

## MEMORANDUM

To:

From:

Date:

Re: Adding a citizenship question to the 2020 decennial census

### SUMMARY

This memorandum considers the legal bases for including a citizenship question on the 2020 decennial census. There exist two potential legal avenues for including the question. First, if citizenship or legal status are constitutionally relevant for apportionment purposes—as this memorandum explores—such questions must be included on the 2020 decennial census. The government appears to never have adopted such an interpretation of the Apportionment Clauses, and the Census Bureau has taken a litigation position against exclusion for apportionment purposes based on legal status. However, the state of Louisiana and some scholars have recently argued that illegal aliens must be excluded from the population count used for apportionment. Second, the citizenship question may be included for data collection purposes if the Secretary does not believe collecting the information on a sample basis to be feasible. The Secretary enjoys broad discretion in making such determinations.

### DISCUSSION

#### **I. INTRODUCTION**

An “actual Enumeration” of the United States population is required by U.S. Const. art. I, § 2, cl. 3. Pursuant to that requirement, a census has been conducted every ten years since 1790. Congress has since delegated the administration of the census to the Secretary of Commerce, 13

U.S.C. § 1 *et seq.*, who shall conduct the inquires “in such form and content as he may determine.”<sup>1</sup> Subsequently, the Secretary created the Bureau of the Census and tasked it with conducting the census.<sup>2</sup> The Director of the Census “shall perform such duties as may be imposed upon the Director by law, regulations, or orders of the Secretary.”<sup>3</sup>

Since the first census in 1790, questions have been posed beyond the constitutionally required population count. These included inquiries about race and gender.<sup>4</sup> In the 1940 census, sampling techniques were introduced to reduce costs of administering the census and reduce the burden of responding.<sup>5</sup> Sampling allowed the Bureau to survey a smaller population with supplemental questions and extrapolate the results to the population-at-large.<sup>6</sup> As a result, census data has been collected by two different questionnaires since 1970.<sup>7</sup> The large majority of the population received the “short form,” which asks only a handful of questions such as questions of race and sex, and is used for apportionment. The remaining population (approximately 16–25%)

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<sup>1</sup> 13 U.S.C.A. § 141(a) (West).

<sup>2</sup> *See, e.g., Slattery v. Clinton*, No. 96 CIV. 2366 DLC, 1997 WL 148235, at \*2 (S.D.N.Y. Mar. 28, 1997) (“Congress has delegated the power over the census to the Secretary of Commerce, who is required to conduct the decennial census ‘in such form and content as he may determine.’ 13 U.S.C. § 141(a). The Secretary of Commerce has subsequently delegated the procedures concerning the census calculation to the Bureau of the Census. 13 U.S.C. §§ 2, 4.”).

<sup>3</sup> 13 U.S.C.A. § 21(c) (West).

<sup>4</sup> *History of the Census*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 3:38 PM), <https://www.census.gov/programs-surveys/decennial-census/2020-census/about/history.html>.

<sup>5</sup> *Utah v. Evans*, 536 U.S. 452, 469 (2002) (“And Congress, in part to help achieve cost savings, responded with the present statute which provides that limited authority. See S.Rep. No. 698, 85th Cong., 1st Sess., 3 (1957) (‘[P]roper use of sampling methods can result in substantial economies in census taking’); S.Rep. No. 94–1256, p. 5 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5463, 5467 (‘use of sampling procedures and surveys ... urged for the sake of economy and reducing respondent burden’)).”)

<sup>6</sup> *See, e.g., City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 864 (9th Cir. 2002) (“Since 1940, the Bureau has employed sampling techniques to gather supplemental information regarding the population.”); Accuracy and Coverage Evaluation; Statement on the Feasibility of Using Statistical Methods To Improve the Accuracy of Census 2000, 65 FR 38374-01. 38382 n. 21 [A.C.E.] (“The Census Bureau first used sampling in a decennial census in 1940, in the program now known as “long form” enumeration, which is used to obtain detailed demographic information. The Census Bureau has used sampling to conduct federal surveys to collect key information, including unemployment and labor force data, etc., for many decades.”).

<sup>7</sup> *Measuring America: The Decennial Censuses from 1790 to 2000*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (Sept. 2002), [https://www.census.gov/library/publications/2002/dec/pol\\_02-ma.html](https://www.census.gov/library/publications/2002/dec/pol_02-ma.html).

traditionally received a “long form.”<sup>8</sup> The long form contained the short form questions and several supplemental questions, and almost always included a citizenship question.

In 2005, the traditional long form was replaced by the American Community Survey (ACS).<sup>9</sup> The ACS asks questions similar to the no-longer-used long form—including whether respondent is a citizen—but it is distributed to a sample of the population monthly rather than every ten years to provide timelier data snapshots of the United States population. The effect is that the entire population now receives the same form for the decennial census (the traditional “short form”), and a sample of approximately 3.54 million addresses each year receive the supplemental ACS form.<sup>10</sup> The ACS asks not only whether a person is a citizen, but also if they are a citizen (1) born in the United States; (2) born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas; (3) born abroad of U.S. citizen parent or parents; or (4) by naturalization.<sup>11</sup>

Indeed, the citizenship question has been posed to at least a sample population in almost every census since 1820, making it one of the oldest questions asked.<sup>12</sup> Only four of the last twenty censuses did not ask at least a sample population about their citizenship status.<sup>13</sup> Of the sixteen censuses requiring designation of citizenship status, at least nine asked the question of everyone.<sup>14</sup>

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<sup>8</sup> See, e.g., *United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) (noting that the supplemental questionnaire was distributed to every fourth household in the 1960 census); *American Community Survey*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 4:13 PM), [https://www.census.gov/history/www/programs/demographic/american\\_community\\_survey.html](https://www.census.gov/history/www/programs/demographic/american_community_survey.html) (noting that before the ACS, one household in every six received the long form).

<sup>9</sup> *History of Place of Birth, Citizenship, Year of Entry Questions*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 3:44 PM) <https://www.census.gov/acs/www/about/why-we-ask-each-question/citizenship/>.

<sup>10</sup> *Sample Size and Data Quality*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (last accessed Aug. 4, 2017 3:30 PM), <https://www.census.gov/programs-surveys/acs/methodology.html>.

<sup>11</sup> *History of Place of Birth, Citizenship, Year of Entry Questions*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 3:44 PM) <https://www.census.gov/acs/www/about/why-we-ask-each-question/citizenship/>.

<sup>12</sup> *Id.*

<sup>13</sup> Jason G. Gauthier, *Measuring America: The Decennial Censuses from 1790 to 2000*, POL/02-MA(RV) at 120, 123 (Sept. 2002), [https://www2.census.gov/library/publications/2002/dec/pol\\_02-ma.pdf](https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf).

<sup>14</sup> *Id.*

The Secretary may legally add a citizenship question to the decennial census<sup>15</sup> so long as he complies with the 1976 statutory mandate that he “shall, if he considers it feasible,” use sampling. In other words, the Secretary would need to conclude that collecting citizenship information by sampling is not “feasible,” which he has broad discretion in deciding.

It is worth noting, however, that in 1980 the Bureau of the Census took a litigation position against increasing efforts to determine citizenship.<sup>16</sup> In the words of the court, the Bureau argued that illegal aliens must be included in the apportionment count,<sup>17</sup> and that increased efforts to determine citizenship status would undermine accuracy:

[A]ny effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. Obtaining the cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.<sup>18</sup>

Despite this litigation the position, the census has a history of asking about citizenship status on its principal and supplemental questionnaires.

## **II. THE CITIZENSHIP QUESTION MAY BE ADDED TO THE DECENNIAL CENSUS FOR DATA COLLECTION PURPOSES**

### *A. The Census Act Requires the Secretary Use Sampling to Collect Citizenship Data “If He Considers It Feasible”*

The Census Act requires the Secretary take a decennial “census of population,”<sup>19</sup> which is defined as “a census of population, housing, and *matters relating to population* and housing.”<sup>20</sup>

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<sup>15</sup> Theoretically the ACS could be more widely distributed to capture a higher percentage of the population’s citizenship status, but because of the great expense and impracticality, this memo proceeds under the assumption that the expanded inquiry would occur by including the citizenship question on the decennial census form.

<sup>16</sup> *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980).

<sup>17</sup> *Id.* (“The Bureau responds that it is constitutionally required to include all persons, including illegal aliens, in the apportionment base, insofar as an accurate count is reasonably possible.”).

<sup>18</sup> *Id.*

<sup>19</sup> 13 U.S.C.A. § 141(a) (West).

<sup>20</sup> 13 U.S.C.A. § 141(g) (West) (emphasis added).

Pursuant to that mandate, “the Secretary is authorized to obtain such other census information as necessary”<sup>21</sup> and “shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.”<sup>22</sup> The statute’s permissive language allows the Secretary to exercise his broad discretion “[i]n connection with *any* such census,” whether the decennial census, a sampling procedure, or a special survey.<sup>23</sup>

In 1957, the Secretary of Commerce requested that Congress approve by statute the Bureau’s use of sampling.<sup>24</sup> The resulting statute, 13 U.S.C. § 195 (1957), couched in permissive language the Secretary’s authority to use sampling: The Secretary “may, where he deems it appropriate, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.”<sup>25</sup> But in 1976, Congress amended § 195 to mandate sampling with limited exception:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, *the Secretary shall, if he considers it feasible*, authorize the use of the statistical method known as “sampling” in carrying out the provisions of this title.<sup>26</sup>

The statute does not define “feasible.” This Department has since interpreted sampling’s feasibility to be “within the meaning of Section 195 if (1) the proposed use of sampling is compatible with

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<sup>21</sup> 13 U.S.C.A. § 141(a) (West).

<sup>22</sup> 13 U.S.C.A. § 5 (West).

<sup>23</sup> The Census Act only expressly precludes questions asking about respondent’s religious affiliations or beliefs. *See* 13 U.S.C.A. § 221(c) (West) (“Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.”). It does not expressly prohibit inquiring about citizenship status. Thus, the textual canon *expressio unius est exclusio alterius*—the expression of one thing excludes those not expressed—suggests that citizenship status is not a prohibited question.

<sup>24</sup> *Utah v. Evans*, 536 U.S. 452, 469 (2002) (citing Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 before the House Committee on the Post Office and Civil Service, 85th Cong., 1st Sess., 7 (1957) (Statement of Purpose and Need) (Secretary of Commerce, describing Bureau’s ability to obtain “some ... information ... efficiently through a sample survey ... rather than a complete enumeration basis”).

<sup>25</sup> *City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 865 (9th Cir. 2002).

<sup>26</sup> 13 U.S.C.A. § 195 (West); *see City of Los Angeles*, 307 F.3d at 865 (citing Mid-Decade Census of Population Act of 1976, Pub.L. No. 94–521, § 10, 90 Stat. 2459, 2464 (1976) (emphasis added)).

the other aspects of the census plan, and with any statutory, timing, and funding constraints; and (2) the proposed use of statistical sampling would improve the overall accuracy of the census data.”<sup>27</sup> The Secretary enjoys “meaningful discretion” in determining the feasibility of sampling, and has discretion “both to set the standard for feasibility and to decide whether that standard has been met.”<sup>28</sup>

[T]he choice of language “if he considers it” as a pre-condition of “feasible” demonstrates that Congress intended for the Secretary to make such judgment calls. This phrase indicates that Congress did not intend to limit the Secretary’s discretion to a finding of whether a particular use of sampling is capable of being done. Rather, it left the choice to the Secretary as to whether sampling could be used, bringing to bear his expertise on the effectiveness of different statistical methodologies and their compatibility with the other aspects of the census. Thus, unlike other cases in which the agency had “little administrative discretion” in making a feasibility determination, § 195 reflects Congress’ intent for the Secretary to strike a balance as to the feasibility of using sampling in any given instance.<sup>29</sup>

Because “feasible” is ambiguous in the statute, courts defer to the Secretary’s reasonable interpretations of the term.<sup>30</sup> The 2010 decennial census, for example, included questions of sex, age, and race, none of which are required for apportionment. Thus, including a citizenship question would be a permissible exercise of the Secretary’s broad discretion “[i]n connection with any such census” for “matters relating to population”—namely, the citizenship status of the population.

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<sup>27</sup> A.C.E., 65 FR 38374-01 at 38398. *See also* A.C.E., 65 FR 38374-01 at 38380 (noting that feasibility has two components: operational feasibility and technical feasibility. “Operational feasibility refers to the Census Bureau’s ability to conduct each major component of the census within applicable deadlines and with available resources. . . . Technical feasibility refers to whether the statistical methodology used by the [Accuracy and Coverage Evaluation] will improve accuracy.”).

<sup>28</sup> *City of Los Angeles*, 307 F.3d at 870 (emphasis in original); *see also* *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 345–46 (1999) (Scalia, J., concurring) (“The Secretary is under no *command* to authorize sampling if he does not consider it feasible.” (emphasis in original)).

<sup>29</sup> *City of Los Angeles*, 307 F.3d at 872.

<sup>30</sup> *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

*B. Similar Questions Appeared on Past Censuses and Withstood Legal Challenges*

Courts have upheld legal challenges to census race and ethnicity inquiries that are similar to potential litigation over including the citizenship question on the decennial census. In *Morales v. Daley*, the United States District Court for the Southern District of Texas rejected allegations that compelling respondents to disclose their race and ethnicity on the census violated the First, Fourth, Fifth, and Fourteenth Amendments.<sup>31</sup> Although the government did not challenge plaintiffs' contention that census data was used to identify and detain Japanese citizens in the Second World War, the plaintiffs did not allege or demonstrate that their data would be used to discriminate against them.<sup>32</sup> The court acknowledged the Bureau's broad authority to conduct the census, and distinguished between self-classification based on individual characteristics and impermissible disparate treatment based on those classifications.<sup>33</sup> In other words, collection of data is not impermissible and should not be confused with potential misuse of data. Similarly, merely collecting citizenship statistics, without more, should withstand legal challenges alleging potential misuse of the information.

Nor does requiring disclosure of citizenship status amount to compelled speech. In *Morales*, the court was unconvinced by allegations that requiring race and ethnicity questions amounted to government impermissibly compelling speech even if the respondents thought the Census Bureau's justification was "trivial" or they "object[ed] to its use on political or moral grounds."<sup>34</sup>

Fourth Amendment allegations that the inquiries are intrusive fare no better. "Asking questions well beyond the constitutionally mandated headcount is far from a novel idea of

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<sup>31</sup> *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000).

<sup>32</sup> *Id.* at 811.

<sup>33</sup> *Id.* at 813–815

<sup>34</sup> *Id.* at 816.

twentieth century big government bureaucrats,” and in fact has been done for over two hundred years.<sup>35</sup> And “[t]he fact that some public opinion research experts might regard the size of the household questionnaire ‘sample’ as larger than necessary to obtain an accurate result does not support a conclusion that the census was arbitrary or in violation of the Fourth Amendment.”<sup>36</sup>

*C. Citizenship Data is Relevant for Federal Programs and for State Redistricting*

Apportionment is not the only purpose for the information collected through the census.<sup>37</sup> The Supreme Court recognizes that “census data also have important consequences not delineated in the Constitution.”<sup>38</sup> The federal government, for example, considers census results when distributing federal program funds to states; states use census data when drawing political districts.<sup>39</sup> Indeed, the Census Act specifically contemplates the use of census results in determining eligibility for federal programs or amount of benefits,<sup>40</sup> and requires redistricting data be sent to states within one year of the decennial census.<sup>41</sup> The census website explains that the ACS asks about place of birth, citizenship, and year of entry “to set and evaluate immigration

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<sup>35</sup> *Id.* at 818.

<sup>36</sup> *Rickenbacker*, 309 F.2d at 463–64.

<sup>37</sup> *See, e.g., City of Los Angeles*, 307 F.3d at 864 (9th Cir. 2002) (“Although the Constitution mandates only that the census be taken for reapportionment purposes, the census data is used for myriad other purposes.”); *Klutznick*, 486 F. Supp. at 568 (“The census figures are also used for a variety of other purposes. Most relevant to this lawsuit is the fact that many states use the figures as the basis for their own internal apportionment of state and local governmental bodies, and Congress requires the use of the figures as a basis for distribution of federal funds under a number of financial assistance statutes.”); *see also Legal Tender Cases*, 79 U.S. 457, 536 (1870) (“Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?”).

<sup>38</sup> *Wisconsin v. City of N.Y.*, 517 U.S. 1, 5 (1996).

<sup>39</sup> *Id.* at 5–6.

<sup>40</sup> 13 U.S.C.A. § 141(e)(1); This is in accordance with Congress’s power under the Necessary and Proper Clause. *See United States v. Moriarity*, 106 F. 886, 891 (C.C.S.D.N.Y. 1901) (“Respecting the suggestion that the power of congress is limited to a census of the population, it should be noticed that at stated periods congress is directed to make an apportionment, and to take a census to furnish the necessary information therefor, and that certain representation and taxation shall be related to that census. This does not prohibit the gathering of other statistics, if ‘necessary and proper,’ for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the government and the citizens.”).

<sup>41</sup> 13 U.S.C.A. § 141(c).



policies and laws, understand the experience of different immigrant groups, and enforce laws, policies, and regulations against discrimination based on national origin.”<sup>42</sup> For example, such information may determine eligibility for grants under the Elementary and Secondary Education Act of 1965 or financial assistance under the Immigration and Nationality Act.<sup>43</sup>

An accurate count of citizens is also important for determining potential Voting Rights Act violations in state-drawn legislative districts.<sup>44</sup> For example, in *League of United American Citizens v. Perry*, the Supreme Court acknowledged the crucial difference between the voting age population and the *citizen* voting age population when considering potential § 2 violations.<sup>45</sup> Race was used to create a “facade of a Latino district” because even though Latinos were a majority of the voting age population, they did not have a *citizen* voting age population that could meaningfully elect candidates. In cases like these, an accurate citizenship count could aid in determining potential violations of the Voting Rights Act.

To be sure, the Census Bureau already provides citizenship estimates based on data it currently collects from the ACS,<sup>46</sup> and courts consider the ACS reliable for enforcement of the Voting Rights Act.<sup>47</sup> But, as discussed above, how such estimates are obtained (including sample size) is within the discretion of the Secretary.

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<sup>42</sup> *History of Place of Birth, Citizenship, Year of Entry Questions*, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE (July 3, 2017 3:57 PM) <https://www.census.gov/acs/www/about/why-we-ask-each-question/citizenship/>.

<sup>43</sup> *Id.*

<sup>44</sup> A.C.E., 65 FR 38374-01 at 38375 (“State and local governments use census data to draw legislative districts of equal population to comply with the constitutional ‘one-person-one-vote’ mandate and the statutory requirements of the Voting Rights Act.”)

<sup>45</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) (“Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship.”)

<sup>46</sup> *See, e.g.*, <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t>.

<sup>47</sup> *See Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 721 (N.D. Tex. 2009) (“The Court takes judicial notice of the Census Bureau’s February 2009 publication ‘A Compass for Understanding and Using American Community Survey Data—What State and Local Governments Need to Know.’ The mere issuance of such a publication by the Census Bureau, which provides detailed guidance on how ACS data should be interpreted and utilized by state and local governments, suggests that the Census Bureau considers ACS data reliable and intends for it to be relied upon in decisions such as Voting Rights Act compliance.” (emphasis added)).

### III. LIMITED RESTRICTIONS ON USE OF CITIZENSHIP DATA

#### A. *The Apportionment Clauses Do Not Suggest the Exclusion of Noncitizens or Illegal Aliens From the Population When Apportioning United States Representatives*

The Constitution's Apportionment Clauses have been read to include all persons in the United States be counted except Indians not taxed. Art. I. § 2 cl. 3 expressly provides "[r]epresentatives . . . shall be apportioned among the several states . . . by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Unlike the special treatment of slaves and Indians in this original enumeration clause, aliens went unmentioned. The Founders certainly knew of their existence because they addressed naturalization in the Constitution.<sup>48</sup> Their conscious choice not to except aliens from the directive to count the population suggests the Founders did not intend to distinguish between citizens and non-citizens for the "actual Enumeration" used for apportionment.<sup>49</sup> And records from the Constitutional Convention indicate that the founders hoped to include as many people in the count as possible because the apportionment numbers were also used for the purposes for direct taxation, and they knew the importance of being able to fund the government after the Articles of Confederation.<sup>50</sup>

The 1820 and 1830 censuses asked whether respondents were "foreigners not naturalized" in addition to the principal count.<sup>51</sup> We are unaware of any evidence that the "foreigners not naturalized" were subtracted from the total population count, though admittedly we are unlikely

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<sup>48</sup> See U.S. Const. art. I, § 8, cl. 4.

<sup>49</sup> *Klutznick*, 486 F. Supp. at 576; *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 847 (1981).

<sup>50</sup> See generally Max Farrand, *The Records of the Federal Convention of 1787*, Volume IV.

<sup>51</sup> Act of Mar. 14, 1829, ch. 24, § 1, 3 Stat. 550; Act of Mar. 23, 1830, ch. 40, Schedule, 4 Stat. 389; *Measuring America* 6-7.

to find such evidence given the state of recordkeeping at the time. This again likely indicates that aliens were included in the apportionment count.

Similarly, the Fourteenth Amendment requires “the *whole* number of persons in each state” be counted for apportionment of representatives, regardless of their citizenship status.<sup>52</sup> Proposals to limit apportionment to voters or citizens were rejected in favor of the more inclusive language.<sup>53</sup> This history strongly suggests a constitutional requirement to include non-citizens in the apportionment calculations. Moreover, the Supreme Court has held that even illegal aliens are protected “persons” under the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment;<sup>54</sup> excluding them from being “persons” in the next section of the same Amendment would be ill-founded. And in fact, the Bureau of the Census has argued in litigation that it is constitutionally required to include all persons in the apportionment base, including illegal aliens.<sup>55</sup>

Indeed, nearly a century of congressional history and proposals to exclude illegal aliens reveal that members generally conclude a constitutional amendment would be required because the Apportionment Clauses currently include them.<sup>56</sup> For example, a 1929 opinion of the Senate’s legislative counsel noted that the “natural and obvious meaning” of the word “persons,” along with internal consistency in the text and structure of the constitution,<sup>57</sup> and “uniform past congressional

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<sup>52</sup> U.S. Const. amend. XIV, § 2 (emphasis added).

<sup>53</sup> *Klutznick*, 486 F. Supp. at 576; *Demography and Distrust* at 847–848.

<sup>54</sup> *See Plyler v. Doe*, 457 U.S. 202, 210–216 (1982).

<sup>55</sup> *Id.* at 568.

<sup>56</sup> *See, e.g.*, H.J. Res. 11, 111th Cong., 1st Sess. (2009) (proposed constitutional amendment to exclude aliens from the apportionment count); 71 Cong. Rec. 1821-1822 (1929) (Senate Legislative Counsel’s opinion that it would be unconstitutional to exclude aliens from the apportionment count); 86 Cong. Rec. 4372 (1940) (statement of Rep. Celler).

<sup>57</sup> For example, if “persons” did not include noncitizens, the exception of “Indians not taxed” would be superfluous. The inference from that exception is that Indians who are taxed (but are not citizens) would be included in population counts used for apportionment.

construction of the term” all establish that illegal aliens are constitutionally required to be included in apportionment counts; only a constitutional amendment can provide otherwise.<sup>58</sup>

In a 2016 Supreme Court case discussing the Apportionment Clauses, all eight Supreme Court Justices<sup>59</sup> used “total population,” “inhabitants,” and “residents” interchangeably.<sup>60</sup> None of the justices even alluded to separating non-citizens or illegal immigrants from “whole number of persons” used for apportioning representatives.

This enduring understanding that citizens and illegal aliens are constitutionally included “persons” who must be counted for apportionment was recently challenged by the state of Louisiana. In 2011, Louisiana filed suit directly in the Supreme Court alleging that the inclusion of illegal aliens in the 2010 apportionment cost Louisiana at least one United States Representative.<sup>61</sup> The brief argued that only “inhabitants,” or lawful permanent residents, are included in the original meaning of the Apportionment Clauses. Although the Apportionment Clauses use the word “persons,” early drafts of the Constitution and the enacting legislation for the 1790 census referred to “inhabitants,” which require a stronger connection to the state than merely being present. The Supreme Court denied the motion for leave to file a bill of complaint without explanation, and may well have done so on procedural grounds.<sup>62</sup> The case was never subsequently filed in lower court. As noted above, however, no Supreme Court Justice adopted such a distinction between lawful permanent residents and apportionment population when they decided *Evenwel* last year.

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<sup>58</sup> 71 Cong. Rec. 1821-1822 (1929).

<sup>59</sup> The late Justice Scalia’s seat had not yet been filled.

<sup>60</sup> See generally *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

<sup>61</sup> Plaintiffs’ Motion for Leave to File a Complaint and Brief in Support of Motion, *Louisiana v. Bryson*, No. 140. Although the brief alleged that at least four other states would lose representation, none joined in the suit.

<sup>62</sup> *Louisiana v. Bryson*, 565 U.S. 1258 (2012).

Over two hundred years of precedent, along with substantially convincing historical and textual arguments suggest that citizenship data likely cannot be used for purposes of apportioning representatives. This is not to say, however, that the question cannot legally be included in the census for other purposes, as discussed above. But should the Bureau of the Census decide to make a distinction that would exclude noncitizens or illegal aliens from apportionment, there is at least a policy argument and a minority-view in scholarship that can be employed in a legal challenge.

*B. Respondents' Answer to Citizenship Question Cannot Be Used in Individualized Proceedings*

The Bureau's use of census information is explicitly limited to the "statistical purposes for which it is supplied."<sup>63</sup> The citizenship status of a respondent may not be used against him or her in any legal proceeding. Census reports "shall be immune from legal process" and "shall not . . . be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."<sup>64</sup> An individual's response to the census can be used only to prosecute alleged violations of the Census Act, such as providing false information on the census form.<sup>65</sup>

Despite these two limited exceptions, census data may be collected and used in the aggregate for a variety of purposes.

#### IV. CONCLUSION

In short, and without opining on the wisdom of such an action, a citizenship status question may legally be included on the decennial census so long as the collected information is not used for apportionment or in any individualized proceeding against a respondent, and the Secretary determines sampling is not feasible. Of course, so determining would contradict decades of

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<sup>63</sup> 13 U.S.C.A. § 9(a)(1) (West).

<sup>64</sup> 13 U.S.C.A. § 9 (West) (emphasis added).

<sup>65</sup> 13 U.S.C.A. § 8 (West) ("In no case shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.").

precedent where the Secretary has found sampling for numerous questions—including citizenship—feasible, and where the resulting ACS citizenship estimates provided by the Department of Commerce were used by other government agencies in litigation.