

VI. POLICY AND LEGAL CONSIDERATIONS REGARDING RACIAL AND ETHNIC DATA COLLECTION



In this Section, we address several policy and legal considerations regarding the collection and reporting of racial and ethnic data that helped shape our policy recommendations. These considerations include the risk of data misuse, legal limitations on federal mandates, and the shortcomings of the OMB categories.

A. Potential Mischaracterizations and Misuses of Racial and Ethnic Data

Concerns about potential mischaracterizations and misuses of racial and ethnic data should not halt the collection and reporting of such data. “Some scholarly and civic leaders believe that measuring [racial inequities] promotes social divisions and fuels a mistaken perception that race is a biological concept.”¹³³ Of course, there is always a risk that information will be used incorrectly. Data about racial and ethnic inequities can be misinterpreted, misused, or politicized¹³⁴ to fuel racist stereotypes¹³⁵ and falsely justify racist policies.¹³⁶ In a “vacuum,” such data can reinforce socially constructed racial categories and mischaracterize the causes of racial inequities.¹³⁷ Racial and ethnic data at local levels can also at times be misused to enforce “‘territorial stigmatization,’ whereby resource-deprived neighborhoods suffer from ‘blemish of place’ and are thought to be ‘composed essentially of poor people, minorities and foreigners,’ many of whom have already been marginalized by the broader society.”¹³⁸ People of color may also, understandably, be wary of government efforts to track their race and identity for fear of misuse of such data, based on prior abuse and oppression.¹³⁹

We need racial and ethnic data, however, to ensure that the “groups suffering the worst receive the most attention, treatment, and resources.”¹⁴⁰ Refusing to examine and measure racial and ethnic inequities will “[a]t best . . . preserve the status quo.”¹⁴¹

Moreover, racial and ethnic data are not needed to engage in racist discrimination—predictive policing algorithms, for example, use factors like zip code that act as proxies for race.¹⁴² Other examples include prison-based gerrymandering¹⁴³ and the racist effects of the use of “big data” and artificial intelligence in credit scores.¹⁴⁴ The antiracist solution to racial inequity is not to avoid tracking racial inequities for fear of their misuse, but to actively educate the public about inequities and the policies that contribute to them.

When racial data are used and contextualized appropriately, they provide critical information about experiences of racism that can inform advocacy and policymaking. We need race and ethnicity data, not concerning any one societal problem in isolation, but across major policy areas, in order to understand the full ecosystem of racial and ethnic subordination and oppression. Racial inequities must be studied alongside resource disparities and the histories and policies that contributed to them, so that the data are effectively wielded toward antiracist policy change. For example, when racial disparities in the criminal legal system are understood in the context of racially targeted and disproportionate policing, prosecution, and sentencing, racial data can help inform the corresponding policy interventions. Ultimately, data collection will allow us to gain a better understanding, not of race, but of *racism*.

B. Legal Considerations

Data collection is subject to several federal laws that have constructed procedural safeguards to protect individuals’ privacy, prevent discrimination, and minimize burdensome requirements, among other protections.¹⁴⁵ Some states also “impose restraints on when and how such data may be collected.”¹⁴⁶ These laws are not barriers to racial and ethnic data collection; rather, they help ensure that data are collected, stored, and shared in ways that protect peoples’ rights.

The most important legal consideration in designing a single, standardized, nationwide system of data collection and reporting by race and ethnicity is the constitutional limitation on the federal government’s ability to impose mandates on states. The Tenth Amendment to the U.S. Constitution provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As a result, the “Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”¹⁴⁷

Federal mandates do not have a settled definition¹⁴⁸ and take a variety of forms—they may be funded or unfunded, and may consist of direct orders, generally applicable regulations, and conditions of assistance, among other formats.¹⁴⁹ The constitutionality of a federal mandate depends largely on the source of power that is used to justify the mandate (such as Congress’s commerce power¹⁵⁰ and spending power¹⁵¹), but on the whole, this remains a murky area of law.¹⁵² Additionally,

“[d]uring the last two decades, the Supreme Court has reopened the debate on whether the Tenth Amendment imposes any limits on the authority of the federal government to subject states and their subdivisions to federal regulations.”¹⁵³ In short, while the federal government often employs mandates,¹⁵⁴ it is difficult to predict how each mandate will fare in court.¹⁵⁵

The clearest course, then, is to use conditions of federal financial assistance that are rooted in Congress’s spending power to incentivize, rather than require, participation. When invoking its spending power, “Congress may attach conditions on the receipt of federal funds,” so long as this power is used “in pursuit of the general welfare” and the conditions are unambiguous and “reasonably related to the federal interest in particular national projects or programs.”¹⁵⁶ In practice, courts are heavily deferential to Congress in determining whether these requirements are met.¹⁵⁷ Thus, for example, in *South Dakota v. Dole*, the National Minimum Drinking Age Act, “which provided that federal highway funds otherwise payable to a state would be withheld if that state did not raise the minimum drinking age to twenty-one,” was not unconstitutional.¹⁵⁸ For these reasons, the federal government should incentivize participation of state and local entities in a standardized and centralized racial and ethnic data collection and reporting system through the use of conditional, highly desirable funding.

C. Limitations of the Federal Office of Management and Budget Categories

This Report’s recommendation to use the OMB categories as a starting point for standardization of racial and ethnic data collection and reporting is not to suggest that these categories are ideal or comprehensive. The OMB categories, which “were honed for bureaucratic and political purposes,”¹⁵⁹ are rightfully critiqued for many reasons, including that they do not reflect the diversity of the U.S. population,¹⁶⁰ and improperly lump together many distinct racial and ethnic experiences.¹⁶¹ The current OMB racial and ethnic categories are clearly lacking, as more and more people are choosing to check boxes for “Other Race” in data collection efforts.¹⁶² In the 2020 Census, “[t]he Some Other Race population was the second-largest alone or in combination race group, comprising 15.1% of the total population.”¹⁶³ Heavy reliance on the “other race” category can lead to data confusion and obscures the true extent of inequities.¹⁶⁴

Despite the OMB categories’ deficiencies, they have become default categories for many federal, state, and local data collection efforts. So much of existing racial and ethnic data are organized according to the OMB categories that their wholesale replacement could make vast amounts of longitudinal data unusable.¹⁶⁵ The OMB itself “encourages,” but does not require, “additional granularity where it is supported by sample size and as long as the additional detail can be aggregated back to the minimum standard set of race and ethnicity categories.”¹⁶⁶ While the

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OMB categories “are political constructs,” they “nonetheless help to code past and present forms of inequality and discrimination,” which are also significantly shaped by politics.¹⁶⁷ As a result, the conversation among scholars and advocates regarding nationwide data collection generally calls for amending and supplementing, rather than replacing, the OMB categories.¹⁶⁸

We encourage the continued critique of the OMB categories and echo scholars and advocates that have called for their supplementation and amendment.¹⁶⁹ This issue will be the subject of a future Center project.