.”<sup>58</sup> A TDSA can be located in more than one state, and it is delineated by the tribe itself in collaboration with the Census Bureau and the BIA.<sup>59</sup> Currently, TDSAs are not available as a statistical entity for most tribes in Alaska or Oklahoma because of ANVSAs and OTSAs in those states, nor are they in use for tribes that do have a land base, which do not have the option to define their own statistical boundaries apart from their legally recognized reservation and trust land boundaries.<sup>60</sup>

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54. U.S. CENSUS BUREAU, *supra* note 40, at 5-9 to 5-10. In the first phase of the Tribal Review Program, the BIA provided the Bureau with maps of reservation boundaries; then the Bureau sent the maps to tribal governments for confirmation that these boundaries reflected their current reservation. *Id.* at 5-11. In the second phase, the Bureau computerized the maps and again sent them to tribes for corrections. *Id.*

55. *Id.* at 5-12 to 5-13. See *Geography Program: Glossary*, *supra* note 10 (defining Oklahoma Tribal Statistical Areas in the same way that U.S. CENSUS BUREAU, *supra* note 40, defines Tribal Jurisdiction Statistical Areas).

56. *Geography Program: Glossary*, *supra* note 10.

57. *American Indian and Alaska Native Areas*, *supra* note 40, at 5-12.

58. *Geography Program: Glossary*, *supra* note 10.

59. *Id.* The Tribal Statistical Areas Program before each census is an opportunity for tribes to help update and define ANVSAs, OTSAs, TDSAs, and SDTSAs, as well as tribal census tracts, tribal block groups, and census designated places. See *TRIBAL CONSULTATION HANDBOOK*, *supra* note 47, at 32.

60. See *Geography Program: Glossary*, *supra* note 10. By definition, a tribe in Alaska otherwise meeting the requirements for a TDSA would instead have an ANVSA; likewise, a tribe that had a former reservation in Oklahoma otherwise meeting the requirements for a TDSA would instead have an OTSA. See *id.* Although tribes with reservation land must use their legal boundaries as statistical boundaries, they are given the opportunity to update what is considered their reservation, off-reservation trust land, and tribal subdivision boundaries, such as tribal census tracts and tribal block groups, through the yearly Boundary and Annexation Survey Program and the final geographic boundary review before the Census

*E. The Census in Indian Country Today:  
Current Methodologies and Demographics*

How do these acronyms translate into the realities of Census procedure in Indian Country? Using the statistical entities laid out above, the U.S. Census Bureau subdivides populations into census tracts for its decennial count. For most tracts, each household is mailed a mail-back Census questionnaire or—as of 2020—instructions for completing the online Census questionnaire.<sup>61</sup> For households in approximately four hundred tracts (many of which are located on tribal lands, without traditional street addresses), the Census does not mail a questionnaire, and in-person enumeration is the only method of census data collection as part of the Update/Enumerate Program.<sup>62</sup> Some households used to receive long-form Census questionnaires for more in-depth data collection. Starting with the 2010 Census, however, all households receive a short-form questionnaire for the decennial Census focusing on basic information needed for apportionment and redistricting like race, age, ethnicity, sex, relationship to the householder, and the tenure of occupied housing units.<sup>63</sup> The American Community Survey (ACS) used to collect the long-form data monthly and release it annually.<sup>64</sup>

The Bureau classifies twenty-six percent of AI/AN individuals as living in “hard-to-count” (HTC) Census tracts.<sup>65</sup> The City University of New York’s Graduate Center Mapping Service created an online tool that maps HTC communities and shows low self-response rates in many areas of

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through the Boundary Validation Program. See TRIBAL CONSULTATION HANDBOOK, *supra* note 47, at 29.

61. *What Is the “Hard to Count” Population and Why Does It Matter?*, HTC 2020, <https://www.censushardtocountmaps2020.us/> [<https://perma.cc/9WRP-C5DN>].

62. *Id.*

63. MARISA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION: A NEW DESIGN FOR THE 21ST CENTURY 9 (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf> [<https://perma.cc/W7GG-GP9Z>].

64. *Id.*

65. THE LEADERSHIP CONFERENCE EDUC. FUND, WILL YOU COUNT? AMERICAN INDIANS AND ALASKA NATIVES IN THE 2020 CENSUS 1 (2018), <http://civilrightsdocs.info/pdf/census/2020/Fact-Sheet-AIAN-HTC.pdf> [<https://perma.cc/P8V2-NE9X>].

Indian Country.<sup>66</sup> When a household does not return its mail-in census questionnaire or complete its questionnaire online, the Bureau must send an enumerator to locate that household for an in-person “non-response follow-up.”<sup>67</sup> The risk of being undercounted is compounded by poverty, low educational attainment, and large populations of young children.<sup>68</sup>

Because the Census is conducted only once every ten years, population trends in the intervening time are not captured by the snapshot survey. Demographer C. Matthew Snipp observes that “anecdotal evidence suggests that there is a great deal of short-term mobility between reservations and urban labor markets” and “[t]his kind of short-term circular mobility . . . is impossible to study using census data” from every ten years.<sup>69</sup> Border towns—urban places near rural reservation communities like Gallup, New Mexico; Rapid City, South Dakota; and Twin Cities, Minnesota—account for large populations of AI/AN people, often engaged in circular mobility patterns back and forth across the legal lines of tribal land.<sup>70</sup> The transience that is so deeply woven into the narrative of border-town migration is acknowledged in discussions surrounding legislation like the VAWRA<sup>71</sup> and in the service-area definitions of federal agencies like the BIA, which designates “near reservation” areas as “those areas or communities designated by the Assistant Secretary that are adjacent or contiguous to

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66. HTC 2020, *supra* note 61. The map defines “HTC” as a census tract with a 2010 self-response rate of seventy-three percent or less or the bottom twenty percent of 2010 mail-return rates nationwide. *See id.*

67. *Id.*

68. LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 65, at 1–2.

69. C. Matthew Snipp, *The Size and Distribution of the American Indian Population: Fertility, Mortality, Residence, and Migration*, in CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 24 (Gary D. Sandefur et al. eds., 1996).

70. *See* Nick Estes, *Border Town, USA: An Ugly Reality Many Natives Call Home*, INDIAN COUNTRY TODAY (Aug. 15, 2014), <https://newsmaven.io/indiancountrytoday/archive/border-town-usa-an-ugly-reality-many-natives-call-home-AyrBxqXFwkKaX-1p3lZJFg/> [<https://perma.cc/CY9K-DZRH>]. The phenomenon of border towns is full of new challenges to old problems: “Statistics show the social ills many equate with reservation life are compounded in border towns, both rural and urban.” *Id.*

71. *See* Genevieve M. Le May, *The Cycles of Violence Against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013*, 12 PORTLAND ST. U. MCNAIR RES. J. 1, 11 (2018), <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1177&context=mcnair> [<https://perma.cc/89WJ-Q455>].

Short-term circular mobility marks the lives of many vulnerable AI/AN women in reservation communities and border towns with impermanence, and short-term construction projects for pipelines and other endeavors bring groups of impermanent non-AI/AN men to these communities. *Id.* Abuse of AI/AN women by non-AI/AN men is more common where these situations of transience exist. *See id.*

reservations where financial assistance and social service programs are provided.”<sup>72</sup>

Even in communities firmly inside reservation boundaries, housing insecurity in AI/AN communities increases the chances that the Census does not accurately capture the reality of these communities. Almost half of AI/AN people are renters, which increases the likelihood that the Census Bureau does not have access to their correct address.<sup>73</sup> Additionally, between forty-two thousand and eighty-five thousand AI/AN individuals and families were doubling up with others in 2013–2015.<sup>74</sup> Many individuals may be hesitant to report how many people are living in their housing units if the number is higher than occupancy agreements allow.<sup>75</sup>

The Census Bureau has struggled to find methodologies that match these demographic realities. For example, the Bureau matches street addresses with survey respondents to map where people live, but the lack of an addressing system in many reservation communities makes this difficult: “A lot of people in Indian Country might have six families using the same post box. Or the address might be first home on the right four miles up before the intersection of two rural roads.”<sup>76</sup> Even “geocoding is not useful in” these remote areas.<sup>77</sup>

To offset these methodological difficulties, the Census Bureau has attempted to partner with tribes to make the 2020 Census more responsive to the unique needs of tribal communities.<sup>78</sup> For example, the Local Update of Census Addresses program provides tribes an opportunity to review the Census Bureau’s address list for their communities and update any addresses.<sup>79</sup> According to Ron Jarmin, then acting director of the U.S. Census Bureau,

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72. NCAI REPORT, *supra* note 11, at 4.

73. LEADERSHIP CONFERENCE. EDUC. FUND, *supra* note 65, at 1.

74. NANCY PINDUS, ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS 91 (2014), <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf> [<https://perma.cc/N5LT-EMMG>].

75. Trahant, *supra* note 5.

76. *Id.*

77. *Id.*

78. *See generally* TRIBAL CONSULTATION HANDBOOK, *supra* note 47.

79. *Id.* at 28.

For the 2020 Census, we began tribal consultations with tribal representatives . . . earlier in the census lifecycle than in prior censuses. The Census Bureau held 17 consultations and one national webinar with federally and state recognized tribes and Alaska regional and village corporations. We met with over 400 tribal delegates representing over 250 different tribes, corporations and organizations.<sup>80</sup>

Each tribe is invited by the Bureau to select a tribal liaison and a “complete count committee,” who develop and implement a strategic plan for tribal participation in the Census.<sup>81</sup>

One of the concerns raised by tribal representatives in the course of these consultations has been the Bureau’s announcement that it will be moving to an internet-based collection method as the primary way for households to respond to the 2020 Census.<sup>82</sup> Only 58.2% of AI/AN people use the internet, and cell phone coverage in rural areas is often insufficient.<sup>83</sup> In an August 2018 letter to Secretary of Commerce Wilbur Ross, three U.S. senators from states with significant AI/AN populations expressed concern that this shift to an online response platform would exacerbate the challenges AI/AN communities face in responding to the Census.<sup>84</sup>

The senators’ letter also criticized the Bureau’s cancellation of field tests in two reservation communities in 2017, calling it “an opportunity lost.”<sup>85</sup> The field tests, scheduled for Standing Rock Reservation in North Dakota and the Colville Reservation and Off-Reservation Trust Land in Washington, would have allowed the Bureau to check its methodologies in

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80. TRIBAL PARTNERSHIP PRESENTATION, *supra* note 13, at 8.

81. *Id.* at 10–11. The Census Bureau’s goals for the 2020 Census in Indian Country include “efficiency in building an address list[,] . . . easier ways to respond[,] . . . better use of information [already obtained, and] more efficient field operations.” *Id.* at 12.

82. LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 65, at 1.

83. NAT’L ADVISORY COMM. ON RACIAL, ETHNIC, & OTHER POPULATIONS: ADMIN. RECORDS, INTERNET, & HARD TO COUNT POPULATION WORKING GRP., FINAL REPORT 9 (2016), [https://www2.census.gov/cac/nac/reports/2016-07-admin\\_internet-wg-report.pdf](https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf) [<https://perma.cc/5EZH-E8JZ>].

84. *See* Letter from Heidi Heitkamp, U.S. Sen., Lisa Murkowski, U.S. Sen. & Amy Klobuchar, U.S. Sen., to Wilbur Ross, Sec’y, U.S. Dep’t of Commerce (Aug. 2, 2018), [https://web.archive.org/web/20181223061338/https://www.heitkamp.senate.gov/public/\\_cache/files/19c9abb4-6cf6-40a6-8486-7f16226670b5/heitkamp-murkowski-klobuchar-census-letter-to-ross-8.2.18.pdf](https://web.archive.org/web/20181223061338/https://www.heitkamp.senate.gov/public/_cache/files/19c9abb4-6cf6-40a6-8486-7f16226670b5/heitkamp-murkowski-klobuchar-census-letter-to-ross-8.2.18.pdf) [<https://perma.cc/KB96-6GUU>] [hereinafter Letter to Wilbur Ross].

85. *Id.*

HTC AI/AN communities ahead of the 2020 Census, but they were dropped due to cited uncertainty about funding levels.<sup>86</sup> According to a report by the Center on Poverty and Inequality at Georgetown Law, “Without a sufficient increase in the Census Bureau’s budget, a complete count [of AI/AN people] will be in jeopardy, and census costs could increase by billions of dollars.”<sup>87</sup>

*F. What Is at Stake for AI/AN Tribes and Individuals*

The way that the abstract concepts of statistical classification are carried out has had real effects on tribal communities throughout history. The relationship between AI/AN people and “official” population measures is complicated. In 1880, the U.S. government created and imposed the Dawes Roll as an inventory of membership for some tribes in the eastern United States, and tracing lineage to tribal rolls is still a part of some tribal membership requirements.<sup>88</sup> Not only do the ghosts of centuries-old population counts linger in the very personal process of understanding identity for some AI/AN individuals, but federal population figures also haunt current political representation.<sup>89</sup> Because Census data is used to apportion representatives in Congress, the boundaries used for AI/AN communities can shape the strength of AI/AN people’s voices in decision making on the local, state, and federal levels.<sup>90</sup>

Furthermore, reservations and other AI/AN communities are considered “communities of interest” for many states’ redistricting policies, which look to Census data for the redistricting process.<sup>91</sup> Communities of interest are one category that guides governments in electoral redistricting; other categories that state statutes create for guidance include voting districts, legislative and congressional districts, contiguity, political boundaries,

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86. Trahant, *supra* note 5.

87. LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 65, at 3.

88. Keith C. Smith, *Tribal Membership: Its Role and Application*, in BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES: LEADING LAWYERS ON NAVIGATING TRIBAL MEMBERSHIP ENROLLMENT ISSUES 15 (Thomas Reuters/Aspatore 2013). The Dawes Rolls were part of the Dawes Act, which attempted to reduce the size of reservations by allotting land to individual tribal members. *Id.*

89. See LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 65, at 1.

90. *Id.*

91. *Id.* at 2.



compactness, and political outcomes.<sup>92</sup> In many states, the legislature alone is responsible for redistricting using Census data; in others, an advisory commission or independent commission does this task.<sup>93</sup> Regardless, having inaccurate data on AI/AN populations, whether through undercounting or through misplaced counts, can affect the impact that AI/AN voters have on all elections.<sup>94</sup>

The Census also impacts tribal requests for funding and agency service providers. Many programs that impact AI/AN communities are funded based in whole or in part on Census data, whether in the selection or restriction of funding recipients, in the process of awarding or allocating funds, or in the monitoring and assessment of program performance.<sup>95</sup> Such programs include Title I Grants to Local Education Agencies, the Indian Health Service, Medicaid, and the Indian Housing Block Grant.<sup>96</sup> Together, these federal services provide billions of dollars of funding to tribes and tribal members.<sup>97</sup> Although individual tribal members may have different views on the desirability of receiving federal funds,<sup>98</sup> the current significance of these resources is readily apparent.

Allocation among tribes depends on the agency or program. For example, the Indian Health Service (IHS) utilizes a “potential service population” that is estimated from the latest U.S. Census enumeration and bases its formula for allocation on the potential population and the health status and amount of resources available in a particular locale.<sup>99</sup> In fiscal year 2018, this meant that four of the twelve IHS service areas did not receive any allocated funds, while one area received sixty-nine percent of

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92. TRIBAL PARTNERSHIP PRESENTATION, *supra* note 13, at 4.

93. *Id.* at 5.

94. *Id.* at 2.

95. HOTCHKISS & PHELAN, *supra* note 63, at 3.

96. LEADERSHIP CONFERENCE EDUC. FUND, *supra* note 65, at 2–3. Other programs include the Head Start Program, Indian Community Development Block Grants, Section 8 Housing Choice Vouchers Program, Native American Employment and Training, Urban Indian Health Program, and Special Programs for the Aging Title VI. *Id.*

97. *Id.*

98. My experience in conversation with various tribal members on this subject has suggested a range of viewpoints.

99. DEP'T OF HEALTH & HUMAN SERVS., INDIAN HEALTH SERVICE CIRCULAR NO. 92-05 § 3 (1992), <https://www.ihs.gov/ihm/circulars/1992/budget-execution-policy-allocation-of-resources/> [https://perma.cc/DK8P-JBEA].

the total amount of IHS's available funding.<sup>100</sup> Because potential service populations are based on Census Bureau designations of statistical areas, these discrepancies in funding may be traced to the lopsided enumeration system that counts non-tribal members in some areas.

## II. ANALYSIS OF DEMOGRAPHIC REALITIES NOT CAPTURED BY THE CURRENT CENSUS

As it has operated in the past and will operate in 2020, the Census count does not adequately capture the nuances of population dynamics in Indian Country: some people are not counted at all, and others are not counted in a way that benefits their tribes.<sup>101</sup> These problems stem from demographic realities and methodological issues.<sup>102</sup> At the root of these issues is a tension between the tribes' traditional understandings and the imposed bureaucratic system's perceptions of boundaries and tribal identity.<sup>103</sup> Complicated layers of association between legal entities and statistical entities have muddied the efficacy of the census process, but there is a simpler way to conceptualize statistical areas that can result in more just data representation and allocation while preserving tribal sovereignty.

Some of the very demographic characteristics that the Census seeks to measure make the measuring difficult.<sup>104</sup> Many of these issues are not unique to AI/AN populations, but because of tribal citizens' status as members of distinct political sovereigns, the challenge of accurately counting AI/AN individuals in America is unique.<sup>105</sup> The existence of the Update/Enumerate Program, in which in-person enumerators are automatically dispatched to some HTC rural areas, mostly on tribal land,<sup>106</sup> is evidence of the Census Bureau's recognition of the particular challenge of even reaching populations in remote locales. Because these demographics have historically had very low return rates, partially due to

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100. INDIAN HEALTH SERV., INDIAN HEALTH CARE IMPROVEMENT FUND ALLOCATION – FY 2018 [https://www.ihs.gov/sites/ihcif/themes/responsive2017/display\\_objects/documents/2018/IHCIF\\_FY18\\_allocation\\_FAQ.pdf](https://www.ihs.gov/sites/ihcif/themes/responsive2017/display_objects/documents/2018/IHCIF_FY18_allocation_FAQ.pdf) [<https://perma.cc/B6RN-SJSX>].

101. See Trahant, *supra* note 5.

102. See *id.*

103. See NCAI REPORT, *supra* note 11, at 2.

104. See HTC 2020, *supra* note 61.

105. Cf. Trahant, *supra* note 5.

106. See HTC 2020, *supra* note 61.

the lack of mail access, the Bureau has had to invest human capital and money into the meticulous tracking of households in these tracts, a process that can be difficult, time-consuming, and costly to the federal government and taxpayers.<sup>107</sup> Even with the added efforts of in-person enumerators, there is no guarantee that remote populations are being accurately counted.<sup>108</sup>

The conceptual mismatch underlying Census problems in Indian Country is perhaps nowhere more apparent than in the Bureau's reliance on street addresses even though many tribal communities continue to operate smoothly without them. Tribal communities in the United States are not the only places in the world that function without street addresses; in fact, some four billion people worldwide do not use a physical addressing system for their homes.<sup>109</sup> Yet the American enumeration process was originally designed for more urban places and places with the Euro-American practice of referencing space by its relation to a road, so the reality that some communities exist outside of this indexing system presents a challenge for the Bureau and its enumerators.<sup>110</sup>

Not all AI/AN individuals live in rural areas, but some still fall into other HTC groups: people of color, low-income households, households with young children, linguistically isolated households, overcrowded households, households headed by a single parent, or households with lower levels of educational attainment.<sup>111</sup> While none of these factors directly indicates that a household will not self-respond, it is easy to see why there is a correlation between non-response rates and households that may be juggling other priorities beyond mailing back a Census questionnaire.<sup>112</sup>

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107. *Id.*

108. *Id.* In fact, in some areas the Census Bureau has stripped funding from the Update/Enumerate Program, forcing enumerators to leave after updating an address, whether or not they have made in-person contact with a resident. Jeffrey Mervis, *Money, Politics, and Abandoned Homes: Why the 2020 Census Might Be in Jeopardy*, SCI. MAG. (July 24, 2017, 2:00 PM), <https://www.sciencemag.org/news/2017/07/money-politics-and-abandoned-homes-why-2020-census-might-be-jeopardy> [<https://perma.cc/H4EJ-U6HP>].

109. Karim Bin-Humam, *Addressing the Issue: How to Deliver on Physical Addresses for the Poor*, DAI: DIGITAL @ DAI (Feb. 3, 2016), <https://dai-global-digital.com/addressing-the-issue-how-to-deliver-on-physical-addresses-for-the-poor.html> [<https://perma.cc/7DYN-3D78>].

110. See Trahan, *supra* note 5.

111. See HTC 2020, *supra* note 61.

112. *Id.*

Not only are AI/AN communities hard to count, they are hard to count *well* because of the realities of migration and transience.<sup>113</sup> In rural reservation communities where there are few employment opportunities, individuals have incentive to move to nearby urban locales to find work, but family ties and responsibilities keep many of these individuals in a loop between family and jobs.<sup>114</sup> The short-term circular mobility that demographer Snipp describes has not been extensively studied, but this phenomenon of movement across legal lines of tribal jurisdiction highlights the reality that people generally do not give much thought to the political geographic entities used to dictate where tribes have sovereignty.<sup>115</sup> Although the annual ACS issued by the Census Bureau tracks some of these migration patterns better than the decennial census,<sup>116</sup> much movement can happen even within a year, and inevitably even ACS data falls short of capturing the full picture. For Congressional apportionment and for the many federal programs that use decennial census data, the more frequent ACS snapshots of migration are less relevant.

For AI/AN individuals and communities soaked in centuries of intergenerational trauma inflicted by the United States government, distrust of American authority is legitimate and pervasive<sup>117</sup> and can contribute to lower response rates.<sup>118</sup> Although the Census Bureau attempts to hire local community members as enumerators where possible and utilize community partners to spread awareness,<sup>119</sup> AI/AN populations may still be skeptical of anyone affiliated with a federal agency like the Census Bureau. Fear of repercussions for overcrowded housing, or other census responses that may be seen as potentially leading to discrimination, might lead some households to withhold their responses.<sup>120</sup> The government's need for personal information and the tabulation of data might seem disconnected

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113. See Snipp, *supra* note 69.

114. *Id.*

115. *See id.*

116. See TRIBAL CONSULTATION HANDBOOK, *supra* note 47, at 41.

117. See generally Shawn Regan, Opinion, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014, 6:07 AM), <https://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#56f18f42c274> [https://perma.cc/C4G6-3KXZ] (describing federal mismanagement of tribal land, resources, and Indian assets).

118. See HTC 2020, *supra* note 61.

119. See TRIBAL CONSULTATION HANDBOOK, *supra* note 47, at 38.

120. See HTC 2020, *supra* note 61.

from the daily lives of individuals who want to protect their security and autonomy.<sup>121</sup>

Distrust might be increased among rural populations unaccustomed to sharing information electronically.<sup>122</sup> The Census Bureau's use of internet-based questionnaire collection in 2020 will, as the senators argued in their letter to Secretary Ross, inherently disadvantage AI/AN communities without widespread access to the internet,<sup>123</sup> and it will particularly impact those already inclined to scoff at government requests for information. Although the Bureau's Tribal Consultation Handbook includes questions for tribal leaders about how best to implement this new use of technology,<sup>124</sup> there is little evidence that the Bureau has followed through on testing its methodologies in tribal communities ahead of the 2020 Census.<sup>125</sup> The loss of funding for the two scheduled field tests could be very problematic considering the dramatic methodological change of shifting to internet-based collection.<sup>126</sup> Without field tests, many of the problems that tribes have identified in the way the Census represents them will persist.<sup>127</sup>

Injustice is compounded by the way the boundaries for statistical entities create limitations for some tribes and not others, affecting apportionment of funding and services among tribes and disadvantaging some of the most under-resourced reservation communities.<sup>128</sup> The official Census populations of tribal communities with more flexible statistical areas, like OTSAs and TDSAs, are likely to include more non-tribal-members than the populations of tribal communities forced to use their legal reservation boundaries as the limits of their statistical areas. The allocation of IHS funding, which uses Census data to identify the "potential service

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121. See generally TRIBAL CONSULTATION HANDBOOK, *supra* note 47, at 2 (addressing tribal members' concerns about the protection of personal information).

122. See generally Issie Lapowsky, *The Challenge of America's First Online Census*, Wired (Feb. 6, 2019), <https://www.wired.com/story/us-census-2020-goes-digital/> [https://perma.cc/MR7Y-XNMX] (pointing out that the Census Bureau never got to test the system in a rural environment and that increased use of technology poses risks that might undermine people's faith in the process).

123. Letter to Wilbur Ross, *supra* note 84, at 1.

124. See TRIBAL CONSULTATION HANDBOOK, *supra* note 47, at 17.

125. Letter to Wilbur Ross, *supra* note 84, at 1.

126. *Id.*; see also Trahan, *supra* note 5.

127. See Trahan, *supra* note 5.

128. See *supra* Section I.F.

population,” serves an example of how this can lead to relatively fewer resources for tribes with federally recognized land bases.<sup>129</sup>

The problems with statistical area designations may seem insignificant, or it may seem arbitrary to focus on them when many other challenges exist at the intersection of Census policy and tribal sovereignty. Statistical area designations are technical in a rote, unromantic way, yet they are also deeply bound to the philosophical and conceptual mismatch that underlies many of the other Census challenges like street addressing and forced technological methodologies. Many of the tribes with federally recognized land bases—those most disadvantaged by the current system of AI/AN statistical area designations—also fall into other categories that disadvantage them in the Census; their reservations may be particularly affected by lack of addressing, low employment rates, circular mobility patterns, and deep-seated distrust for the government.<sup>130</sup> The injustices of the Census in Indian Country feed off each other.

### III. APPLYING THE TRIBAL DESIGNATED STATISTICAL AREA CLASSIFICATION FOR ALL AI/AN COMMUNITIES

Considering the complexity of the demographic and methodological problems with the Census in Indian Country, a holistic solution must start by addressing the root conceptual mismatch. The Census Bureau can begin working toward this by reforming its policies to create and update statistical entities in AI/AN communities. All AI/AN statistical entities currently in use—reservations bound by their legal lines of jurisdiction as well as ANVSAs, OTSAs, SDTSAs, and TDSAs—can be reclassified as TDSAs. The Bureau must work with all tribes to define their Census boundaries, in keeping with the principles of the government-to-government relationship that the Bureau aims to respect. This collaborative process to define TDSAs is already used for tribes without federal land bases, so it would not be a great leap for the agency to begin using TDSAs with tribes that have federal

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129. See INDIAN HEALTH SERV., *supra* note 100 (discussing discrepancies in allocation of funding in different IHS regions, based on Census Bureau statistical area designations).

130. See *Half the Top 20 Poorest Counties in America Are Included in Indian Reservations*, AAANATIVEARTS.COM, <https://www.aaanativearts.com/half-the-top-20-poorest-counties-in-america-are-included-in-indian-reservations> [https://perma.cc/PMF3-3CBP].

land bases, and tribes themselves will likely welcome the opportunity to draw statistical boundaries that make sense for their demographics.

The TDSA category is inherently flexible. This flexibility will better capture the nuances of migration, service provision, and community affiliation than the rigidity of legal reservation lines. Using TDSAs for all AI/AN communities will not strip Oklahoma tribes, Alaska villages, or other tribes without federally recognized land bases of their rights to articulate the places where their populations currently reside; rather, one flexible category will “even the playing field” for allocations of funding by giving *all* tribes this right.

Eliminating the notion that tribes with federally recognized reservations must use their legal boundaries as their statistical boundaries is in line with the more-fluid conceptions of geography in many AI/AN traditions and in keeping with the core purposes of the Census. The Census is an empirical count, and statistical boundaries are used for scientific collection and the processing of demographic data. Statistical entities exist on an entirely distinct plane than legal entities, which is why tribal jurisdiction would be completely unaffected by switching to TDSAs. For example, reservation lines would continue to dictate the bounds of criminal and civil jurisdiction for tribal communities, but they would not have to cut tribal members living in border towns out of the demographic counts for their tribes. Allowing tribes to map their affiliated members onto the clean slate of a flexible TDSA will result in more accurate data that is crucial in the development of tribal economies and the protection of indigenous women and children.

Although shifting to TDSAs throughout Indian Country would simplify the terminologies and concepts used by the Census Bureau in counting AI/AN populations, the process of making this adjustment should not be oversimplified, because the stakes are high for tribal communities. Moreover, implementing these new categories in time for the 2020 Census would be impossible and unhelpful. The upcoming count can, however, be an opportunity to track and evaluate the deficiencies in the current system of statistical entities, and the discrepancies that these entities cause in allocations from agencies. The Census Bureau and tribal governments will then have a decade to carry out the process of re-designation of TDSAs before the 2030 Census. It is likely that the reclassification would require some additional funding from Congress, which could dictate the practicality of its implementation timeline. But the Census Bureau already consults

regularly with tribes and evaluates boundaries through the Boundary and Annexation Survey Program, so the additional funding burdens should be relatively light.

The idea of making all AI/AN Census areas into TDSAs flows from a conceptual framework that understands legal boundaries and statistical boundaries to be different things, but it would require the expert input of statisticians and geographers, as well as the expert knowledge of tribal members on the ground in each community, to flesh out its concepts. Consultation and collaboration—which are already at the forefront of how the Census Bureau tries to operate within Indian Country—must be the tools that provide details to any strategic plan to reorganize statistical entities. Only in this way can the historical cycles of oppressive bureaucracy in AI/AN communities be transformed into genuine government-to-government partnership and reliable and just data can be generated and utilized for the benefit of all.

#### CONCLUSION

Census Bureau policy that moves away from the complicated dual statistical-legal-areas system currently used in AI/AN communities and toward universal use of TDSAs would allow all tribal communities to have the flexibility of defining their own statistical boundaries for the U.S. Census. If this shift is made in full collaboration with tribes as sovereigns, it will better capture the realities of human demographics in AI/AN communities as well as those in border towns and near-reservation communities. Taking into account mobility patterns, existing service areas, and individual tribal affiliation, universal TDSAs will result in a fairer distribution of funding through federal programs and a more accurate allocation of representatives based on Census data. Data collected using these statistical boundaries will be invaluable to tribes wishing to serve and protect their tribal members, regardless of whether they reside within legal jurisdictional lines.

Beyond the practical effects of this conceptual reclassification, using TDSAs in tribal communities will be a step toward solving the broader issues with the Census in Indian Country, many of which spring from a fundamental conflict between traditional conceptions and bureaucratic classifications of geography and identity. In the process of working with



tribes to delineate TDSAs, the Census Bureau can think creatively about its methodologies in Indian Country. TDSAs are all about tailoring the system to meet the needs and realities of specific communities, and in this vein, the Census Bureau must continue developing enumeration strategies that go beyond a one-size-fits-all approach like reliance on street addresses. HTC populations will benefit from exposure to the process of redefining TDSAs; tribes can use the decade of exploration to energize their members around the importance of Census counts. By 2030, the Census undercounts that have plagued tribal communities and resulted in millions of dollars of lost funds might be a thing of the past.

The moment is right for the Census Bureau and Congress to turn a brighter spotlight on Indian Country. With the 2020 Census coinciding with a high-stakes general election, there will be much need for accurate data in the coming years, and AI/AN voices are louder than ever. Newly-elected indigenous congresswomen Sharice Davids (Kansas) and Debra Haaland (New Mexico) have already made headlines, not only for their historic election as the first AI/AN women in the House of Representatives, but for their willingness to advocate for AI/AN communities and creative, progressive ideas.<sup>131</sup> Tribes, tribal members, the media, the general public, and lawmakers are increasingly aware that representation matters. Being counted counts. And geography—the lines we choose to draw—shapes much of our political, social, and economic reality. To achieve a more just society, these lines should reflect the demographic reality.

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131. See Caroline Kelly, *First Native American Congresswomen Hug After Swearing-In*, CNN POLITICS (Jan. 3, 2019, 6:16 PM), <https://www.cnn.com/2019/01/03/politics/first-native-congresswomen-hug/index.html?no-st=1572121322> [<https://perma.cc/ZX8X-F9AW>].

