

BOOK REVIEW

KIDS & CUL-DE-SACS: *CENSUS 2000* AND THE REPRODUCTION OF CONSUMER CULTURE

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U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *CENSUS 2000: CENSUS OF POPULATION AND HOUSING* (2001), <http://factfinder.census.gov>.

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The facts which we learn from the Censuses at any one time will condition our thinking from that time forward. Our knowledge of the marketing structure and of marketing procedures has been vastly augmented, and this knowledge, whether we will it or not, can not but affect decisions on marketing policies, and procedures for putting those policies into effect.

—D. Maynard Phelps, Professor of Marketing, University of Michigan Business School, December 29, 1939¹

With the new census questions on education, income, and work status, and more complete tabulations on age, sex, color composition, marital status, labor force data, and the entirely new housing census, marketing research has come of age.

—Vergil D. Reed, Assistant Director, Bureau of the Census, December 29, 1941²

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¹ Paul T. Cherington, *The Uses of the Census of Business*, 35 J. AM. STAT. ASS'N 107, 115 (1940).

² Vergil D. Reed, *Business Uses of Data by Census Tracts and Blocks*, 37 J. AM. STAT. ASS'N 238, 241 (1942).

INTRODUCTION

Blame Starbucks on the census. The omnipresent coffee chain, with its four dollar venti espresso macchiatos, its goateed baristas, overstuffed sofas, and internet kiosks, could never have conquered the American landscape without the aid of population and demographic data collected by the United States Bureau of the Census. As business journals are quick to point out, the secret to Starbucks's success lies in store location,³ and every one of the company's 3500 North American outlets has been sited with scientific exactitude, guided by age, race, gender, income, occupation, and other data made freely available by the federal government's decennial population census.⁴ When cross-referenced with other statistics from such sources as proprietary customer surveys, public opinion polls, media usage studies, and consumer credit reports, the census results provide Starbucks with a richly drawn demographic and psychological snapshot of the populace in any given geographic location, down to a block as small as twenty-five households.⁵ In that manner, the company can be certain that the three stores it opens on average each day⁶ will be greeted by a steady stream of java-jonesing patrons holding the requisite disposable dollars.

Starbucks is by no means alone in its use of federal census data. Ubiquitous discount retailer Wal-Mart achieved its spectacular growth throughout rural America by targeting areas of low population density ignored by other major chain sellers.⁷ The makers of Wrangler and Levi Strauss jeans responded to census signs of an aging American population by appropriately altering the cut of their dungarees and the tenor of their marketing efforts.⁸ And when the De Beers diamond family targeted a readily identifiable demographic group in its print advertisements—"Bell bottoms. Psychedelic Rock. Children's braces. Car pools. Peewee Hockey. Piano practice. Grapefruit diets. Wok cooking. Middle age spread. Empty nesting. Your love tri-

³ See Julie Creswell et al., *Remedies for an Economic Hangover*, FORTUNE, June 25, 2001, at 130, 132 (noting that "while chains like McDonald's and Wendy's routinely shutter 50 to 100 restaurants a year, Starbucks has closed only a small number of outlets in its 30-year history").

⁴ See Amy Merrick, *New Data Will Let Starbucks Plan Store Openings, Help Blockbuster Stock Its Videos*, WALL ST. J., Feb. 14, 2001, at B1 (reporting that "Starbucks Corp. crunches sales and census data in a complex algorithm with online software, which offers a 'thumbs-up' or 'thumbs-down' response to each address entered as a potential new-store site").

⁵ See *id.*

⁶ See Creswell et al., *supra* note 3, at 132.

⁷ See LEON G. SCHIFFMAN & LESLIE LAZAR KANUK, CONSUMER BEHAVIOR 38 (7th ed. 2000); see also VITHALA R. RAO & JOEL H. STECKEL, ANALYSIS FOR STRATEGIC MARKETING 60 (1998) (noting that Wal-Mart "deliberately located early stores in small towns with populations that were not large enough to support a second large-scale mass merchandiser").

⁸ See RONALD D. MICHMAN, LIFESTYLE MARKET SEGMENTATION 33 (1991).

umphed over all."⁹—census data were available to ensure that the desired baby boomer audience received maximum exposure to the ad.

Such efforts are commonplace. As the director of research and planning for one of America's largest general merchandise retailers stated in testimony before Congress, "All marketing and strategic plans are based on census data."¹⁰ No surprise, therefore, that a group of associations and individual companies mobilized to oppose recent efforts to reduce the extent of information collected during the constitutionally mandated population census.¹¹ The so-called Coalition to Preserve Census Data was organized by a group of commercial entities that "shared [an] interest in ensuring that the . . . census produces reliable demographic, economic, transportation, and housing information."¹² According to the Coalition's spokesperson, "[p]rivate businesses could not possibly replicate the data collection accomplished in the decennial census,"¹³ and without such data, the business community would be unable to "provide useful products and services that meet the needs of diverse communities."¹⁴

This Review takes an inquisitive tour through the 2000 Census of Population and Housing, focusing especially on its role as the statistical foundation of marketing efforts by retail firms.¹⁵ The underlying motivation for the project is a suspicion that, at least if the industries' own words before Congress are to be believed, the decennial census confers a significant positive externality (some might say a hidden subsidy)¹⁶ on retail and marketing firms. Over the years, the census has

⁹ Advertisement, De Beers, reprinted in SCHIFFMAN & KANUK, *supra* note 7, at 49.

¹⁰ *Census 2000: Hearings Before the Senate Comm. on Governmental Affairs*, 105th Cong. 77 (1997) (statement of Joan Gentile Naymark) [hereinafter Naymark Testimony] (emphasis added).

¹¹ U.S. CONST. art. I, § 2, cl. 3.

¹² *Oversight of the 2000 Census: Reviewing the Long and Short Form Questionnaires*, Hearing Before the House Subcomm. on the Census of the House Comm. on Gov't Reform and Oversight, 105th Cong. 88–89 (1998) [hereinafter *House Hearings*] (statement of David Crowe).

¹³ *Id.* at 93.

¹⁴ *Id.* at 95.

¹⁵ As noted *infra* text accompanying note 66, the Census Bureau conducts a variety of other census-taking exercises besides the population count. As used throughout this Review, however, the term "census" will refer specifically to the constitutionally mandated decennial population census. See *infra* text accompanying notes 33–36.

¹⁶ See, e.g., *The American Community Survey—A Replacement for the Census Long Form?* Hearing Before the Subcomm. on the Census of the Comm. on Gov't Reform, 106th Cong. 79 (2000) (testimony of Edward L. Hudgins, Director of Regulatory Studies, Cato Institute) [hereinafter Hudgins Testimony] ("[E]xtensive census questions . . . seem calculated to provide free marketing data for corporations, with the federal government[] footing the bill . . ."); *House Hearings*, *supra* note 12, at 67 (testimony of Marlo Lewis, Jr., Vice President for Policy and Coalitions, Competitive Enterprise Institute) ("If business really needs the kinds of data supplied by the [census], then business should pay for it, not the taxpayer."). Although data collected by the Census Bureau are typically available without charge or with a fee related only to the cost of dissemination, these commentators are incorrect to assume that the Bureau never charges a fee with respect to its data-gathering and tabulat-

provoked a number of social, political, and economic controversies.¹⁷ Little attention, however, has been given to the role of the census in fostering the creation and maintenance of markets for consumer goods. Indeed, it has only been during the preparations for the 2000 census that the use of census data in marketing has achieved even slight salience outside specialized management textbooks and consumer research journals.¹⁸ Thus, in addition to providing a descriptive account of the population census and its various uses by commercial entities, this Review also attempts to provide a framework for determining whether the census marketing externality merits more serious normative consideration.

Part I offers an overview of the population census, examining its constitutional and statutory basis, historical outline, modern procedures, and primary governmental purposes. Part I also examines representative examples of the type of demographic data gathered by census officials in conjunction with the mandatory headcount, focusing upon the results of the 2000 census.

Part II describes how marketers use census results to create mechanisms for defining and accessing various consumer substrata within the population at large.¹⁹ As will be seen, the marketers' microscope peers far deeper than the mere surface layers of demographic analysis. Combined with the multibillion-dollar "private sociology"²⁰ of retail and marketing firms, census data are transformed into nuanced descriptions of identifiable and predictable consumer lifestyles, motivations, and behaviors. These descriptions provide an indispensable aid for product manufacturers and retailers in the design of consumer goods and accompanying promotional materials.

ing services. For instance, if the Bureau conducts a survey or tabulates data in some special manner requested by a private user that is not already part of the Bureau's official activities, it will typically charge the user for the costs of that additional exercise. See Paul T. Zeisset, *Disseminating Economic Census Data*, 15 GOV'T INFO. Q. 303, 312 (1998) ("When users need the census data reanalyzed in a special way, they can contract with the Census Bureau to make a 'special tabulation' The Bureau's costs in preparing a special tabulation . . . must be reimbursed by the customer or group of customers requesting their preparation.").

¹⁷ See *infra* notes 36, 73; *infra* Part I.C.

¹⁸ See, e.g., Greg Johnson, *Census Breakdowns Help Marketers Follow the Money*, L.A. TIMES, May 12, 2001, at A15; *Morning Edition: U.S. Census Numbers* (NPR radio broadcast, Mar. 7, 2001), <http://www.npr.org>.

¹⁹ Earlier, more general discussions of such market segmentation techniques can be found in Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 154-58 (1990); and Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1561-65 (1999).

²⁰ IAIN RAMSAY, *ADVERTISING, CULTURE AND THE LAW* 41 (1996) (citing WILLIAM M. O'BARR, *CULTURE AND THE AD: EXPLORING OTHERNESS IN THE WORLD OF ADVERTISING* 201 (1994)).

Part III takes up the broader theoretical question of how legal policymakers should view the census marketing externality and its impact on consumer behavior. Legal and academic treatments of consumer behavior have generally adopted a paradigm of either consumer sovereignty or consumer susceptibility.²¹ That is, consumers are viewed either as utility-maximizers whose aggregate choices dominate firm behavior in the marketplace, or as guileless automata whose susceptibility to persuasion results in costly, unsatisfactory consumption choices. On these accounts, the use of census data by product marketers could be seen, alternatively, as a sophisticated means for recognizing and responding to sovereign consumer preferences or as a devious method for constructing and exploiting the desires of a vulnerable mass.

Both the consumer sovereignty and the consumer susceptibility models are premised on the notion of consumers as primarily, if not exclusively, *economic* actors. Debate over legal protection of consumers tends to be about market power, cost minimization, and access to information, with no attention to consumption as an event carrying significance beyond the mere satisfaction of individual needs. Part III argues that such an approach can provide only a partial account of consumer behavior and census-based marketing. In contrast, a textured, *cultural* understanding of consumption and its accompaniments (e.g., advertising, packaging, shopping centers, mass media) might provide a more realistic depiction of consumer behavior and its motivations. Such an approach might also help determine whether the marketers' use of census data is designed to be informative and responsive, invasive and exploitative, or something else altogether.

It should be noted, of course, that anyone attempting to question the provision of census data to marketers bears a heavy burden of persuasion. Facilitating an informational infrastructure for private activity has long been viewed as an essential role of government.²² The results of the decennial population count are a vital component of such an infrastructure, providing as they do the starting point for virtually all understandings of the diversity and dynamism of the American population.²³ Moreover, since the beginning of U.S. census-

²¹ See *id.* at 39 ("The law seems to view the consumer either as a puppet of false consciousness or a rational subject making careful choices.").

²² See *infra* text accompanying notes 43–56.

²³ See U.S. GEN. ACCOUNTING OFFICE, DECENNIAL CENSUS: OVERVIEW OF HISTORICAL CENSUS ISSUES 12 (1998) ("Data from a decennial census provide official, uniform information gathered over the decades on this country's people and their social, demographic, and economic characteristics. They provide the baselines for countless other surveys" (footnote omitted)); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, REPORT TO CONGRESS: THE PLAN FOR CENSUS 2000, at ix (rev. Aug. 1997) ("Census data tells us what we know about our country; they are the definitive benchmark for virtually all demographic information"), <http://www.census.gov/main/plans/plan2000.pdf>.

taking, government officials have made census results freely available to academic and professional users, including users engaged in the practice of marketing.²⁴ Thus, in addition to the support it derives from political theory, provision of census data to commercial users also holds a historical presumption in its favor. Finally, as one court has noted, “[s]tatistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted.”²⁵ As will become clear in Part III, the interpretation of census data by marketers imports a range of meanings too ambiguous and diverse to generate precise or comprehensive policy recommendations.

In light of these considerations, the purpose of this Review is not to provide a conclusive normative analysis of the census marketing externality. Rather it is simply to argue that the phenomenon of census-based marketing raises complex issues that have received little attention to date. Significantly, to appreciate many of the thorny issues raised by the census marketing externality, one must abandon the categories of sovereignty and susceptibility in favor of the socially situated consumer. One must recognize not only that social context affects consumer preferences, beliefs, values, and lifestyles, but that social context is simultaneously shaped by human forces—by the seemingly innocuous decisions of census bureaucrats, by the sophisticated lifestyle visions of marketers, and by the stylistic whims of individual consumers. Only on such an expanded view can the more subtle, and perhaps more pernicious, effects of census-based marketing be recognized.

I

THE HEADCOUNT

The United States’ first census asked just six basic questions regarding age, sex, and race calculated to determine the nation’s total population size as well as its potential military strength.²⁶ James Madison had proposed a more detailed survey of the population’s occupational characteristics, but he was rebuked by an early Congress which, in Madison’s words, considered the proposed survey “a waste of trouble and supplying [of] materials for idle people to make a book.”²⁷ Thus, the United States marshals, accompanied by some 650 assistants, set out in August 1790 to conduct the nation’s first census,²⁸ not as a sociological inquiry, but as a simple enumeration. And al-

²⁴ See *infra* text accompanying notes 57–61.

²⁵ *United States v. New Hampshire*, 539 F.2d 277, 280 (1st Cir. 1976).

²⁶ See MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 14 (1988).

²⁷ JAMES H. CASSEDY, *DEMOGRAPHY IN EARLY AMERICA* 216 (1969) (quoting Letter from James Madison to Thomas Jefferson (Feb. 14, 1790), in 13 *THE PAPERS OF JAMES MADISON* 41 (Charles F. Hobson et al. eds., 1981)).

²⁸ See ANDERSON, *supra* note 26, at 13.

though a “book” of sorts was eventually produced from this effort, its slender fifty-six pages revealed little other than the facts necessary to apportion members of the House of Representatives among the states and their nearly four million residents.²⁹

The 2000 census, on the other hand, was the largest peacetime mobilization in the history of the United States, employing approximately 970,000 people to distribute, collect, and tabulate 400 million questionnaires covering 115.9 million housing units and 281.4 million people.³⁰ The census questionnaires contained six population questions and one housing question in the “short form” sent to most households, and forty-six additional questions in the “long form” sent to one out of every six households.³¹ The resulting stream of data promises to inform researchers not only about the population’s size, age distribution, and racial constitution, but also about such matters as marital status, educational attainment, migratory patterns, languages, and housing values.³²

This Part describes briefly the evolution of the U.S. census from a horseback headcount to an unparalleled sociodemographic study, examining in the process both the latest iteration of the decennial census and a sampling of the recurring controversies that it has generated over the years.

A. Overview of Census Law and History

“Although the census is the delight of statisticians and sociologists . . . it was not created for those purposes.”³³ Instead, the census was designed to implement the Great Compromise between small and large states by providing a means for periodically reallocating political power according to population shifts. Article I, Section 2, Clause 3 of the U.S. Constitution sets forth in relevant part:

Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United

²⁹ See *id.* at 14; see also U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, USES FOR QUESTIONS ON THE CENSUS 2000 FORM, at I-1 (1998), http://www.census.gov/pub/dmd/www/pdf/02a_in.pdf (“The earliest censuses were simple tallies of individuals in each household.”); Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1904 (1981) (“The first United States census in 1790 sought little more than the constitutionally required enumeration of persons, slave and free.”).

³⁰ See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, INTRODUCTION TO CENSUS 2000 DATA PRODUCTS 1 (2001), <http://www.census.gov/mso/www/prodprof/census2000.pdf>; Merrick, *supra* note 4.

³¹ See U.S. CENSUS BUREAU, *supra* note 30, at 1.

³² See *id.*

³³ *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir. 1981).

States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.³⁴

The original and primary role of the census, therefore, was to provide the data necessary to apportion seats in the House of Representatives once every ten years.³⁵ However, the Framers left the details of both the enumeration process and the apportionment mechanism unspecified.³⁶

Many have seized upon this spare constitutional language as a reason for challenging the federal government's authority³⁷ to gather the extensive demographic information that it does. After all, the "actual enumeration" required by the Constitution does not necessarily entail the collection and compilation of all manner of ancillary sociological data. Moreover, census respondents are given no choice as to whether their data will be passed along in aggregate form to market-

³⁴ U.S. CONST. art. I, § 2, cl. 3.

³⁵ The census was also intended to enable the apportionment of direct federal taxes, but the national government rarely utilized its power of direct taxation and the Sixteenth Amendment eventually made apportionment unnecessary. See ANDERSON, *supra* note 26, at 111; U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 12. Other governmental uses of census data abound, however. Most significantly, the data are used to determine eligibility for certain federal aid programs and guide the disbursement of more than \$100 billion in federal funds annually. See U.S. CENSUS BUREAU, *supra* note 29, at I-1. A sampling of further uses includes: determining the allocation of electoral votes to the states for selection of the president, drawing state congressional and legislative districts, compiling data used in antitrust litigation, calculating the Consumer Price Index, and marshalling statistics on race for use as evidence in discrimination suits. See Sheldon T. Bradshaw, Note, *Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 GEO. WASH. L. REV. 379, 385 (1995).

³⁶ This silence turned out to be significant, as technical but all-important questions of measurement and allocation have plagued the apportionment process since its inception. See *Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992) ("As one season follows another, the decennial census has again generated a number of reapportionment controversies."). Most recently, both the 1990 and the 2000 population censuses prompted great debate concerning whether and how to utilize modern sampling techniques to overcome the widely recognized problem of undercounting, particularly undercounting of certain minority groups. See Margo Anderson & Stephen E. Fienberg, *Census 2000: Politics and Statistics*, 32 U. TOL. L. REV. 19 (2000); David B. Goldin, *Number Wars: A Decade of Census Litigation*, 32 U. TOL. L. REV. 1 (2000); Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899 (2001); Bradshaw, *supra* note 35; Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841 (1981); Benjamin J. Razi, Comment, *Census Politics Revisited: What to Do When the Government Can't Count?*, 48 AM. U. L. REV. 1101 (1999).

³⁷ Congress has delegated the duty to conduct the decennial census to the Secretary of Commerce. See 13 U.S.C. § 141 (2000). Pursuant to 13 U.S.C. § 21 (2000), the Secretary in turn has delegated this function to the Census Bureau. Nevertheless, it is important to bear in mind that ultimate authority over the content and format of census questionnaires rests with Congress. The Secretary of Commerce must submit to Congress "not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census," and "not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census." *Id.* § 141(f).

ers and other users. Indeed, they face statutory penalties for refusing to provide responses to Bureau inquiries.³⁸ Courts, however, have treated challenges to the Bureau's authority to require responses perfunctorily,³⁹ no doubt influenced by the fact that only aggregate, not individual, level data are released and by the fact that the federal government has sought at least some information not strictly necessary to the apportionment headcount since the very first census. As one court recently stated: "Such a census has been thought to be necessary for over two hundred years. There is no basis for holding that it is not necessary in the year 2000."⁴⁰

Still, one might question why, apart from historical artifact, ancillary data collection has been deemed "necessary." As noted above,⁴¹ Congress authorized questions pertaining to age, gender, and race in the 1790 census. The reasons for such inquiries at that time were quite pragmatic: age and gender in order to assess the nation's potential military strength, race in order to implement the three-fifths compromise.⁴² Madison's vision, however, was much bolder:

[A]ll legislatures had wished for [extensive demographic information]; but this kind of information had never been obtained in any country. . . . If the plan was pursued in taking every future census, it would give them an opportunity of marking the progress of the society, and distinguishing the growth of every interest.⁴³

In other words, because of its mandatory and comprehensive nature, the census could provide an ideal opportunity for gathering sound data necessary to assist both the rational design of legislation and the accurate mapping of national development.

Despite Madison's early failure to persuade Congress, the U.S. census has expanded to encompass his vision. From its beginnings as a simple tally, the enumeration process quickly evolved into a sweeping sociological exercise, provoking great academic and popular interest.⁴⁴ Inquiries about manufacturing were added in 1810,

³⁸ See *infra* text accompanying note 107.

³⁹ See, e.g., *United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) ("The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively."); *United States v. Moriarity*, 106 F. 886, 891 (C.C.S.D.N.Y. 1901) ("It would be [a] curious governmental debility that should incapacitate the nation from directing its census enumerator to ask an inhabitant concerning his business because for certain purposes he was only to be counted . . .").

⁴⁰ *Morales v. Daley*, 116 F. Supp. 2d 801, 820 (S.D. Tex. 2000).

⁴¹ See *supra* text accompanying note 26.

⁴² See ANDERSON, *supra* note 26, at 12-14.

⁴³ *Baldrige v. Shapiro*, 455 U.S. 345, 354 n.9 (1982) (quoting 13 THE PAPERS OF JAMES MADISON, *supra* note 27, at 8-9).

⁴⁴ See RUTH KASSINGER, U.S. CENSUS: A MIRROR OF AMERICA 29 (2000).

occupational questions in 1820,⁴⁵ and questions regarding disability and health in 1830.⁴⁶ By 1850, the census sought additional information, including place of birth, school attendance, literacy, and criminal records.⁴⁷ Around this time, a consensus began to emerge that the importance of the census far exceeded its somewhat mechanistic role as an apportionment mechanism.⁴⁸ Writing in 1843, former Congressman George Tucker lauded the census as having “substantial merits of its own,” allowing as it does “speculations in political philosophy of great moment and interest [to] be made to rest on the unerring logic of numbers.”⁴⁹

Congress began to subscribe to this lofty view in the 1850s as it “redirected the census from its traditional role as an apportionment instrument and added major new scientific functions to the decennial effort.”⁵⁰ Indeed, a new standard of statistical curiosity was set in 1890, when the Census Bureau posed over 13,000 questions to respondents through the use of 200 separate questionnaires.⁵¹ While more recent censuses have retreated somewhat from that prodigious effort, the Census Bureau has added, altered, and removed population and housing questions ever since, based upon perceived informational needs that far exceed the simple population count necessary for apportionment.⁵²

Toward the end of the nineteenth century, policymakers also began to view the census as an instrument of primarily economic utility. Thus, when Congress formed the Department of Commerce in 1903 with the express charge to “foster, promote, and develop the foreign and domestic commerce,”⁵³ it was careful to house the Census Bureau within the new department. By the 1920s, “[t]he bureau’s energies . . . were directed toward the improvement of business statistics, toward fostering cooperation between industry, government, and academic experts in the area of economic statistics, and toward the collection of data that might foster improvements in the national

⁴⁵ *See id.*

⁴⁶ *Morales v. Daley*, 116 F. Supp. 2d 801, 818 (S.D. Tex. 2000).

⁴⁷ *See id.*

⁴⁸ *See* ANDERSON, *supra* note 26, at 85 (noting that in the latter half of the nineteenth century, “the census . . . became a full-fledged instrument to monitor the overall state of American society”).

⁴⁹ *Id.* at 22 (quoting GEORGE TUCKER, *PROGRESS OF THE POPULATION OF THE UNITED STATES IN POPULATION AND WEALTH IN FIFTY YEARS* 1, 13–14 (Augustus Kelley ed., 1964) (1843)).

⁵⁰ *Id.* at 33–34.

⁵¹ *See* KASSINGER, *supra* note 44, at 30.

⁵² During preparations for the most recent census, the Office of Management and Budget, in conjunction with the Census Bureau, surveyed all federal agencies with regard to their informational needs and produced a report detailing the various federal programs that utilize census data. *See* U.S. CENSUS BUREAU, *supra* note 29, at I-3.

⁵³ 15 U.S.C. § 1512 (2000).

economy without the heavy hand of government 'planning.'⁵⁴ A significant moment in the evolution of the population census came in 1940, when the Bureau added questions on individual income and wealth to the decennial survey.⁵⁵ Subsequent advances in Bureau geographic linking techniques in the 1950s and 1960s meant that answers to the income questions could be transformed into per capita income distributions for local areas.⁵⁶ As Part II will show, such calculations have proven essential to modern marketing approaches.

Additionally, throughout these developments the Bureau has maintained a strong working relationship with academic and professional users of census data. For instance, by the late nineteenth century, business associations began lobbying for inclusion of census questions that would suit their needs,⁵⁷ and the Bureau accepted their requests.⁵⁸ A formal relationship among these groups began in 1918 with the formation of the Census Advisory Committee of the American Statistical Association and the American Economic Association.⁵⁹ The American Marketing Association (AMA), following its formation in 1937, also became a member of the Advisory Committee.⁶⁰ Today these organizations continue their consultative role by "advis[ing] the Director, Bureau of the Census, on the full range of Census Bureau programs and activities in relation to [their] areas of expertise."⁶¹

As historian Margo Anderson notes, the Advisory Committee has played a prominent role in shaping the U.S. population census: "The committee effectively served as a policymaker in the absence of strong bureau leadership. Over the years its members testified before Congress, wrote reports on sensitive issues, determined the form and content of census schedules and set priorities for special census studies."⁶²

⁵⁴ ANDERSON, *supra* note 26, at 129–30.

⁵⁵ *See id.* at 111.

⁵⁶ *See id.* at 206.

⁵⁷ *Id.* at 85.

⁵⁸ *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 18.

The Bureau and its predecessor entities have always been responsive to congressional direction, but they have also been influenced by the many users of its statistics. In the nineteenth century, . . . business associations . . . were among those who influenced the questions contained in the schedules, and the censuses provided them data that helped them in their various endeavors.

Id.

⁵⁹ *See* ANDERSON, *supra* note 26, at 128.

⁶⁰ *See* Am. Marketing Ass'n, *Marketing Services Guide* (Sept. 1, 2001), at <http://www.ama.org/about/ama/atglance.asp>; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHARTER OF THE CENSUS ADVISORY COMMITTEE OF PROFESSIONAL ASSOCIATIONS (Mar. 27, 2000), at <http://www.census.gov/cac/www/commcharter.html> (listing the American Marketing Association as member).

⁶¹ U.S. CENSUS BUREAU, *supra* note 60.

⁶² ANDERSON, *supra* note 26, at 129; *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 18 ("Professional statisticians have been and continue to be influential in the Secre-

The Advisory Committee, for example, played a prominent role in the design of the 1930 census, which added new questions on consumer goods and unemployment.⁶³ It was also instrumental in introducing the sampling techniques that permit the Bureau to collect supplementary data at a much reduced cost and with less total burden on respondents.⁶⁴ Such techniques, which allow the Bureau to generate population-level conclusions using data gathered from only a small subset of the population, led to the introduction of the long form questionnaire for extensive socioeconomic questions, which the Bureau still uses today.⁶⁵

In sum, over the preceding two centuries, the U.S. population count has steadily evolved from a rudimentary reckoning to the primary basis for measuring and comprehending the nation's size, economic characteristics, and demographic composition. This expansion of purpose was not inherent in the constitutional or statutory framework of the census, but was instead the result of a conscious effort by policymakers, academics, and business-minded lobbyists to design and implement a national information infrastructure.

B. The 2000 Census of Population and Housing

Although the Census Bureau conducts about 200 other censuses and surveys,⁶⁶ it is the constitutionally mandated population count that truly demonstrates the Bureau's data-collecting capabilities. Weeks before the official census date of April 1, 2000, the U.S. Post Office and Census Bureau staff began delivering over one hundred million census forms to households across the nation.⁶⁷ In addition, over 30,000 canvassers planned to survey approximately 22 million residences lacking known postal delivery addresses.⁶⁸ During the en-

tary's determination of the form and content of the questions, as well as in decisions concerning the presentation of data.").

⁶³ See ANDERSON, *supra* note 26, at 159–60.

⁶⁴ See *id.* at 176–77.

⁶⁵ In recent years, the Bureau has sought to replace the long form with a smaller but more frequent survey of approximately three million households. Known as the American Community Survey, this technique would gather the same type of information as the long form but on an annual basis. See Nicholas Kulish & Will Pinkston, *The Long Form May Be Down for the Count*, WALL ST. J., Feb. 14, 2001, at B1. Business interests naturally are in support of the plan. See *The American Community Survey—A Replacement for the Census Long Form?: Hearing Before the Subcomm. on the Census of the House Comm. on Gov't Reform*, 106th Cong. 65 (2000) (statement of David Crowe, Staff Vice President for Housing Policy, Nat'l Ass'n of Home Builders) ("The American Community Survey . . . would provide far more timely data than the once-a-decade long form, and allow far more precise estimates of change over time."); Kulish & Pinkston, *supra* ("After companies see what the [American Community Survey] can do . . . 'they won't ever want to go back to what they were doing before.'" (quoting Karl Eschbach, Professor of Sociology, University of Houston)).

⁶⁶ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 17.

⁶⁷ Anderson & Fienberg, *supra* note 36, at 19.

⁶⁸ See U.S. CENSUS BUREAU, *supra* note 23, at 20.

suing months, a temporary army of 500,000 enumerators paid personal visits to millions of households that did not respond to earlier questionnaire mailings.⁶⁹ The results of this \$4 billion effort⁷⁰ were impressive. For the first time in census history, voluntary questionnaire response rates did not decline from the prior decade's rates.⁷¹ Enumerator follow-up to nonresponding households was also successful, as experts predicted a reduction in the undercount rate from the highly criticized 1990 survey.⁷² In short, despite all of the controversy that it engendered,⁷³ commenters have hailed the 2000 effort as "a good census."⁷⁴

Following the physical enumeration, the Bureau compiles and releases data in stages over a three-year period.⁷⁵ Information necessary to conduct congressional reapportionment and local redistricting efforts receives top processing priority.⁷⁶ After completing that task, the Bureau then releases counts and basic cross-tabulations of information collected on the short form questionnaire. The far more detailed information collected by the long form questionnaire is the last to be released, currently scheduled for availability in late 2002. Eventually, all of the data will be available for a variety of geographic divisions, including states, postal zip code approximations, metropolitan areas

⁶⁹ See Anderson & Fienberg, *supra* note 36, at 20.

⁷⁰ See Letter from Kenneth Prewitt, Director, U.S. Census Bureau, to Dan Miller, Chairman, Subcomm. on the Census of the Comm. on Gov't Reform 1 (Sept. 27, 2000), <http://www.census.gov/Press-Release/www/2000/927miller.pdf> (describing a total funding level of \$4.5 billion with an anticipated surplus of \$305 million).

⁷¹ See U.S. Census Bureau, U.S. Dep't of Commerce, "Well Done, America" (Sept. 19, 2000), <http://www.census.gov/Press-Release/www/2000/cn57.html>. Response rates to the long form questionnaire, however, were negatively affected by political criticism of the form as an abuse of privacy. See Anderson & Fienberg, *supra* note 36, at 19; *infra* Part I.C.

⁷² See U.S. Census Bureau, U.S. Dep't of Commerce, *Statement by William G. Barron Jr. on the Current Status of Results of Census 2000 Accuracy and Coverage Evaluation Survey* at tbl.1 (July 13, 2001), <http://www.census.gov/Press-Release/www/2001/cb01cs06.html> (reporting a national net undercount rate of 1.18% as compared to 1.61% for the prior census).

⁷³ Preparations for the 2000 census sparked considerable debate regarding the use of statistical sampling to remedy racial undercounting. This debate, touched upon *supra* note 36, has taken dramatic twists in recent years. In *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), the Supreme Court determined that the Census Act prohibits the use of sampling techniques for apportionment purposes. *Id.* at 317. The Clinton Administration responded by devising a plan to use numbers adjusted by sampling for other purposes such as redistricting. See Daniel Garth Hazard, Note, Department of Commerce v. United States House of Representatives—*Constitutional Text: Out of Sight, Out of Mind*, 32 U. Tol. L. Rev. 89, 89 (2000). The Bush Administration, however, later moved to block any release of the adjusted data. See *Government Reform Democrats Sue over Sampled Census Data*, CONGRESSDAILY A.M., May 22, 2001, 2001 WL 20347349.

⁷⁴ Anderson & Fienberg, *supra* note 36, at 20 (quoting Census Director Kenneth Prewitt).

⁷⁵ See U.S. CENSUS BUREAU, *supra* note 30, at 3.

⁷⁶ See 13 U.S.C. § 141(b)–(c) (2000) (specifying periods of nine months and one year following the census date, respectively, to deliver apportionment and local redistricting data).

consisting of at least 50,000 people, census tracts consisting of only 4,000 people, and approximately 8.5 million unique census blocks, the smallest geographic unit for which the Census Bureau tabulates data.⁷⁷

In 2000, the short form sought information related to the following topics: name, sex, age, relationship to householder, Hispanic origin, race, and tenure (i.e., whether a housing unit is owned or rented). Table 1, which summarizes the 2000 short form results for the city of Ithaca, New York, demonstrates the many ways in which such basic demographic data can be revealing. One can immediately see, for instance, that Ithaca has a disproportionately high percentage of college-age residents, with 36% of its population aged 20 to 24 years, compared to a national average of just 6.7%.⁷⁸ In addition, Ithaca's median age of 22.0 years is well below the national median of 35.3, defying the baby boomer aging trend that led in 2000 to the highest median age ever recorded for the United States.⁷⁹ No surprise, therefore, that Ithaca is home to both Cornell University and Ithaca College.⁸⁰ Ithaca also bucked national trends by reporting a decline in total population size from 29,541 to 29,287 between the 1990 and 2000 censuses.⁸¹ The nation as a whole, by contrast, added some 32.7 million people, the largest ten-year population gain in the country's history.⁸² In fact, the only areas in the country not experiencing population growth during the last decade tended to be predominantly rural areas,⁸³ such as the interior New York countryside where one finds the city of Ithaca.

⁷⁷ U.S. CENSUS BUREAU, *supra* note 30, at 2; *see also* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CENSUS 2000 REDISTRICTING DATA (PUBLIC LAW 94-171) SUMMARY FILE: TECHNICAL DOCUMENTATION app. A (2001), <http://www.census.gov/prod/www/abs/pl94-171.pdf> (describing a variety of Census Bureau geographic entities).

⁷⁸ National-level data are available at U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING, <http://www.census.gov> (last visited Nov. 19, 2001).

⁷⁹ *See* U.S. Census Bureau, U.S. Dep't of Commerce, *Nation's Median Age Highest Ever, But 65-and-Over Population's Growth Lags, Census 2000 Shows*, U.S. DEP'T OF COMMERCE NEWS, May 15, 2001, <http://www.census.gov/Press-Release/www/2001/cb01cn67.html>.

⁸⁰ Another consequence of Ithaca's high student population is a tight rental housing market. Census 2000 data shows a rental vacancy rate of 2.7% for Ithaca, while the national average is 6.8%. *See* U.S. CENSUS BUREAU, *supra* note 78, tbl.DP-I; *see also* Daniel E. Wenner, Note, *Renting in Collegetown*, 84 CORNELL L. REV. 543 (1999) (providing a thorough description and economic analysis of the Ithaca rental housing market).

⁸¹ 2000 and 1990 data for the city of Ithaca are available at <http://factfinder.census.gov> (last visited Nov. 19, 2001); *see also* Rebecca James, *Ithaca Struggles to Stay a Metropolis*, POST-STANDARD (Syracuse), May 21, 2001, at A1 (noting that Ithaca and its surrounding communities risked losing federal transportation funds if the 2000 population count dropped below 50,000).

⁸² U.S. Census Bureau, U.S. Dep't of Commerce, *Largest Census-to-Census Population Increase in U.S. History as Every State Gains, Census Bureau Reports*, U.S. DEP'T OF COMMERCE NEWS, Apr. 2, 2001, <http://www.census.gov/Press-Release/www/2001/cb01cn64.html>.

⁸³ *Id.*

In other respects, however, Ithaca conformed to national demographic shifts between the two most recent censuses. As with the nation as a whole, the city's 2000 data reflect a shift away from traditional family households to households maintained by single women and non-family households.⁸⁴ Comparing 1990 and 2000 census results also shows that Ithaca is home to an increasingly diversifying population, with the percentage of Hispanic residents rising from 3.6% to 5.3%, black or African American residents rising from 6.5% to 7.8%, and Asian residents rising from 10.0% to 15.1%.⁸⁵ Nationally, such trends were even more pronounced. Indeed, the Bureau's 2000 enumeration revealed an Hispanic population 9.9% higher than it had projected as recently as November 2000.⁸⁶

It is important to note that the geographic unit of analysis for such data need not be so crude as a city of 30,000 people. Indeed, in addition to the many official areas defined by the Census Bureau, one can also utilize the Bureau's Topologically Integrated Geographic Encoding and Referencing system (TIGER) to generate custom reports for almost any geographic area the user cares to define.⁸⁷ A TIGER-generated map of the author's home neighborhood, for instance, revealed an area containing a total population of only 41 people according to the 2000 census results.⁸⁸ Currently, several marketing firms make limited census demographic data for any such user-defined area freely available on the Internet.⁸⁹ In other words, given publicly released census data and available technologies, the inquisitive mind easily can determine, say, the age characteristics of an area as small as one's own city block. Moreover, in subsequent months, the Census Bureau will release Public Use Microdata Sample (PUMS) files, which allow users to acquire the actual individual questionnaire responses,

⁸⁴ Given its large student population, Ithaca generally has a much higher percentage of non-family households than the nation at large—71.2% compared to 31.9% nationally for the year 2000. U.S. CENSUS BUREAU, *supra* note 78. In absolute terms, however, Ithaca saw its family households and married-couple family households decline significantly between 1990 and 2000, while the number of non-family households and households headed by single women actually increased despite a slight decline in total population. *See id.*

⁸⁵ Completely reliable comparisons between 1990 and 2000 census racial data cannot be made, given respondents' ability to select more than one racial category for the 2000 census. *See infra* text accompanying note 227. Even if one focuses only on Ithaca residents who selected a single race in the year 2000, however, the trend of increasing racial diversity remains present.

⁸⁶ *See* Ira Teinowitz, *Counting Change*, ADVERTISING AGE, May 14, 2001, at 16.

⁸⁷ *See* Joel Morrison, *Census 2000 and Geographic Information Infrastructures*, 32 U. TOL. L. REV. 35, 36–37 (2000).

⁸⁸ The data provided in the next two paragraphs relate to an area defined by a half mile radius surrounding a particular household address located within the neighborhood, as reported on a private marketing firm's website.

⁸⁹ *See, e.g.*, ClaritasExpress, at <http://www.foggybottom.claritas.com> (last visited Nov. 19, 2001); FreeDemographics.com, at <http://www.freedemographics.com> (last visited Nov. 19, 2001).

TABLE I:
2000 PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS
ITHACA CITY, TOMPKINS COUNTY, NEW YORK

Subject	Number	Percent	Subject	Number	Percent
Total population	29,287	100.0	HISPANIC OR LATINO AND RACE		
SEX AND AGE			Total population	29,287	100.0
Male	14,830	50.6	Hispanic or Latino (of any race)	1,555	5.3
Female	14,457	49.4	Mexican	296	0.8
Under 5 years	727	2.5	Puerto Rican	406	1.4
5 to 9 years	721	2.5	Cuban	80	0.3
10 to 14 years	729	2.5	Other Hispanic or Latino	833	2.8
15 to 19 years	5,739	19.6	Not Hispanic or Latino	27,732	94.7
20 to 24 years	10,551	36.0	White alone	20,893	71.3
25 to 34 years	3,703	12.6	RELATIONSHIP		
35 to 44 years	2,179	7.4	Total population	29,287	100.0
45 to 54 years	2,080	7.1	In households	21,870	74.7
55 to 59 years	593	2.0	Householder	10,287	35.1
60 to 64 years	429	1.5	Spouse	1,951	6.7
65 to 74 years	822	2.8	Child	2,981	10.2
75 to 84 years	705	2.4	Own child under 18 years	2,432	8.3
85 years and over	309	1.1	Other relatives	419	1.4
Median age (years)	22.0	(X)	Under 18 years	156	0.5
18 years and over	26,582	90.8	Nonrelatives	6,232	21.3
Male	13,433	45.9	Unmarried partner	590	2.0
Female	13,149	44.9	In group quarters	7,417	25.3
21 years and over	18,093	61.8	Institutionalized population	180	0.6
62 years and over	2,107	7.2	Noninstitutionalized population	7,237	24.7
65 years and over	1,836	6.3	HOUSEHOLD BY TYPE		
Male	627	2.1	Total households	10,287	100.0
Female	1,209	4.1	Family households (families)	2,953	28.8
RACE			With own children under 18 years	1,459	14.2
One race	28,302	96.6	Married-couple family	1,951	19.0
White	21,663	74.0	With own children under 18 years	818	8.0
Black or African American	1,965	6.7	Female householder, no husband present	803	7.8
Am. Indian and Alaska Native			With own children under 18 years	524	5.1
Native	114	0.4	Nonfamily households	7,329	71.2
Asian	3,998	13.7	Householder living alone	4,451	43.3
Asian Indian	570	1.9	Householder 65 years and over	762	7.4
Chinese	1,659	5.7	Households with individuals under 18 years	1,571	15.3
Filipino	93	0.3	Households with individuals 65 years and over	1,355	13.2
Japanese	207	0.7	Average household size	2.13	(X)
Korean	469	1.6	Average family size	2.81	(X)
Vietnamese	125	0.4	HOUSING OCCUPANCY		
Other Asian*	875	3.0	Total housing units	10,736	100.0
Native Hawaiian and Other Pacific Islander	16	0.1	Occupied housing units	10,287	95.8
Native Hawaiian	5	0.0	Vacant housing units	449	4.2
Guamanian or Chamorro	2	0.0	For seasonal, recreational, or occasional use	48	0.4
Samoan	4	0.0	Homeowner vacancy rate (percent)	2.1	(X)
Other Pacific Islander**	5	0.0	Rental vacancy rate (percent)	2.7	(X)
Some other race	546	1.9	HOUSING TENURE		
Two or more races	985	3.4	Occupied housing units	10,287	100.0
<i>Race alone or in combination with one or more other races***</i>			Owner-occupied housing units	2,671	26.0
White	22,376	76.4	Renter-occupied housing units	7,616	74.0
Black or African American	2,282	7.8	Average household size of owner-occupied units	2.30	(X)
Am. Indian and Alaska Native	289	1.0	Average household size of renter-occupied units	2.07	(X)
Asian	4,428	15.1			
Native Hawaiian and Other Pacific Islander	133	0.5			
Some other race	834	2.8			

Source: U.S. Census Bureau, U.S. Dep't of Commerce, *Census 2000: Advance National Summary File 1 (SF 1)*, <http://factfinder.census.gov>

(X) Not applicable

* Other Asian alone, or two or more Asian categories.

** Other Pacific Islander alone, or two or more Native Hawaiian and other Pacific Islander Categories.

*** In combination with one or more other races listed. The six numbers may add to more than 100 percent because individuals may report more than one race.

stripped of name and address information, for desired geographic areas.⁹⁰

Of course, such findings are merely the tip of the iceberg when one considers that the far more detailed long form data are yet to come. Results from the previous census reveal, for instance, that in 1990, the author's home neighborhood contained just thirty-three people living in fifteen housing units. According to estimates generated from the long form sample, eighteen of these people were employed outside the home, with jobs in such fields as education, manufacturing, construction, communications, retail, and transportation. Three-quarters of the neighborhood work force commuted alone, with the average trip for all commuters being 15.47 minutes. The majority acquired at least some college experience, and their children overwhelmingly attended public educational institutions. Median household income was \$39,773, while mean household income was \$46,431. Three housing units in the area were rentals, while the remainder were owner-occupied, all having a median value of \$105,100.⁹¹

Similar information will soon be available from the 2000 census for forty-six separate questions covering the social, economic, and housing characteristics of one out of every six U.S. residents. As one can surmise, a staggering number of cross-tabulations are possible using the results of such questions, with an equally staggering number of available geographic restrictions. Indeed, as Part II will detail, the population census data are comprehensive enough to allow the drawing of remarkably rich demographic and cultural portraits of almost any U.S. locality. Given the impressive scope of the 2000 census information and the geographic detail with which it now can be extracted, it is perhaps not surprising that some commentators have criticized the census generally and the long form in particular as invasions of privacy.⁹² As the next subpart illustrates, however, such criticisms often fail to understand and appreciate both the legal provisions that protect individual respondent confidentiality and also the power to identify and target respondents that exists despite such provisions.

⁹⁰ See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE U.S. CENSUS BUREAU'S RECOMMENDATIONS CONCERNING THE CENSUS 2000 PUBLIC USE MICRODATA SAMPLE (PUMS) FILES (Nov. 3, 2000). The Bureau does take steps to protect the privacy of individual census respondents, for instance, by releasing actual individual questionnaire results only for "geography sufficiently broad to protect confidentiality." U.S. CENSUS BUREAU, *supra* note 30, at 3.

⁹¹ Of course, because such data are calculated from the long form sample, the reliability of the data varies inversely with the degree of geographic specificity.

⁹² See, e.g., Hudgins Testimony, *supra* note 16.

C. Privacy and the Census

Throughout its history, the population census has faced resistance from respondents worried about privacy.⁹³ As early as 1870, Congressman James A. Garfield complained that the citizen's "'private affairs, the secrets of his family and his business, will be disclosed to his neighbors'" or be "'made the quarry of bookmakers and pamphleteers.'"⁹⁴ New questions added to the 1890 census on diseases and home mortgages sparked "a storm of public protest that such questions were impertinent, illegal, and unconstitutional."⁹⁵ Later, libertarian commentator William Rickenbacker refused to answer the 1960 census schedule, proclaiming in the *National Review* that "when the summer satrap of the Snooper State comes to ask me why I refuse to contribute my share of statistics to the national numbers game, I shall call for my lawyer."⁹⁶ A federal lawsuit challenging the Bureau's authority to require answers to racial-classification and medical questions in the 2000 census demonstrates the continuing unease with which many people greet the Bureau's decennial survey.⁹⁷

Such concerns are not entirely without basis. Throughout history, census data have been utilized for nefarious or questionable purposes, "from Hitler's misuse of the European Census to Sherman's use of census data to facilitate his March through Georgia."⁹⁸ Indeed, the U.S. Census Bureau released certain aggregated census information that enabled the internment of Japanese-Americans during World War II.⁹⁹ Nevertheless, despite such historical counterexamples, the Bureau has maintained a policy of strict confidentiality with respect to individual census returns since at least 1840.¹⁰⁰ This policy received formal statutory expression in 1909,¹⁰¹ and remains evident in present provisions of the Census Act.¹⁰² Census officials and courts acknowl-

⁹³ See Note, *supra* note 29, at 1905.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ William F. Rickenbacker, *The Fourth House*, NAT'L REV., May 21, 1960, at 325. Rickenbacker was shortly thereafter convicted of violating 13 U.S.C. § 221(a). See *United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962).

⁹⁷ See *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000).

⁹⁸ Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 STAN. TECH. L. REV. 1, ¶ 106, at http://stlr.stanford.edu/stlr/articles00_STLR_2.

⁹⁹ See ANDERSON, *supra* note 26, at 194.

¹⁰⁰ See *Baldrige v. Shapiro*, 455 U.S. 345, 356 n.11 (1982); see also U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 35 (quoting 1850 Bureau policy that returns were to be "'exclusively for the use of the government, and not to be used in any way to the gratification of curiosity, the exposure of any man's business or pursuits, or for the private emolument of the marshals or assistants'").

¹⁰¹ See *Baldrige*, 455 U.S. at 356 n.11 (referring to the 1909 revisions of the Census Act).

¹⁰² See 13 U.S.C. §§ 8-9 (2000). Specifically, § 8(b) provides that subject to specified limitations, "the Secretary [of Commerce] may furnish copies of tabulations and other

edge that these strict proscriptions are necessary in order to ensure the viability of the census process: "Although Congress has broad power to require individuals to submit responses, an accurate census depends in large part on public cooperation. To stimulate that cooperation Congress has provided assurances that information furnished . . . by individuals is to be treated as confidential."¹⁰³

One might think, therefore, that the long history of this stringent statutory scheme would have mollified concerns over census privacy. During the most recent enumeration, however, claims by key Republican officials that the long form questionnaire represents an unnecessary encroachment by big government into private affairs reignited the debate over census intrusiveness.¹⁰⁴ Former Republican congressman Tom Coburn, for instance, stated vehemently, "[i]t is ridiculous for the Census Bureau to ask personal questions that have nothing to do with their constitutional mandate to count the citizens of the United States."¹⁰⁵ Senator Trent Lott advised constituents not to answer questions on the census forms that they believed were invasive of their privacy,¹⁰⁶ despite the fact that failure to complete and return census forms is a crime punishable by fine.¹⁰⁷ Then-presidential candidate George W. Bush stopped short of encouraging civil disobedience, but did claim to "understand why people don't want to give over that information to the government."¹⁰⁸ Through these and other public statements, the complaining politicians attempted to

statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent." *Id.* § 8(b). Section 9(a) expressly proscribes the Bureau from releasing any information "whereby the data furnished by any particular establishment or individual . . . can be identified." *Id.* § 9(a)(2). Officials violating either prohibition are subject to a fine of up to \$5000 and imprisonment up to five years. *See id.* § 214 (2000). These provisions have been strictly enforced. As the federal courts have repeatedly held, "[b]oth the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality." *McNichols v. Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981); *see also Baldrige*, 455 U.S. at 361 ("§ 8(b) and § 9(a) of the Census Act embody explicit congressional intent to preclude all disclosure of raw census data reported by or on behalf of individuals."); *Seymour v. Barabba*, 559 F.2d 806, 808 (D.C. Cir. 1977) (stating that the provisions of § 9(a) are a "flat barrier to disclosure with no exercise of discretion permitted").

¹⁰³ *Baldrige*, 455 U.S. at 354; *see also* Eleanor Singer et al., *The Impact of Privacy and Confidentiality Concerns on Survey Participation: The Case of the 1990 U.S. Census*, 57 PUB. OPINION Q. 465, 467-68 (1993) (noting that privacy concerns had significant negative impact on 1990 census mail returns).

¹⁰⁴ *See* D'Vera Cohn, *Census Too Nosy? Don't Answer Invasive Questions, GOP Suggests*, WASH. POST., Mar. 30, 2000, at A1.

¹⁰⁵ Genaro C. Armas, *Trent Lott Criticizes Census Form*, AP ONLINE, Mar. 30, 2000, at 2000 WL 17834349.

¹⁰⁶ *See* Cohn, *supra* note 104.

¹⁰⁷ *See* 13 U.S.C. § 221(a)-(b) (2000).

¹⁰⁸ Joe Sciacca, *As a Rebellion, Census Boycott Doesn't Count*, BOSTON HERALD, Apr. 3, 2000, at 8.

characterize the Census 2000 long form as “another onerous sign of the federal government expanding without regard to personal freedom”¹⁰⁹—an ironic criticism given that Congress itself had passed upon the questionnaire content.¹¹⁰

There are other ironies to this recent flare-up. Republican opposition to the census long form appears to have been motivated by a desire to capitalize on what pollsters are calling a “powerful groundswell” of public concern over privacy.¹¹¹ Political analysts consider this groundswell relatively untapped and therefore subject to ideological capture by either of the major parties.¹¹² As Part II will document, however, the analysts’ awareness of such sociological phenomena partially depends on the very census that the Republicans attacked.¹¹³ In other words, opportunistic political criticism of the long form was itself a demonstration of the form’s utility. Moreover, as Republican critics soon discovered, many commercial enterprises adamantly oppose any effort to reduce the amount of information collected by the Census Bureau.¹¹⁴ This apparent tension between the GOP’s public stance and its corporate constituents caused one *Business Week* editorial to lament that “republicans claim to be an ardently pro-business party, but this is one case where populism trumps commercialism.”¹¹⁵

Even defenders of the census long form exhibited a surprising naiveté about the form’s uses. An op-ed piece in *Newsweek* attributed census privacy concerns to an increase in targeted commercial messages: “Americans live in a permanent state of siege. We are bombarded by telemarketers, direct mail, commercials, faxes, and e-mails. It is this constant assault on our time and sensibilities that most threatens what should be a national treasure: the once-a-decade Census.”¹¹⁶ The author fails to note, however, that the marketing bombardment

¹⁰⁹ Judith Graham, *Lawmaker Sees Big Brother in Census Form*, CHI. TRIB., June 25, 2000, § 1, at 4 (quoting Republican Rep. Tom Coburn).

¹¹⁰ See *supra* note 37 (describing procedure whereby the Bureau submits proposed census questionnaires to Congress).

¹¹¹ Richard L. Berke, *What Are You Afraid Of? A Hidden Issue Emerges*, N.Y. TIMES, June 4, 2000, § 4, at 4 (“Increasingly, people confess to pollsters, they are suspicious of companies that have access to their financial and health care records, and are frightened that the information will be used against them. They are no less wary of what the government could do with such data.”).

¹¹² *Id.* (“This is a hill that nobody holds, and either party could seize the ground.” (quoting a Democratic pollster)); see also *id.* (“Acknowledging that either party could potentially become identified with privacy, [Republican pollster Neil] Newhouse said the competition will be over who ‘can be there first and strongest and be the noisiest on it.’”).

¹¹³ See, e.g., U.S. CENSUS BUREAU, *supra* note 23, at 1 (“Census data . . . are the definitive benchmark for virtually all demographic information used by educators, policymakers, journalists, and community and nonprofit organizations.”).

¹¹⁴ See *supra* text accompanying notes 12–14 (describing the formation of the Coalition to Preserve Census Data).

¹¹⁵ Lee Walczak, *Bashing the Census Bashes Business*, BUS. WK., Apr. 24, 2000, at 56.

¹¹⁶ Robert J. Samuelson, *Complete This Form, Please*, NEWSWEEK, Mar. 20, 2000, at 64.

he derides is made possible in no small part by the same national treasure he extols.¹¹⁷ Similar tension can be found in a review of historical census issues prepared by the General Accounting Office: “[I]n an age when many people feel anxious about the reach of marketers, poll-takers, and others who come armed with computer-based data about individuals, the concern over privacy and confidentiality will be hard to vanquish”¹¹⁸

Finally, amidst all of this furor and confusion, the Census Bureau itself took to the airwaves to encourage public participation in the 2000 census. Notably, it did so by embarking on the first paid advertising campaign in the Bureau’s history.¹¹⁹ The Bureau employed five advertising agencies to deliver more than 250 different television, radio, print, outdoor, and Internet ads in seventeen languages, with each audience member receiving an average of fifty impressions of the “census message.”¹²⁰ The campaign, which cost approximately \$167 million, was calculated to reach ninety-nine percent of the population by employing a multitude of narrowcast, audience-specific messages.¹²¹ To gauge its effectiveness, a representative sample of 4,673 Americans were surveyed on a weekly basis during the campaign concerning their attitudes toward the “long-form controversy” and their feelings of “civic disengagement.”¹²² Again, the irony is palpable: The Census Bureau responded to declining participation levels caused in part by concerns over data privacy through the use of sophisticated marketing techniques that were themselves developed using publicly disclosed census information.

Such incongruities might be usefully understood by analogizing from the Bureau’s traditional response to complaints over its role in the Japanese-American internment program. As Professor Anderson has noted, the Bureau defends itself by noting that it never released individual names and addresses, only aggregated data for certain lo-

¹¹⁷ See *infra* Part II (describing use of census data in combination with private informational databases as foundation for many marketing practices).

¹¹⁸ U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 37.

¹¹⁹ *Oversight of the 2000 Census: Examining the Census Bureau’s Advertising Campaign: Hearing Before the Subcomm. on the Census of the House Comm. on Gov’t Reform*, 106th Cong. 22–27 (1999) (statement of Kenneth Prewitt, Director, U.S. Bureau of the Census).

¹²⁰ See U.S. Census Bureau, U.S. Dep’t of Commerce, *Advertising Campaign* (2001), at <http://www.census.gov/dmd/www/advcampaign.html>.

¹²¹ For instance, while most of the population heard the tagline, “This is your future. Don’t leave it blank,” African-American audiences were told, “This is our future. Don’t leave it blank,” to better resonate with the supposed strong sense of group identity among blacks. *Id.* Likewise, American Indians and Alaska Natives heard the missive, “Generations are counting on this. Don’t leave it blank,” to better appeal to those groups’ perceived sense of ancestral responsibility. *Id.*

¹²² InterSurvey, *America’s Experience with Census 2000*, DIRECT MARKETING, Aug. 1, 2000, at 46, 2000 WL 16564893.

calities.¹²³ Nevertheless, while the Bureau achieved technical compliance with legal restrictions on releasing information relating to individuals, the practical effect of its actions was tantamount to individual disclosure given that the released population figures were sufficiently detailed to “provide[] the parameters for finding and interning the [Japanese-American] population.”¹²⁴

The internment experience suggests that much of the rhetoric regarding privacy and the census long form is misguided. That is, the proper situs of controversy should not be the gathering of individual-level data, for the Bureau *has* been scrupulous in its compliance with the privacy provisions of the Census Act. Rather, the controversy should focus on the manner in which the aggregated information can be (and has been) used to achieve results functionally equivalent to individual disclosure. Section 8(c) of the Census Act states plainly that “[i]n no case shall information furnished . . . be used to the detriment of any respondent or other person to whom such information relates.”¹²⁵ Although courts have interpreted this prohibition to apply only to the use of raw personal data supplied by identifiable census respondents,¹²⁶ properly understood, the privacy controversy should center on whether the conceptual distinction between raw data and aggregated data is justified. If not, the disclosure of aggregated data also should be restricted in some manner.

Part II sheds light on this hypothetical debate by examining the ways in which marketers have used aggregated census data to count

¹²³ ANDERSON, *supra* note 26, at 194; *see also* U.S. CENSUS BUREAU, *supra* note 23, at 49 (“The Bureau refused, when requested during World War II, to identify Japanese-American individuals from Census Bureau records . . .”).

¹²⁴ ANDERSON, *supra* note 26, at 194. This practical equivalency is tacitly admitted by the Bureau’s current efforts to make it more difficult for government agencies, marketers, and other data users to attach individual names and addresses to aggregated census information. *See* Glenn R. Simpson, *Bureau Blurs Data to Keep Names Confidential*, WALL ST. J., Feb. 14, 2001, at B1. In neighborhoods containing only three residents of Hispanic ancestry, for example, correlation of the published census data with telephone listings and other available name-specific information (“re-identification”) is not a difficult task. To hinder such matching, the Census Bureau engages in complex data-blurring techniques known as “data-swapping,” “random noise,” and “coarsening,” all designed to protect the integrity of the aggregated data while heightening the security of individual-level information. *See* RICHARD A. MOORE, JR., U.S. BUREAU OF THE CENSUS, ANALYSIS OF THE KIM-WINKLER ALGORITHM FOR MASKING MICRODATA FILES (1996), <http://www.census.gov/srd/papers/pdf/rr96-5.pdf>. Still, even with such statistical counter-maneuvers at its disposal, the Bureau remains concerned about re-identification. *See id.* at 15 (“The expanding capacity of computers and the constant improvement of matching software makes total elimination of disclosure risk an impossibility.”).

¹²⁵ 13 U.S.C. § 8(c) (2000).

¹²⁶ *See, e.g.*, *Supervisors of Boone County v. Vill. of Rainbow Gardens*, 153 N.E.2d 16, 22 (Ill. 1958) (“A careful reading of this provision . . . indicates that the prohibition against the use of information does not refer to the end result of the census . . . but refers to the use of personal information procured from people in the course of taking the census.”).

and classify consumers in highly imaginative and fruitful ways—a process known as market segmentation.¹²⁷

II THE HEAD GAME

To read the business press, one would think that the 2000 census was the most anticipated event in the history of consumer product marketing. Typical was a *Wall Street Journal* article enthusing that “marketers across the country are on the edge of their seats for the fresh census figures, the most definitive, detailed demographic snapshot ever produced of this growing nation.”¹²⁸ Yet using census data to design business plans and fine-tune marketing campaigns is hardly a novel practice. As early as 1916, a statistics expert for Metropolitan Life Insurance Company reported to the American Statistical Association on “The Application of Statistics to Advertising and Marketing,” recommending the Census Bureau as a primary source of data for business firms.¹²⁹ During the 1920s and 1930s, General Motors followed this advice by developing one of the nation’s first targeted direct-marketing campaigns, a booklet featuring the company’s line of products sent to a carefully researched group of “Ford owners of two years standing.”¹³⁰ As any student of marketing history knows, such customer-oriented tactics helped General Motors attract significant market share from Ford Motor Company, whose founder had famously declared that Americans could have any color vehicle they wanted, as long as it was black.¹³¹

Census-based marketing came of age, however, in the 1940s, as Bureau officials began publicly touting the possible uses of population

¹²⁷ See Hanson & Kysar, *supra* note 19, at 1561.

¹²⁸ Merrick, *supra* note 4; see also John Fetto, *Lust for Statistics*, AM. DEMOGRAPHICS, Mar. 2001, at 68 (“For those with an affinity for numbers, the decade-long wait is finally over.”); Valeria Godines, *If Numbers Could Talk*, ORANGE COUNTY REG., May 4, 2000, at C1 (“Marketing companies eager for new information are poised to snatch up the latest census products . . .”); Erin Hallissy, *Marketers See Treasure Trove in Census Data*, S.F. CHRON., Mar. 25, 2001, at A3 (noting that “marketing companies and private businesses . . . view the census . . . as a gold mine of data about how much disposable income you have, what kind of vehicle fits your lifestyle and whether your local supermarket should stock more ethnic foods”). *But see* Jeanette Burriesci, *Timing and Privacy Issues May Reduce CRM Value of Census 2000*, INTELLIGENT ENTER., Apr. 16, 2001, at 14, 15 (claiming that technological advances in customer information capture have pushed businesses away from reliance on census data toward “an ideal of profiling individual customers and prospects in order to retain valuable customers and identify poor customers who aren’t worth keeping”).

¹²⁹ See Hyman L. Roth, *The Application of Statistics to Advertising and Marketing*, 15 PUBLICATIONS AM. STAT. ASS’N 436, 437, 441 (1916).

¹³⁰ Roland Marchand, *Customer Research as Public Relations: General Motors in the 1930s*, in GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY 85, 85 (Susan Strasser et al. eds., 1998) (quoting minutes of the General Sales Committee of General Motors, June 18, 1926).

¹³¹ See SCHIFFMAN & KANUK, *supra* note 7, at 33.

and housing data by consumer product firms.¹³² One official, for instance, noted that census data can be used to segregate the national population into similar subgroups for marketing purposes: "From the examination of a national market through a telescope [one] can turn to dissection and then examine the sections under the microscope."¹³³ Such examination, he argued, could help tailor product lines for "highly specialized markets,"¹³⁴ and locate stores in areas of maximum profit potential.¹³⁵ Decades before the advent of Starbucks, this prescient Census Bureau administrator understood the key to the company's prolific growth.¹³⁶

Two other Bureau officials warned in 1943 of a coming challenge for marketers as unprecedented postwar consumer spending power would require imaginative marketing techniques to distinguish particular products.¹³⁷ To these officials, census data provided the marketers' best weapon: "[I]t is possible to derive directly from census schedules compilations of the social and economic characteristics of groups of individuals that may be of much importance to a business organization . . . [and] for whom names and addresses are available for identification."¹³⁸ As an example, the officials noted that the Bureau provided publishers of the *Saturday Evening Post* and *Better Homes and Gardens* with detailed data concerning the aggregate economic and social features of their subscribers.¹³⁹ That data in turn allowed the publishers to adjust article and advertising content to match the demographic characteristics revealed by the Bureau's statistical breakdown.¹⁴⁰ In the view of the Bureau officials, such targeting practices would become all the more important in the postwar era, as firms strove to distinguish their wares amidst the cacophony of a booming consumer product market.¹⁴¹

¹³² See, e.g., A. Ross Eckler & E.P. Staudt, *Marketing and Sampling Uses of Population and Housing Data*, 38 J. AM. STAT. ASS'N 87, 87 (1943) ("Statistics on the size and characteristics of the population . . . are of basic importance to marketing men . . ."); Reed, *supra* note 2, at 240 ("[F]ar too few businessmen know the profit possibilities of [census] information, available at a negligible fraction of the cost of collection.").

¹³³ Reed, *supra* note 2, at 238.

¹³⁴ *Id.* at 241.

¹³⁵ See *id.* at 242 ("[A]ny retailer desiring to determine the best location for different types of stores has available to him practically all the facts he needs from the census He can certainly know his potential customers better and find better ways to reach the types of consumer which he wishes to cover.").

¹³⁶ See *supra* text accompanying notes 3–6.

¹³⁷ See Eckler & Staudt, *supra* note 132, at 88.

¹³⁸ *Id.* at 89.

¹³⁹ See *id.* at 89–90. The Bureau today continues to provide such services. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 14.

¹⁴⁰ See Eckler & Staudt, *supra* note 132, at 90.

¹⁴¹ See *id.*

The prognosis of these census bureaucrats was accurate. Consumer product marketing did wholeheartedly embrace the statistical techniques that they advocated.¹⁴² Nevertheless, even these officials could not have foreseen the sophistication with which such techniques developed over the next few decades. Driven by advances in computer database technology and the challenges of marketing to an increasingly affluent populace, census-based marketing practices evolved to provide a means of identifying and accessing consumers not simply by their income, race, gender, or geographic location, but by their “lifestyles”—the work, leisure, and consumption patterns that seem to bind them together more reliably than any other socioeconomic characteristics. In the words of journalist Michael Weiss, marketing became “the new cartography of American society.”¹⁴³

A. Segmenting the Census

Although described much earlier by perceptive Census Bureau officials, Wendell Smith’s oft-cited 1956 article¹⁴⁴ marked the arrival of *market segmentation* as a dominant perspective for comprehending consumer product markets and tailoring promotional activities to suit those markets. No longer would purchasers be viewed as monolithic masses, treated by manufacturers and marketers with nearly palpable contempt, as exhibited by Henry Ford’s dismissive fiat. Instead, firms would attempt to segment the market into smaller clusters of buyers, such that products and marketing messages could be tailored more specifically to customer desires without sacrificing the tremendous efficiency gains achieved by mass production. In Smith’s words, manufacturers would approach the postwar era of increasing consumer affluence by “viewing a heterogeneous market (one characterized by divergent demand) as a number of smaller homogenous markets in response to differing product preferences among important market segments.”¹⁴⁵

As two contemporary marketing researchers note, “[s]ince its introduction by Smith, market segmentation has become a central concept in both marketing theory and practice.”¹⁴⁶ Although firms divide consumer markets along a variety of different social, demographic, and economic fissures, the common theme of all such segmentation

¹⁴² See ANDERSON, *supra* note 26, at 238 (describing “the growth of the new ‘demographics industry,’ which serves business with population projections, marketing segmentation strategies, and the like”).

¹⁴³ MICHAEL J. WEISS, *THE CLUSTERED WORLD* 3 (2000).

¹⁴⁴ See Wendell R. Smith, *Product Differentiation and Market Segmentation as Alternative Marketing Strategies*, 21 J. MARKETING 3 (1956).

¹⁴⁵ *Id.* at 6.

¹⁴⁶ MICHEL WEDEL & WAGNER A. KAMAKURA, *MARKET SEGMENTATION* 3 (2d ed. 2000) (citation omitted).

techniques is a heavy reliance upon data that either originate or are in some manner derived from the population and housing census. Basic segmentation techniques, for instance, target consumers of specific age, gender, race, ethnicity, marital status, educational background, or occupational characteristics, depending in each instance upon the availability of accurate and comprehensive census data in order to measure and assess the prevalence of relevant characteristics. Not satisfied with these largely objective analyses, some marketing researchers classify consumers according to their "psychographic" characteristics.¹⁴⁷ Using standard research methods of attitude and personality measurement, these marketers attempt to discover fruitful insights by asking people whether they agree with statements such as "I feel that my life is moving faster and faster, sometimes just too fast."¹⁴⁸ As with basic demographic segmentation, psychographic techniques rely upon the availability of census data, most importantly to provide the population-level information necessary for constructing viable research samples.

The most ambitious segmentation technique, *geodemographic segmentation*, is even more intimately intertwined with the population and housing census. This technique combines elements of geographic, demographic, and psychographic approaches in an attempt to develop a comprehensive analysis of consumer lifestyles. Practitioners of geodemographic segmentation believe that, other things being equal, people tend to reside in areas populated by residents that are similar to themselves in socioeconomic status, race, educational attainment, housing preference, and other important demographic and psychographic characteristics.¹⁴⁹ Importantly, when Census Bureau officials design census tracts and census blocks, they also seek to create "homogenous units with shared population characteristics, economic status, and living conditions."¹⁵⁰ Thus, by marrying published census data with information gleaned from other sources, geodemographic marketers believe that they can develop a reasonably robust depiction of the spending habits, media preferences, political views, leisure activities, and other lifestyle components of a relatively narrow subset of the population. By repeating this process for the entire nation, they believe that they can produce a comprehensive typology of consumer lifestyle patterns and a map of where, geographically, those patterns express themselves.

¹⁴⁷ See Hanson & Kysar, *supra* note 19, at 1563-64.

¹⁴⁸ See SCHIFFMAN & KANUK, *supra* note 7, at 43 tbl.3-2.

¹⁴⁹ See WEDEL & KAMAKURA, *supra* note 146, at 241 (noting that geodemographic segmentation is "based on the assumption that people are similar to their closest neighbors in their sociodemographic characteristics, lifestyles and consumption behavior").

¹⁵⁰ John J. Fahs Bender, Note, *An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 5 N.Y.U. ENVTL. L.J. 120, 131 (1996).

Segmentation of consumer product markets in this manner was developed in the 1970s by a social scientist named Jonathan Robbin, who had aided the Department of Housing and Urban Development in efforts to target housing grants to cities with a history of rioting.¹⁵¹ Sensing an opportunity to apply such statistical methods to consumer product marketing, Robbin founded the international marketing firm Claritas and developed a segmentation system known as PRIZM, which divided the United States into forty “lifestyle clusters, or segments,” of people who shared key demographic and consumption-related characteristics.¹⁵² His original system contained such clusters as “Blue Blood Estates,” “Money & Brains,” “Furs and Station Wagons,” and “Public Assistance,” each with its own descriptive profile as well as highly detailed data concerning product purchase habits, education levels, travel and leisure preferences, wealth information, and other characteristics typical of the cluster.¹⁵³ Companies subscribing to Claritas’s services could utilize these profiles to selectively distribute promotional mailings, purchase advertising space, sponsor charitable and sporting events, design advertising messages, and conduct a whole host of other targeted marketing practices.

Throughout the 1980s and 1990s, such market segmentation practices flourished as ever-increasing computing capacity allowed cheaper and more sophisticated cross-analyses of data.¹⁵⁴ Geodemographic cluster systems became linked with numerous proprietary databases, allowing the further refinement of consumer clusters to include extensive information on consumption behavior, political beliefs, television viewership, print media preferences, and so on.¹⁵⁵ The 1990 decennial census in particular marked a turning point for geodemographic clustering systems, as the wealth of new population and housing data was combed for marketing insights with unprecedented speed and accuracy. Indeed, following the 1990 census,

¹⁵¹ See RAO & STECKEL, *supra* note 7, at 28; WEDEL & KAMAKURA, *supra* note 146, at 241; WEISS, *supra* note 143, at 142.

¹⁵² See WEISS, *supra* note 143, at 24.

¹⁵³ See HANSON & KYSAR, *supra* note 19, at 1562.

¹⁵⁴ See ANDERSON, *supra* note 26, at 222 (noting that following the 1980 census, “[i]ncreasingly, the people who could make best use of the census were highly trained statisticians and social scientists—either in academe or the burgeoning private ‘demographics industry’—who had access to computers and who knew how to use the data”); Timothy C. Lambert, Note, *Fair Marketing: Challenging Pre-Application Lending Practices*, 87 GEO. L.J. 2181, 2183 (1999) (“Only since the early 1990s has increased computer capacity allowed marketers inexpensively to establish, maintain, and merge the vast databases of information on consumers necessary to generate lists of individuals to be targeted.”).

¹⁵⁵ See WEDEL & KAMAKURA, *supra* note 146, at 258 tbl.15.4 (providing a list of thirty media and marketing databases that are linked to geodemographic systems, ranging in content from Nielsen Media Research’s television ratings to Gallup’s opinion polls to J.D. Power & Associates’s automobile industry surveys).

Claritas revised its PRIZM system to include a total of sixty-two lifestyle segments, with only twenty of the forty pre-1990 segments remaining relatively unchanged.¹⁵⁶ Undoubtedly, the highly anticipated 2000 long form results also will necessitate alteration of the geodemographic typology to reflect social, economic, and cultural trends.

To better understand the descriptive richness of the lifestyle clusters, consider two of the dominant groups for Ithaca, New York's 14850 zip code, described in Table 2.¹⁵⁷ The first cluster, "Second City Elite," comprises "working couples seeking relief from the hassles of urban life," and "prosperous executives who adorn their stately homes with antiques, computers, and the latest golfing equipment."¹⁵⁸ Their lives tend to focus on the family and, particularly, children. PTA meetings are standing-room-only and parents clamor to be involved in school activities.¹⁵⁹ Members of the Second City Elite cluster are well-educated. They prefer "high-brow magazines" and National Public Radio,¹⁶⁰ and are reluctant to engage in extravagant spending, even going so far as to cut designer labels out of clothing to avoid making status statements.¹⁶¹ Second City Elite residents are concerned about the environment and urban/suburban sprawl. A typical bumper sticker reads, "Think Globally, Act Locally."¹⁶²

A second dominant Ithaca cluster, "Towns & Gowns," consists of people in college communities that, because of increasing numbers of permanent residents attracted by the area's quality of life, "are now more upscale and chic than ever before."¹⁶³ As one resident of Boulder, Colorado, described, "'Status used to mean showing up at the farmers' market in town on Saturday,' . . . 'Now it's running with your personal trainer.'"¹⁶⁴ Progressive politics are still common in the Towns & Gowns cluster, but now the Sixties-era vibe is accompanied by "trust fund babies" who wear Birkenstocks and drive BMWs.¹⁶⁵ Tofu, wild oats, and organic produce are devoured at above-average levels, and almost everyone seems interested in health food and exercise. Cigarette rolling papers, with their inevitable implication of ma-

¹⁵⁶ See WEISS, *supra* note 143, at 24.

¹⁵⁷ At its "You Are Where You Live" website, <http://www.velocity.claritas.com/YAWYL> (last visited Nov. 19, 2001), Claritas provides the most common PRIZM clusters for any given zip code. The firm lists "Middleburg Managers," "Boomtown Singles," and "Smalltown Downtown" as the other dominant clusters for the 14850 zip code.

¹⁵⁸ WEISS, *supra* note 143, at 192.

¹⁵⁹ *Id.*

¹⁶⁰ See *id.* at 193.

¹⁶¹ *Id.*; cf. ROBERT H. FRANK, LUXURY FEVER 168 (1999) (describing Ithaca's "strong, if usually unstated, social norm against conspicuous consumption").

¹⁶² WEISS, *supra* note 143, at 193.

¹⁶³ *Id.* at 240.

¹⁶⁴ *Id.* at 240-41.

¹⁶⁵ *Id.* at 240.

rijuana use, are consumed at twice the national rate.¹⁶⁶ Like Second City Elite members, residents of this cluster are environmentally concerned. As a result, they are “routinely at odds with developers hoping to cash in on the growing population and the gorgeous settings of Towns & Gowns areas.”¹⁶⁷ The typical Towns & Gowns bumper sticker is more whimsical than that of their “Second City Elite” neighbors, but of similar sentiment: “Visualize Whirled Peas.”¹⁶⁸

As one might expect, Claritas has not been alone in the provision of census-based segmentation services. A handful of marketing giants offer competing comprehensive clustering systems for the United States. CACI Marketing Systems, for instance, has categorized the nation into forty-three segments based upon an algorithmic analysis of sixty-one key demographic characteristics.¹⁶⁹ Other firms choose to focus their efforts on ever narrower segmentation systems, such as Mediamark Research, Inc.’s set of ten clusters that describe various subgroups within the affluent share of the American consumer market (defined as the top ten percent of households in terms of income).¹⁷⁰ The firm claims that its proprietary rubric can help distinguish wealthy individuals likely to pursue golf from those likely to pursue tennis.¹⁷¹

Some marketing firms even produce clustering systems specifically constructed with their client’s product in mind. Such a system, for instance, was designed for R.J. Reynolds Tobacco Company to help develop a new brand of cigarettes aimed at “18- to 24-year-old women with high school educations or less who work in entry-level factory or service jobs.”¹⁷² The company called this low-income, low-education segment—one of the last remaining segments in which smoking rates were increasing—the “Virile Female.”¹⁷³ Her hobbies included “cruising, partying, and going to hot rod shows,” while “[h]er chief aspirations [we]re to spend time with her boyfriend, doing whatever he does, and to get married in her early 20s.”¹⁷⁴

¹⁶⁶ *Id.* at 241.

¹⁶⁷ *Id.*; cf. Bob Niedt, *New McD. Will Sprout at Western Lights Site*, SYRACUSE HERALD AM., Apr. 29, 2001, at E1 (noting Ithaca-area opposition to a proposed Target retail store in a “sensitive location”), available at 2001 WL 5540574.

¹⁶⁸ WEISS, *supra* note 143, at 241.

¹⁶⁹ See CACI Marketing Systems, *Demographic Solutions by CACI*, http://www.demographics.caci.com/products/life_seg.htm (last visited Nov. 19, 2001).

¹⁷⁰ See SCHIFFMAN & KANUK, *supra* note 7, at 315.

¹⁷¹ See *id.* at 316.

¹⁷² MICHAEL R. SOLOMON, *CONSUMER BEHAVIOR* 586 (3d ed. 1996).

¹⁷³ See *id.*

¹⁷⁴ *Id.*

TABLE 2:
A TALE OF TWO LIFESTYLES
PRIZM CLUSTERS FOR THE 14850 ZIP CODE (ITHACA, NY)

Second City Elite		Towns & Gowns	
1.7% of U.S. households Primary age group: 35-64 Median household income: \$58,800 Median home value: \$147,500		1.4% of U.S. households Primary age group: under 24 Median household income: \$18,600 Median home value: \$74,600	
Thumbnail demographics		Thumbnail demographics	
Upscale executive couples and families in second-tier cities Single-family housing Predominantly white households College graduates White-collar professionals		College-town singles 10+ unit rental housing Predominately white and Asian households College graduates White-collar and service workers	
Politics		Politics	
Predominant ideology: moderate Republican 1996 presidential vote: Bob Dole Key issues: reducing size of government, tax reform, toxic waste disposal		Predominant ideology: liberal Independent 1996 presidential vote: Bill Clinton Key issues: human rights abroad, gay rights, legalizing marijuana	
Preferences (index of 100=U.S. average)		Preferences (index of 100=U.S. average)	
<u>Lifestyle/Products</u>	<u>Food/Drink</u>	<u>Lifestyle/Products</u>	<u>Food/Drink</u>
Country clubs 199 Car phones 177 Power boats 175 Camcorders 161 On-line services 160 Attending theater 159 Shopping by mail 148 Exercise walking 135 Gardens 134 Volunteering 132 Veterans' clubs 80 Baby food 78 Volleyball 78 Condoms 77 Work boots 71 Hunting 69 Motel 6 66 Watching TV 58 Campers 57 Rolling papers 35	Scotch 201 Low-fat sour cream 164 Low-cal frozen meals 159 Skim milk 158 Low-cal bread 141 <u>Print Media</u> <i>Wall Street Journal</i> 223 <i>Golf Magazine</i> 217 <i>Outside</i> 204 <i>Eating Well</i> 182 <i>Boating</i> 167 <i>Money</i> 163 <i>Byte</i> 151 <i>Audubon</i> 151 <i>National Geographic</i> 148 <u>Cars/Trucks</u> Mercedes-Benz 352 Mazda Millenia 324 Saab 306 Cadillac Seville 306	Foreign videos 551 Volleyball 269 Billiards/pool 221 On-line services 216 Rolling papers 209 Bars/nightclubs 192 Jogging 186 Condoms 148 Stereo equipment 147 Museums 128 Family videos 78 Call forwarding 66 Coupons 60 Home Depot 58 Large-screen TVs 56 Dogs 54 Dry-cleaning 54 Woolworth 45 Premium credit cards 43 Sewing 35	Tequila 183 DoveBars 160 Coke Classic 145 Kellogg's All-Bran 142 Pasta salad 141 Frozen dinners 136 Canned stew 132 <u>Print Media</u> <i>Scientific American</i> 215 <i>Cosmopolitan</i> 183 <i>Sports Illustrated</i> 182 <i>Parenting</i> 177 <i>Rolling Stone</i> 175 <i>Self</i> 126 <u>Cars/Trucks</u> Volkswagen Corrado 220 Mazda 323 155 Volkswagen Fox 149 Hyundai Sonata 141 Volkswagen Golf 131

Source: MICHAEL J. WEISS, THE CLUSTERED WORLD 192-93, 240-41 (2000)

As noted above, all such segmentation systems depend, in one way or another, upon the use of census data.¹⁷⁵ Combined with information from numerous private sources, the population and housing census results provide surprisingly detailed descriptions of the socio-economic, leisure, and consumption characteristics of populations as small as one's own neighborhood. Indeed, even if one has never visited Ithaca, a vivid, multidimensional depiction of the area and its residents emerges from the PRIZM lifestyle clusters described above. Similar depictions are available from marketing firms for almost any area or population one chooses to inspect: "From the high-rises of Manhattan's Upper East Side to the trailer parks of South Texas, from the techno-elite professionals with their frequent-flier cards to the blue-collar laborers who frequent corner bars, America has fractured into distinct lifestyles, each with its own borders."¹⁷⁶ As described in the next subpart, consumer product marketers have grown accustomed to perceiving this increasingly populous and splintered audience through lenses such as the lifestyle clustering systems.

B. Selling to Segments

For many consumer product marketers, ground zero in the PRIZM system is "Kids & Cul-de-Sacs," the largest cluster in Claritas's classification scheme.¹⁷⁷ These Americans have a high median household income (\$61,600) and are keen consumers, particularly in order to provide leisure and educational goods and services for their numerous children.¹⁷⁸ They can sometimes be seen driving fifty miles a day carpooling children to after-school lessons, sports, and activities.¹⁷⁹ They fancy barbecue grills, home videos, wholesale goods stores (e.g., Sam's Club), zoos, and "My Child Is an Honors Student" bumper stickers.¹⁸⁰ Politically, these residents express concern about family values, tax reform, public-school funding, and crime. In other words, "[p]rotecting their child-centered world is preeminent in the minds of conservative Kids & Cul-de-Sacs households."¹⁸¹

The Kids & Cul-de-Sacs cluster is responsible for many of the most visible commercial trends in the United States. Minivans and sport-utility vehicles, which have exploded in popularity in recent years, are targeted toward Kids & Cul-de-Sacs parents (and often di-

¹⁷⁵ See Lambert, *supra* note 154, at 2186-87 ("Marketing has often been organized according to geography, demographics, or sometimes 'socioeconomic segments' of the population based primarily upon census data . . .").

¹⁷⁶ Weiss, *supra* note 143, at 10.

¹⁷⁷ See *id.* at 17.

¹⁷⁸ See *id.* at 198-99.

¹⁷⁹ *Id.* at 199.

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

rectly to their children).¹⁸² As a result, they are twice as likely as the average American to own a minivan or sport-utility vehicle.¹⁸³ Affluent Kids & Cul-de-Sacs families also are among the people developers have in mind when they fashion residential communities painstakingly designed to recall early 1900s “front-porch” living. The most famous of such communities, the Walt Disney Company’s development in Celebration, Florida, “resembles nothing more than a Frank Capra movie set, reflecting the deep American nostalgia for small-town life.”¹⁸⁴

The Kids & Cul-de-Sacs cluster resembles turn-of-the-century U.S. residential patterns in another way as well, containing as it does half as many African Americans as the national norm.¹⁸⁵ Nevertheless, as African Americans achieve higher socioeconomic status, the Kids & Cul-de-Sacs lifestyle is proving to be a powerful attractor for them. Indeed, the former upwardly mobile cluster “Black Enterprise” was dropped following the 1990 census as Claritas concluded that its residents more closely resembled non-black families of similar socioeconomic status than other African Americans.¹⁸⁶ In Weiss’s view, such findings demonstrate the way in which Kids & Cul-de-Sacs residents “have a singular effect on consumer patterns.”¹⁸⁷ By virtue of its size, wealth characteristics, and love of consumption, the cluster exerts a strong influence on the composition of the consumer goods market. In the process, it helps to define the “good life” for Americans of all clusters, a vision of suburban streets lined with pram-pushing mothers in Eddie Bauer fleeces, Gap-clad adolescents listening to MP3 players, and pedigreed Alaskan Malamutes lying behind invisible fences.

Despite its vast influence, the Kids & Cul-de-Sacs cluster is still but one slice of a U.S. consumer market that is susceptible to numerous dissections. Given the availability of market segmentation techniques of the kind described in the previous subpart, consumer product firms have become increasingly proficient at targeting a range of narrowly defined population segments. Video rental chain Blockbuster Inc., for instance, chooses neighboring store locations for entirely different audiences based upon geographically linked information derived from census results: “Trolling through census data—block by block—is standard practice at Blockbuster Inc. . . . That’s why there are two Blockbuster stores less than a mile apart in East Dallas. One targets

¹⁸² See Hallissy, *supra* note 128; see also WEISS, *supra* note 143, at 95 (“Savvy marketers tailor their appeals to the people in this group who really control the family’s pocket-book—the kids.”).

¹⁸³ See WEISS, *supra* note 143, at 199.

¹⁸⁴ *Id.* at 66.

¹⁸⁵ See *id.* at 17.

¹⁸⁶ See *id.* at 29.

¹⁸⁷ *Id.* at 17.

the Latino population; the other goes after a general market.”¹⁸⁸ Perhaps best known for using a geographic segmentation technique in its marketing is the manufacturer of Campbell’s Soup, which carefully manipulates product ingredients to suit the taste preferences of some twenty-two gastronomically distinct regions of the United States.¹⁸⁹

Other products are geared toward consumers during particular stages of their life cycle.¹⁹⁰ Time Warner, Inc., for instance, created an entire division to market magazines such as *Cooking Light*, *Parenting*, and *Martha Stewart Living* to baby boomers.¹⁹¹ Still other segmentation practices target people of certain occupations or income levels. For instance, through customer research, Hyundai Motor Company discovered that its car models were especially popular with people in the nursing profession. Now, the company plans to use 2000 census data to narrowcast product messages toward other nurses: “‘That information is going to be wonderful’ ‘We’ll be able to match Hyundai’s buyer data against general population data to determine how big this market is and where those nurses might be living.’”¹⁹²

Applications of psychographic segmentation attempt to find people who fit a perceived personality profile, irrespective of their geographic or demographic characteristics. Apple Computer, for instance, targets idealistic, visionary consumers in its “Think Different” campaign featuring photographs of individuals known for their creativity and individuality (e.g., Albert Einstein, Muhammed Ali, Mahatma Gandhi, Martin Luther King, Jr., Amelia Earhart, Jim Henson): “An aim of the campaign is to communicate the notion that these historically important individuals have dared to ‘think different,’ and that in the same spirit the consumer segment that uses Apple computers is also willing to ‘think different.’”¹⁹³ Other Apple campaigns seem designed to appeal to more pragmatic personality types, as with the “What’s On Your Powerbook?” ads that demonstrate a variety of potential uses for the company’s notebook computers.

Such market segmentation strategies are ubiquitous. The Gap, Inc., for instance, attempts to reach different swaths of the consumer marketplace through its multiple storefront images. In addition to Gap and Super Gap stores which are designed to attract a broad range of customers, the company also operates the Banana Republic line which targets upscale consumers, the Old Navy brand which seeks a

¹⁸⁸ Dianne Solis, *Census Figures Help Fuel Efforts to Beef-Up Marketing to Latinos*, DALLAS MORNING NEWS, Apr. 5, 2001, at 1D; see also Merrick, *supra* note 4 (quoting a Blockbuster executive as saying that “[t]he census is really sort of our data gospel”).

¹⁸⁹ See Hanson & Kysar, *supra* note 19, at 1561.

¹⁹⁰ See, e.g., WEDEL & KAMAKURA, *supra* note 146, at 9.

¹⁹¹ SCHIFFMAN & KANUK, *supra* note 7, at 35.

¹⁹² Johnson, *supra* note 18 (quoting a representative of Hyundai’s advertising agency).

¹⁹³ SCHIFFMAN & KANUK, *supra* note 7, at 42.

more downscale segment, Baby Gap and Gap Kids locations which cater to parents of young children, and Gap-to-Go stores which serve affluent, time-pressed urbanites who apparently desire the ability to order khakis by fax.¹⁹⁴ Among the many goods-and-services industries that follow a similar strategy are hotel chains, which develop multiple brands to be associated with distinct types of travel (e.g., luxury, business, extended stay, budget).¹⁹⁵

The publisher of *Business Week* produces a number of different editions of its magazine in order to offer advertisers more finely calibrated readerships. A variety of geographic versions are available, as are an Elite edition (for subscribers living in high-income zip codes), an Industrial/Technology edition (for individuals working in pertinent industries), and a Small Business Enterprise edition.¹⁹⁶ Indeed, magazines in general have become increasingly segment-driven, as publishers seek to develop narrow subscription bases to sell to advertisers. Thus, *Mode* magazine offers advertisers a readership consisting of full-figured women,¹⁹⁷ *Black Outdoorsman* a pool of African-American outdoor enthusiasts,¹⁹⁸ and *Bride Again* a base of women planning to become "encore brides."¹⁹⁹ Other magazines aim squarely at wealthy consumers. As of 1998, *Architectural Digest*, *Condé Nast Traveler*, and *Vanity Fair* all had subscription bases with a median household income above \$120,000.²⁰⁰

As these examples demonstrate, the use of market segmentation strategies by business firms is both diverse and sophisticated. Although systematic evidence regarding the extent and effect of such planning and marketing is unavailable, a few scattered reports suggest that the practice is wide and influential. Speaking just with respect to geodemographic clustering, Weiss states that "[a]n estimated fifteen thousand North American companies, nonprofit groups, and politicians have used clusters as part of their marketing strategies."²⁰¹ Likewise, Weiss reports that U.S. marketers spend some \$300 million a year on efforts to develop socioeconomic and psychological profiles of the nation's households.²⁰² As for product sales figures resulting from such marketing practices, one can only speculate. An obviously interested spokesperson for retail and marketing firms claims simply that

194 See *id.* at 34.

195 See *id.* at 34-35.

196 See *id.* at 35.

197 See *id.*

198 See BLACK OUTDOORSMAN MAG., available at <http://www.blackoutdoorsman.com> (last visited Nov. 19, 2001).

199 See BRIDE AGAIN, available at <http://www.brideagain.com> (last visited Nov. 19, 2001).

200 See SCHIFFMAN & KANUK, *supra* note 7, at 315 tbl.11-10.

201 WEISS, *supra* note 143, at 32.

202 See *id.* at 33; Godines, *supra* note 128.

“the use of census data by the for-profit and nonprofit private sectors to guide wise investments and community-based services is worth more than anyone can easily calculate.”²⁰³

III THE HEADCOUNT HEAD GAME?

Geodemographic segmentation provides an especially instructive example of how census figures are transformed by marketers into accessible descriptions of consumer subgroups. Although all market segmentation systems depend upon the use of census data,²⁰⁴ the geodemographic technique makes such data central to its approach by “clustering” individuals explicitly with the aid of geographically linked census data.²⁰⁵ The U.S. Census Bureau is, of course, well aware of this and other ways in which its data are used by the commercial sector: “Private businesses large and small have come to depend on the Census Bureau’s population, income, education and housing data to locate new offices, shops and factories, and to market new products.”²⁰⁶ Indeed, as noted above,²⁰⁷ the Bureau has actively sought to encourage such commercial uses of its data throughout much of the agency’s history. Furthermore, there appears to be a consensus that the data collected by the Census Bureau could not be generated as effectively by private firms.²⁰⁸

²⁰³ *House Hearings, supra* note 12, at 92 (testimony of David Crowe); *see also Emerging Financial Privacy Issues: Hearing Before the House Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Fin. Servs.*, 106th Cong. (1999) (testimony of Richard A. Barton, Senior Vice President for Cong. Relations, The Direct Marketing Ass’n) (noting that direct marketing, which depends upon “general demographic information garnered from public sources such as the U.S. census,” accounts for more than \$1.3 trillion in annual sales of goods and services), 1999 WL 20010214.

²⁰⁴ *See supra* text accompanying notes 146–50.

²⁰⁵ *See WEDEL & KAMAKURA, supra* note 146, at 254.

²⁰⁶ U.S. CENSUS BUREAU, *supra* note 23, at 1; *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 14 (“Census data about population trends help businesses succeed . . . by alerting them to opportunities to provide new services and products and to tailor existing ones to demographic changes. Census data also help businesses efficiently target their advertising dollars.”).

²⁰⁷ *See supra* text accompanying notes 53–65, 132–40.

²⁰⁸ *See House Hearings, supra* note 12, at 94 (testimony of David Crowe) (“No private business can earn the level of trust that the Bureau has earned by virtue of its unblemished historical record of protecting the privacy of individual answers to the census.”); Naymark Testimony, *supra* note 10, at 78 (“Only the Census Bureau has sufficient infrastructure and the assurance of confidentiality to ensure an accurate and complete count.”); U.S. CENSUS BUREAU, *supra* note 23, at 13 (“The census is the only data gathering effort that collects the same information from enough people to get comparable data for every geographic area in the United States.”); Walczak, *supra* note 115, at 56 (“There is a lot of extrapolated trend information out there, but without the benchmarking you get with the census data, the private stuff only takes you so far.” (quoting Maurine Haver, chair of the statistics committee of the National Association of Business Economists)); *id.* (“No other source

This Part provides a brief discussion of whether the longstanding partnership between the Census Bureau and consumer product marketers should be reevaluated. It does so by outlining two visions of consumer behavior that have been influential in judicial and academic treatments of consumption-related issues. As will be argued, neither of these visions can provide a complete assessment of the influence and desirability of census-based marketing, as neither recognizes the full complexity of the relationship between producers and consumers. That is, both paradigms perceive firms and consumers as being engaged in largely unilateral relationships, with either the former or the latter enjoying the locus of power. In that manner, the visions deprive the consumers' role of the contingency and indeterminacy that in many respects defines it.

Properly conceived, consumers are neither purely self-defined nor purely other-defined. In the absence of authoritarian cultural institutions, reverence for ancestral traditions, or other means of strictly regulating social roles—and in the presence of unsurpassed levels of disposable income, geographic and socioeconomic mobility, and exposure to diverse patterns of living—contemporary individuals are left to craft for themselves a set of values, beliefs, and habits that define who they are and where they fit within the social network. Increasingly, they have sought to fashion those identities through the medium of consumption. As this Part will argue, the conversation that ensues between consumer and producer is far too nuanced and ambiguous to fit within a paradigm of sovereignty or susceptibility. Consequently, the census marketing externality resists ready categorization as welfare-enhancing or welfare-reducing.

A. Comprehending Consumer Behavior

One dominant theme in decisional and academic treatments of consumer behavior adopts the neoclassical economic portrayal of consumers as sovereign, hedonic calculators seeking an optimal mix of goods and services in the marketplace.²⁰⁹ The appropriate unit of analysis on this account is taken to be the consumer acting as an individual, pursuing self-interest through the satisfaction of ordered pref-

has this detail about the topography of the nation.” (quoting Everett M. Ehrlich, former Under Secretary of Commerce)).

²⁰⁹ See, e.g., Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671 (1977) (“[P]rotection of consumers against advertising fraud should [be] a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process.”); W. Kip Viscusi, *Using Warnings to Expand the Boundaries of Consumer Sovereignty*, 23 HARV. J.L. & PUB. POL’Y 211, 212 (1999) (“In idealized market situations, the unconstrained choices of consumers, coupled with the provision of goods in the marketplace by competitive firms, lead to efficient outcomes as consumers select the bundle of goods they most prefer.”).

erences. The theorist treats the individual's desires as both stable and exogenously given, meriting no scrutiny except insofar as they must be recognized in order to be satisfied. Indeed, preferences in the consumer sovereignty model almost seem to appear spontaneously and independent of any cultural context, including the markets within which they are satisfied.²¹⁰ Consequently, consumer product firms are not seen to have control or influence over consumer preferences; rather, they are depicted as scrambling to cater to the consumer's every whim and fancy in order to garner an evanescent profit margin.

In contrast to this consumer sovereignty model, proponents of the consumer susceptibility vision argue that individuals are vulnerable to exploitation by those actors in a position to shape the informational and aesthetic environment within which economic decisionmaking occurs, namely, the producers of consumer goods. Among economists, John Kenneth Galbraith is most famously associated with this view.²¹¹ He argues that an individual's desires remain urgent across rising levels of affluence only if some external force constantly manufactures new and pressing wants that are thrust upon the individual. To Galbraith, key elements in that process are "the institutions of modern advertising and salesmanship" whose "central function is to create desires—to bring into being wants that previously did not exist."²¹²

²¹⁰ As Chief Judge Irving Kaufman wrote in an antitrust decision:

[N]o one can determine with any reasonable assurance whether one product is "superior" to another. Preference is a matter of individual taste. The only question that can be answered is whether there is sufficient demand for a particular product to make its production worthwhile, and the response, so long as the free choice of consumers is preserved, can only be inferred from the reaction of the market.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287 (2d Cir. 1979).

²¹¹ See JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 124–31 (4th ed. 1998).

²¹² *Id.* at 127 (footnote omitted). Efforts also have been made in recent years to utilize the findings of cognitive psychology to attempt to create more scientifically grounded accounts of consumer manipulability, particularly in relation to consumer risk perceptions. According to proponents of this view, the presence of widespread and systematic cognitive biases among consumers ensures that some actors—such as consumer product manufacturers, see Hanson & Kysar, *supra* note 19; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000), or "availability entrepreneurs," see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999)—will be able to exploit those biases for gain. The new research generally has stopped short, however, of providing an extended analysis of consumer preferences and their formation (as opposed to consumer perceptions of health and safety hazards). See James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 258 (2000) (noting that accepting the full implications of a "psychological world of constructed preferences" would disrupt the behavioral law and economics project by eliminating the very basis for determining whether one state of the world is "better" than another).

As with most polarities, the truth lies somewhere between the extremes of consumer sovereignty and susceptibility. The basic limitation of both viewpoints is their insistence on analyzing consumers as primarily, if not exclusively, economic beings. Consumption for both camps is a simple act consisting of the fulfillment of needs through commodified purchase. With that assumption in place, debate then focuses on whether consumers have sufficient information and ability to make sound decisions, or whether instead manufacturers distort market outcomes either through their superior access to relevant information or through their deceptive and misleading marketing. Such an analysis forces one to conceive of consumers either as modern Robinson Crusoes or as passive victims; of “needs” either as immaculately conceived rational wants or as viral delusions propagated by commercial puppeteers; and of data-based marketing practices either as invaluable market lubricants or as hidden subsidies to corporate thought control.

Such dichotomies obscure the nature of consumptive acts. In reality, consumption is a messy communicative act that combines pleasure-seeking with elements of self-definition and social expression. As Jean Baudrillard writes, “Consumer behavior, which appears to be focused and directed at the object and at pleasure, in fact responds to quite different objectives: the metaphoric or displaced expression of desire, and the production of a code of social values through the use of differentiating signs.”²¹³ Those who view consumer goods as vehicles for satisfying unspecified personal desires ignore the many ways in which consumer product markets are culturally inflected: “That which is determinant is not the function of individual interest within a corpus of objects, but rather the specifically social function of exchange, communication and distribution of values within a corpus of signs.”²¹⁴ That is, theorists should assume an insatiable desire, not for objects, but for the meanings, implications, and values (“signs”) that they import. The modern market’s superfluity of consumable goods

²¹³ JEAN BAUDRILLARD, *Consumer Society*, in JEAN BAUDRILLARD: SELECTED WRITINGS 32, 49 (Mark Poster ed., 2d ed. 2001). James Twitchell expresses a similar sentiment with considerably less jargon:

What characterizes commercial culture is that [the mythological world], our utopian otherland, has been populated by new beneficent spirits, spirits magically residing not in nature, holy books, magical signs, or chants but in objects as mundane as automobile tires, rolled-up tobacco leaves, meat patties, green beans, and sugar water.

JAMES B. TWITCHELL, *LEAD US INTO TEMPTATION: THE TRIUMPH OF AMERICAN MATERIALISM* 68 (1999).

²¹⁴ BAUDRILLARD, *supra* note 213, at 49.

and services evidences not unlimited material wants, but unlimited need for social distinction.²¹⁵

According to sociologist Don Slater, this *consumer culture*, in which individuals consume not simply to satisfy basic needs, but to package an identity for consumption by others, arose out of necessity.²¹⁶ Western modernity, which orients itself around core concepts of individuality, rationality, and market relations, is characterized also by the erosion of tradition and social rigidity. The previous three centuries have seen the decline of various sources of regulation of people's lifestyles, including religious prohibitions on excess, sumptuary laws, community norms, and philosophical conceptions of a "natural" social order. Similarly, the rise of capitalist labor relations has contributed to the decline of productive activities as a source of cultural meaning. One's identity is no longer bound up in the craft guild to which one belongs, for much of productive labor has become anonymous and devoid of distinction. As a consequence, "[m]odern man spends less and less of life in production, and more and more in the continuous production and creation of personal needs and of personal well-being."²¹⁷

Although this fluidity of social relations is common to all modernist societies, the United States represents an especially vivid example of the phenomenon. As Alexis de Tocqueville wrote: "Imagine, my dear friend, if you can, a society formed of all the nations of the world: . . . a society without roots, without memories, without prejudices, without routines, without common ideas, without a national character. . . ." ²¹⁸ This rootlessness creates space for socioeconomic mobility, a "land of opportunity." It also, however, forces upon individuals a fate of self-definition. Individuals no longer receive their place in the world from authoritarian dictate or historical happenstance; instead, they must fashion it themselves from some combination of available cultural and material resources. The claim of consumer culture theorists is that individuals in the modern world (and particularly the United States) have sought to satisfy this obligation of self-definition through the medium of consumption. That is, individuals in contemporary consumer cultures define their values, aspirations, and identities by reference to the goods they consume, the leisure activities they

²¹⁵ *Id.* at 48 ("[I]f we acknowledge that a need is not a need for a particular object as much as it is a 'need' for difference (the *desire for social meaning*), only then will we understand that satisfaction can never be *fulfilled* . . .").

²¹⁶ DON SLATER, *CONSUMER CULTURE AND MODERNITY* 22 (1997).

²¹⁷ BAUDRILLARD, *supra* note 213, at 51.

²¹⁸ Letter from Alexis de Tocqueville to Ernest de Chabrol (June 9, 1831), in ALEXIS DE TOCQUEVILLE, *SELECTED LETTERS ON POLITICS AND SOCIETY* 37, 38 (Roger Boesche ed., James Toupin & Roger Boesche trans., 1985).

undertake, and the locations to which they travel. In Baudrillard's succinct terms, "consumption is *social labor*."²¹⁹

These ideas have significant implications for the underlying assumptions of both the consumer sovereignty and the consumer susceptibility models. For instance, the models' emphasis on individual choice, whether conceived as fruitful, autonomous decisions or as fruitless, induced compulsions, seems misplaced from the consumer culture standpoint. The notion of individual choice in the marketplace tends to abstract away from the cultural realities of the consumption process: "Choices . . . are socially controlled, and reflect the cultural model from which they are produced. We neither produce nor consume just any product: the product must have some meaning in relation to a system of values."²²⁰ Individuals, in other words, exercise choice primarily in the sense that they select a pattern of consumption, a way of living, from among various socially constructed alternatives. The decision to purchase an item depends at least partially on the item's meaning, where meaning is defined by originators, producers, existing users, oppositional forces, and other entities who affect the social significance of that particular act of consumption.

Additionally, from the consumer culture viewpoint, one cannot maintain the notion that preferences are exogenous to markets. This is true in the sense that markets consist of social relations that seem unavoidably to affect the disposition and development of participants.²²¹ It is also true in the more narrow sense of this Review. Preferences are not exogenous to markets because marketers configure sophisticated lifestyle visions that, in part, define people's desires. Advertising and media agents are well aware of the tendency to mediate social meaning through product markets: "In an age of overwhelming consumer choices, cluster residents look to brand names and product myths as distinguishing lifestyle markers."²²² Consequently, firms have an interest not only in perceiving lifestyle segments, but also in cultivating them. The consumption habits that nominate one for membership in Kids & Cul-de-Sacs therefore do not represent entirely autonomous, spontaneous acts of free will on the part of individuals. Instead, they are the product of an ongoing dialogue between and among segment members and the multitude of consumer product manufacturers, travel agents, recreational industry firms, and other entities that help shape the Kids & Cul-de-Sacs personae. Put pejora-

²¹⁹ BAUDRILLARD, *supra* note 213, at 56.

²²⁰ *Id.* at 39-40.

²²¹ See Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LITERATURE 75, 75 (1998) ("Markets and other economic institutions do more than allocate goods and services: they also influence the evolution of values, tastes, and personalities.").

²²² WEISS, *supra* note 143, at 20.

tively, whether there were Gap Kids before Gap Kids is not a resolvable question.

To better understand this process, consider an analogy drawn from census practices: The nation of Canada never conducted a racial census until 1998,²²³ while the United States has carefully tabulated racial statistics since its very first census. Few would dispute that such starkly different approaches to government classification have impacted race relations and the manner in which groups are defined and represented.²²⁴ Nor should there be dispute that the manner of collecting and presenting census data affects the way in which individuals themselves conceive of their racial identities. Asian Americans, for instance, have long selected from a multitude of subclassifications on the U.S. census questionnaire, while the questionnaire lumps European and African descendants into monolithic categories of white and black,²²⁵ a distinction that seems likely to influence the manner in which subject individuals perceive their racial identity. Likewise, the Census Bureau's practice of posing "Hispanic origin" as a question separate from the racial inquiry has tended to affect both identity formation and ethnic cohesion.²²⁶ Finally, the most recent census sparked considerable debate by allowing for the first time selection of more than one racial category.²²⁷ No doubt official cognizance of multiracial identities will influence how such classified individuals perceive themselves and are perceived by others. In short, Census Bureau officials, in close connection with their academic and professional advisors, have "put an irrevocable stamp on what we know about the American people at any time."²²⁸

Similarly, consumer product manufacturers (and the marketing firms they employ) have left an indelible imprint on the modes of living, attitudes, and beliefs of consumers. These firms not only sell to segments, but they also sell *the segments themselves*, offering individuals pre-packaged identities for adoption through the medium of product purchase.²²⁹ As Anthony Giddens writes, "the project of the self be-

²²³ *Id.* at 123.

²²⁴ *Cf.* U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 21 ("In 1850, the question of what to ask in the census became highly political as the [U.S.] debated how to handle the coming crisis between the northern and southern states. . . . A growing national awareness about the changing ethnic composition of the American population was reflected in the census questions.").

²²⁵ *See* Persily, *supra* note 36, at 926.

²²⁶ *See* Eric Schmitt, *Census Data Show a Sharp Increase in Living Standard*, N.Y. TIMES, Aug. 6, 2001, at A1 ("[N]early 48 percent of Hispanics responding to the 2000 Census identified themselves as white and 42 percent said they were 'some other race.'").

²²⁷ *See* Persily, *supra* note 36, at 927.

²²⁸ ANDERSON, *supra* note 26, at 2.

²²⁹ *Cf.* TWITCHELL, *supra* note 213, at 75 ("The object of advertising is not just to brand parity objects but also to brand consumers as they move through these various [consumption] communities.").

comes translated into one of the possession of desired goods and the pursuit of artificially framed styles of life.”²³⁰ The concept of a yuppie achieves remarkable salience not because of its particular demographic and socioeconomic characteristics, but because of the vivid depiction that media and marketing firms developed of the yuppie *lifestyle*, with its elaborate kitchen appliances, stock options, Burberry outerwear, and lushly appointed “Beemers.”²³¹ Similarly, “extreme sports” and “adventure travel” are currently popular not simply because of their intrinsic qualities, but also because consumers in recent years have been exposed to a stream of carefully drawn representations of people engaging in such outdoor activities, apparently to great personal fulfillment.²³² A recent ad for a sport-utility vehicle, for instance, paints a suggestive depiction of the outdoor lifestyle, barely mentioning the vehicle itself: “Friday Afternoon. 5 P.M. The count-down begins. Biking? Hiking? Snowboarding? More biking? Sure. With the Nissan Xterra, you can cram more into a Saturday and Sunday than you thought humanly possible.”²³³

In short, consumers are neither incapable of resisting social influence—including the influence of the supposed “culture industry”²³⁴ of marketers and mass media—nor impervious to it. Rather, consumers and the market are in a constant dance of definition and redefinition, a formless cultural duet in which improvisation defies attribution. Put more plainly, deeming consumers sovereign ignores the fact that they must satisfy their preferences within a distinctly social environment; deeming them manipulable ignores the fact that social environments are, after all, constructed with the input of individual actors.

²³⁰ ANTHONY GIDDENS, *MODERNITY AND SELF IDENTITY* 198 (1991).

²³¹ As Robbin, the founder of Claritas, describes: “The ad community blew up the concept of yuppie, so it became a self-fulfilling prophecy. Because people consume by perception, if a person perceives himself to be a yuppie, he can act out the image.” WEISS, *supra* note 143, at 168.

²³² See Hanson & Kysar, *supra* note 19, at 1462.

²³³ Advertisement, Nissan Motor Co., in *NAT’L GEOGRAPHIC ADVENTURE*, Aug. 2001, inside front cover. This close relationship between consumption habits and identity representation is sometimes oddly evident in the way marketers describe their customers. A marketing executive for Mazda, for instance, explains the company’s increasing efforts to target minorities this way: “It’s not just because of the census shift, but more importantly, as we worked out our psychographic target, people who have that psychographic have skewed to Hispanics and Asians.” Teinowitz, *supra* note 86, at 20. The executive seems almost to believe that one is first and foremost an automobile-consumer type. Racial identities are tried on *after* the fact, and they sometimes “skew” one way or another in relation to the prior vehicular persona.

²³⁴ See Theodor W. Adorno & Max Horkheimer, *The Culture Industry: Enlightenment as Mass Deception* (1944), reprinted in *THE CONSUMER SOCIETY READER* 3 (Juliet B. Schor & Douglas B. Holt eds., 2000).

B. Assessing the Census Marketing Externality

In light of the foregoing analysis, consumer product firms that use census results in combination with other data sets to access various subcategories of the population are not simply responding to exogenous preferences that they discover in the data, nor are they fashioning artificial desires that consumers reflexively adopt. Instead, marketers—and particularly the lifestyle segmentation marketers at the center of this Review—are attempting to organize sociological and cultural participants into coherent “consumption communities,”²³⁵ modern tribes melded not by blood or tradition, but by common patterns of consumption. Their efforts both reflect and refine their subjects.

Naturally, therefore, how one views the census marketing externality depends critically upon how one views consumer culture and the lifestyle segments that it comprises. For instance, does one view the continual expansion of personal consumption expenditures as evidence of rising standards of living?²³⁶ Or does one view such increases as evidence of the continual failure of consumption to satisfy individuals who search for authenticity in a world of objects not of their own making?²³⁷ Does one believe that consumption is a liberating, playful art of material acquisition, in which “[g]etting and spending has become the most passionate, and often the most imaginative, endeavor of modern life”?²³⁸ Or does one believe that it is an extravagant arms race in which escalating efforts to achieve social distinction cancel each other out, rendering much of expenditure not only conspicuous but wasteful?²³⁹

Some recent commentators acknowledge that consumption is often motivated by an affective desire for image, status, signs, and other non-utilitarian meanings, but, unlike other theorists in the Veblenian tradition, they refuse to mourn those aspects of consumer culture. Economist Stanley Lebergott, for instance, insists that “[i]n open societies, human consumption choices share only one characteristic—they are made in pursuit of happiness.”²⁴⁰ Cultural theorist James Twitchell likewise argues that “[w]hat critics of consumption

²³⁵ SLATER, *supra* note 216, at 88.

²³⁶ See, e.g., DANIEL T. SLESNICK, CONSUMPTION AND SOCIAL WELFARE (2001) (amassing consumption expenditure data to rebut claims of income stagnation and inequality).

²³⁷ See SLATER, *supra* note 216, at 85 (“Consumerism simultaneously exploits mass identity crisis by proffering it goods as solutions to the problems of identity, and in the process intensifies it by offering ever more plural values and ways of being.”).

²³⁸ James Twitchell, *Two Cheers for Materialism* (1999), reprinted in THE CONSUMER SOCIETY READER, *supra* note 234, at 281, 290.

²³⁹ See FRANK, *supra* note 161, at 161–62.

²⁴⁰ STANLEY LEBERGOTT, PURSUING HAPPINESS: AMERICAN CONSUMERS IN THE TWENTIETH CENTURY II (1993).

see as the layering of the repressive hegemony over unformed imaginations is instead the pleasure of fill in the dots."²⁴¹ On this account, marketers provide a public service through their continual generation of commodity-oriented lifestyles: the ensuing carnival of consumption fills the void of social meaning that has been wrought by modernity. That is, choosing among physically indistinguishable products based upon elaborate mythologies is much less taxing than an existential search for self-definition and, it turns out, more fun.²⁴²

Of course, not all market segments receive the lavish attention from marketers that wealthy yuppies and their adventure-loving offspring garner. For such less affluent consumers, the lifestyle visions of census-based marketers might offer something different than "the most passionate . . . endeavor of modern life."²⁴³ Consider, for instance, the denizens of "Norma Rae-ville" in the PRIZM system, a cluster of down-and-out mill towns that lie primarily in the Southeast and are a cultural world away from Kids & Cul-de-Sacs.²⁴⁴ Members of this cluster feel unfairly distanced from the iconic life of more affluent clusters. As one resident of Monroe, Georgia put it, "I'd really feel like we made it if a Red Lobster came to town."²⁴⁵ Other underserved consumers can be found in "Mid-City Mix," a cluster of primarily African-American middle-class singles and couples where retail vacancies are typically filled by liquor stores and check-cashing outlets, much to the dismay of local officials and residents who desire mainstream retail services.²⁴⁶

Given the dialectical nature of consumer culture, such market treatment is not only a consequence but also a contributing cause of the socioeconomic status of certain segments. Put differently, if an individual views her hometown as a failure because Red Lobster does, it is possible to imagine the individual's own self-worth and achievement also being affected. Social context shapes and limits educational and professional aspirations, and social context must be thought to include the many representations of ways of living that are

²⁴¹ TWITCHELL, *supra* note 213, at 198.

²⁴² Of course, this view is not entirely new. Over a half century ago, Ralph Brown wrote in the *Yale Law Journal*:

The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer?

Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1181 (1948).

²⁴³ TWITCHELL, *supra* note 213, at 286.

²⁴⁴ See WEISS, *supra* note 143, at 286-87.

²⁴⁵ *Id.* at 18.

²⁴⁶ *Id.* at 53-54.

directed to individuals by marketers. Targeting certain images to certain clusters is not simply a response to existing characteristics of the clusters; it is also a reinforcement and redefinition of those characteristics. In other words, the conditions that give rise to socioeconomic and lifestyle clustering may include the very marketing images that seek to respond to such clustering.

Such a self-reinforcing process can be seen in a 1985 R.J. Reynolds marketing study entitled, "Less-Educated: Today's Trend, Tomorrow's Market," which concludes that "[t]he 'less educated' smoker may represent an opportunity for a new brand [that is able] to meaningfully address the lifestyle, attitudes and values of this group." The document contrasts "less educated" and "college graduate" young adult profiles, emphasizing that the "less educated" individual faces a "life course" of "low pay, unchallenged/boring" employment and has greater "psychological needs" because of a lack of parental and university support in such key categories as "self-esteem," "belonging," and "security."²⁴⁷

Obviously, the purpose of such studies is to develop marketing campaigns calibrated to resonate with the examined group: "Image projection through advertising and other communications tools informs the potential smoker of the brand's enhancement of his lifestyle."²⁴⁸ As consumer culture theorists would argue, however, the resulting stream of representations of the "less educated" lifestyle also will likely help to perpetuate it. An entire genre of cigarette and alcohol ads, for instance, consists of variations on the theme: "Work Sucks." Individuals viewing such ads may respond favorably because their employment is, in fact, unpleasant; but they also may grow to expect that all labor "sucks," never seeking to change their educational or professional status.

In short, the use of census data by marketers may impact far more than the fashion craze of Kids & Cul-de-Sacs teens or the foreign car fancy of high-income yuppies. It also may influence the self-esteem of "Norma Rae-ville" waitresses or the decision to take up smoking by "Mid-City Mix" youth. In light of such possibilities, one might contend that the practice of providing detailed population and housing census data to marketers deserves reconsideration. Indeed, one might argue that Congress should require the Census Bureau to cease providing marketers with the census data that help construct and sustain lifestyle segments—particularly segments like Norma Rae-ville and Mid-City Mix where the postmodern consumption carnival seems

²⁴⁷ *Id.*

²⁴⁸ Draft Report by Taylor Shaine Inc. for R.J. Reynolds Tobacco Co., *Sampling Young Adult Smokers* (Oct. 18, 1984), <http://www.library.ucsf.edu/tobacco/mangini/html/e/129/otherpages/allpages.html> (last visited Jan. 15, 2002).

less about playful, emancipatory acquisitiveness than about subtle reinforcement of undesirable socioeconomic conditions.

Nevertheless, as warned at the outset,²⁴⁹ the consequences of consumer culture and the relationship between marketing and behavior are far too dimly understood to support sweeping policy conclusions regarding the census marketing externality, especially given the long-standing consensus that a vital activity of government is the construction of an informational infrastructure that includes detailed population and demographic information. Instead, all that can be said with confidence is that the situation is more complicated than admitted by the widely held paradigms of consumer sovereignty and susceptibility. The socially situated consumer cannot be extricated from her formative environment, nor can her acts of consumption be reduced to the satisfaction of stable needs and desires. Consequently, the census marketing externality cannot be condemned as controlling of consumers, nor assumed to be innocuous.

CONCLUSION

The United States was the first modern nation to designate a thorough, recurring count of its population as a responsibility of government.²⁵⁰ It is perhaps no coincidence that the United States was also the birthplace of consumerism. As this Review has attempted to demonstrate, census data play an essential role in the construction of marketing apparatuses that are themselves inexorably tied to consumer culture. Nevertheless, the role of both the census and commercial enterprise in fostering the consumerist mentality is complicated. Viewed fairly, consumer product manufacturers and the census-based marketing strategies that they adopt are part of an ongoing dialogue concerning the production and reproduction of an entire way of living, a culture of consumption. Consumers are neither hollow vessels hypodermically injected with false preferences, nor immovable stones gifted with unerring judgment and taste. Rather, they are subjects struggling for self-definition in a world that offers for inspiration, almost exclusively, objects.

At times, this interplay becomes startlingly transparent. Internet company eziba.com, which maintains a website offering handcrafted goods from native cultures around the globe, invites shoppers in its advertisements to “experience the world one object at a time.”²⁵¹ General Motors fuels the fires of consumer greed by noting, “What

²⁴⁹ See *supra* text accompanying notes 21–25.

²⁵⁰ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 23, at 8.

²⁵¹ Advertisement, eziba.com, at <http://home.att.ne.jp/sky/tarotaro/dotcom.htm> (last visited Jan. 15, 2002).

1% of the world wants, it gets.”²⁵² Competitor Ford Motor Company depicts a man meditating in a yoga pose, surrounded by a pickup truck, camping equipment, sporting goods, and other gear for the outdoor enthusiast. The tagline reads: “To be one with everything . . . you’ve gotta have one of everything.”²⁵³ These consumer product firms, with their endorsement of self-interest and commodity orientation, are quite obviously engaged in the reproduction of consumer culture.

As this Review has attempted to demonstrate, such firms are aided in their efforts by the national census. Indeed, consumer goods retailer Target recently demonstrated its commitment to the census by printing shopping bags bearing the message, “Census 2000: How America Knows What America Needs.”²⁵⁴ Contrary to the company’s implicit statement, however, “What America Needs” is not a stable concept, existing independently of product pitches or census inquiries, nor is the population and housing census a means for helping to discern autonomously selected consumer preferences. Instead, in the hands of consumer product marketers, the census and the detailed demographic data it supports are mechanisms for constructing identities—lifestyles—that consumers adopt and discard with varying degrees of comfort and consciousness. They are a foundation for the “private sociology” of marketers that both considers and constitutes its subjects. They are a force that links personality to purchase.

As this Review also has attempted to demonstrate, whether that force expands or contracts opportunities for human thriving is far more complicated than one might suspect. Consequently, the desirability of the census marketing externality may be open to question despite its historical pedigree.

²⁵² Advertisement, General Motors Corp. (on file with author).

²⁵³ Advertisement, Ford Motor Co. (on file with author).

²⁵⁴ *House Hearings*, *supra* note 12, at 99 (statement of David Crowe).

