



August 3, 2018

Ms. Jennifer Jessup  
Departmental Paperwork Clearance Officer  
Department of Commerce, Room 6616  
14<sup>th</sup> Street and Constitution Avenue NW  
Washington, D.C. 20230

RE: Comments on Proposed Information Collection on 2020 Census, Docket No. USBC-2018-0005

The Constitutionality Accountability Center (CAC) is a non-profit law firm, think tank, and action center dedicated to the text, history, and values of the Constitution. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. Through our expert commentary, issue briefs, narratives, and testimony to Congress, we inform the public and America's elected leaders with comprehensive analysis of the most contentious topics in modern constitutional and federal law.

CAC urges you to remove a mandatory question from the 2020 Census asking all persons to divulge their citizenship status. The Constitution requires the Census Bureau to count all persons, not merely citizens. A new, untested citizenship question would be an end-run around the Constitution's text, history, and values. It cannot be squared with the federal government's constitutional obligation to ensure a national count of all persons—regardless of where they are from or their immigration status. Such a question would result in inaccurate data, thereby biasing congressional apportionment, redistricting, and funding decisions, for an entire decade.

More than two centuries ago, our Constitution's Framers established a democracy premised on the idea that all persons—no matter where they are from—deserve equal representation. To ensure a proper count of the nation's population, the Constitution explicitly requires an "actual Enumeration" of the people.<sup>1</sup> This itself was a revolutionary undertaking. "While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document."<sup>2</sup>

The Constitution's Framers put the requirement that there be a decennial Census directly in the Constitution itself to prevent partisan manipulation of our representative democracy. The Framers understood that "those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know

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<sup>1</sup> U.S. Const., art. I, § 2, cl. 3.

<sup>2</sup> *Utah v. Evans*, 536 U.S. 452, 510 (2002) (Thomas, J., concurring in part and dissenting in part).

they will always when they can rather increase it.”<sup>3</sup> Wary that those in power might try to undermine the promise of equal representation for all, the Framers were careful to write into the Constitution a “permanent and precise standard” for the Census—counting all persons—“as essential to ye. fair representation.”<sup>4</sup> As Hamilton insisted, “[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectively shuts the door to partiality and oppression.”<sup>5</sup> Thus, the Constitution imposes a clear duty: it requires a count of *all* people living in the United States.

The original Constitution’s promise of equal representation for all persons, however, was marred by the Three-Fifths Clause, which provided that for the purpose of determining representation in Congress, an enslaved person would be counted as three-fifths of a person. This guaranteed slaveholding states additional representation based on the number of people held in bondage. But, nearly 80 years later, after a bloody civil war fought over slavery, the Fourteenth Amendment fixed this injustice and reaffirmed the need for an accurate count of all persons to apportion representatives among the states.

The Fourteenth Amendment requires apportioning representatives among the states “according to their respective numbers, counting the whole numbers of persons in each state,”<sup>6</sup> reflecting that representation should be based “on the largest basis of population, counting every man, woman, and child.”<sup>7</sup> “Numbers, not voters; numbers, not property, this is the theory of the Constitution.”<sup>8</sup> During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. The Framers of the Fourteenth Amendment explicitly considered and then decisively rejected those arguments. They insisted that “the whole immigrant population should be numbered with the people and counted as part of them.”<sup>9</sup> As history shows, the purpose of the Census required by the Constitution has never been to count just citizens, but rather to count “the whole body of the people.”<sup>10</sup>

Adding the new citizenship question proposed by the Department of Justice would undermine the Census Bureau’s constitutional commitment to count all persons. It would also result in inaccurate data, thereby biasing congressional apportionment, redistricting, and funding decisions, for an entire decade, and producing harmful inequalities which would last even longer. Former Directors of the Census Bureau—appointed by Presidents of both parties—have recognized that “[d]irectly inquiring about citizenship status as part of the short form Census . . . would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status.”<sup>11</sup> Overwhelming evidence shows that this new question, if it becomes a part of the 2020 Census, will deter participation by immigrants across the country, who

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<sup>3</sup> 1 *Records of the Federal Convention* 578 (Max Farrand ed., 1911).

<sup>4</sup> *Id.*

<sup>5</sup> *The Federalist No. 36*, at 188 (Clinton Rossiter rev. ed., 1999).

<sup>6</sup> U.S. Const. amend XIV, § 2.

<sup>7</sup> Cong. Globe, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1280 (1866).

<sup>8</sup> *Id.* at 2767.

<sup>9</sup> *Id.* at 432.

<sup>10</sup> *Id.* at 385.

<sup>11</sup> Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae*, at 23, *Evenwel v. Abbott*, 136 S. Ct. 1220 (2016).

do not want an official record of their immigration status and fear that their responses will be used by the government to harm them and their families. The Census Bureau's own data demonstrates "an unprecedented groundswell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants."<sup>12</sup> In the run up to the 2020 Census, "researchers heard respondents express new concerns about topics like the 'Muslim Ban,' discomfort 'registering' other household members by reporting their demographic characteristics, the dissolution of the 'DACA' . . . program, [and] repeated references to Immigration and Customs Enforcement."<sup>13</sup> Adding a citizenship question to the 2020 Census—given the overwhelming evidence that it will chill participation and produce inaccurate responses—would break faith with the Constitution's mandate for a head count of the entire nation.

The Department of Justice urges that a citizenship question is necessary to ensure compliance with the Voting Rights Act, but this is transparently false. Since the passage of the Voting Rights Act in 1965, neither the short form Census nor the Census questionnaire has ever asked the American people to report their citizenship. A mandatory question on citizenship has never been necessary to ensure robust protection for the right to vote. That is just as true now as it was in 1965 when the Voting Rights Act was passed. This is a specious justification for undercutting what the Constitution mandates: a count of all the people.

The Justice Department's effort to game the Census and manipulate the national head count our Framers wrote into the Constitution should be rejected. Failing to count all persons in the United States, as the Constitution mandates, would deal a huge blow to our democracy. The stakes are high, and there are no do-overs permitted—we must get it right, and get it right now.

Sincerely,



Elizabeth B. Wydra  
President

*Encl.: The Cornerstone of our Democracy: The Census Clause and the Constitutional Obligation to Count All Persons*, David Gans, CAC Issue Brief, March 19, 2018, available at [https://www.theusconstitution.org/think\\_tank/cornerstone-democracy-census-clause-constitutional-obligation-count-persons/](https://www.theusconstitution.org/think_tank/cornerstone-democracy-census-clause-constitutional-obligation-count-persons/)

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<sup>12</sup> Mikelyn Meyers, U.S. Census Bureau, Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census 15 (Nov. 2, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf>.

<sup>13</sup> Memorandum from Ctr. for Survey Measurement to the Assoc. Directorate for Research & Methodology, Re: Respondent Confidentiality Concerns 1 (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.

## The Cornerstone of Our Democracy: The Census Clause and the Constitutional Obligation to Count All Persons

By David H. Gans  
March 19, 2018

### I. Introduction

More than two centuries ago, our Constitution’s Founders established a democracy premised on the idea that all persons—no matter where they are from, regardless of whether they can vote—deserve equal representation in our government. To ensure a proper count of the nation’s population and apportion representatives, the Constitution explicitly requires an “actual Enumeration” of the people.<sup>1</sup> By requiring an “actual Enumeration,” the Constitution’s text imposes a clear duty on the federal government: it must count *all* people living in the United States, whether they are citizens or non-citizens, whether they were born in the United States or in a distant part of the world. This was a critical part of the Framers’ insurance policy against partisan efforts to manipulate the ground rules of our democratic system of government.

Of course, as it stood at the end of the 18<sup>th</sup> century, the Constitution’s promise of equal representation for all persons was grievously undermined by the Three-Fifths Clause, which provided that, for the purpose of determining representation in Congress, enslaved persons would be counted as three-fifths of a person. Following a bloody Civil War fought over slavery, the Fourteenth Amendment fixed this shameful injustice in the text of our charter and reaffirmed the need for an accurate count of all persons to apportion representatives among the states.

As these provisions of the Constitution reflect, the Census is a cornerstone of our democracy. Census data is used to apportion representatives in Congress; determine how many votes each state will have in the Electoral College; draw state, local, and congressional districts; and allocate billions of dollars of federal funds to local communities. Far from simply a computational error, failing to count all persons in the United States—as our Constitution requires—would be enormously damaging. It would undermine our democracy and shortchange undercounted communities, leaving them without the federal funds they need for infrastructure, schools, and other vital services. The Census occurs only once every ten years, and there are no do-overs. Thus, our nation would suffer the consequences of an unfair, inaccurate count for at least the next ten years, and possibly much longer. The repercussions of an unfair, inaccurate count are immense.

Supreme Court precedent hews closely to these basic constitutional understandings. In opinions written by Justice Stephen Breyer and Justice Ruth Bader Ginsburg, the Justices have emphasized that “the Framers chose to use population . . . as the basis for representation,”<sup>2</sup> and

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<sup>1</sup> U.S. Const. art. I, § 2, cl. 3.

<sup>2</sup> *Utah v. Evans*, 536 U.S. 452, 478 (2002).

that “representatives serve all residents, not just those eligible or registered to vote.”<sup>3</sup> The Court has also recognized that the Constitution’s “periodic census requirement . . . ensure[s] that entrenched interests” do not “stall or thwart needed reapportionment.”<sup>4</sup> In separate opinions, the Court’s conservative Justices have affirmed that the Framers “knew that the calculation of populations could be and often were skewed for political or financial purposes” and “chose to make an ‘actual Enumeration’ a part of our constitutional structure” in order “to preclude the availability of methods that permit political manipulation.”<sup>5</sup> While the Justices have differed on the permissibility of sampling and imputation,<sup>6</sup> all agree on the constitutional imperative of counting *all* persons.

Despite the important role the Census plays in our constitutional order, President Donald Trump’s administration is threatening to undermine the fairness and accuracy of the 2020 decennial census. On December 12, 2017, the Department of Justice urged the Department of Commerce to add a new, untested question to the census, asking all persons residing in the United States to divulge their citizenship status. This new question, if it becomes a part of the 2020 Census, will deter participation by immigrants across the country, who do not want an official record of their immigration status and fear that their responses will be used by the government to harm them and their families. Former directors of the Census Bureau—appointed by Presidents of both parties—have recognized that “[d]irectly inquiring about citizenship status as part of the short form Census . . . would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status.”<sup>7</sup> These concerns are even more pronounced for the 2020 Census. The Census Bureau’s own data demonstrates “an unprecedented groundswell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants.”<sup>8</sup> In the run up to the 2020 Census, “researchers heard respondents express new concerns about topics like the ‘Muslim Ban,’ discomfort ‘registering’ other household members by reporting their demographic characteristics, the dissolution of the ‘DACA’ . . . program, [and] repeated references to Immigration and Customs Enforcement.”<sup>9</sup> To add a citizenship question runs directly counter to the constitutional duty on the Census Bureau to ensure a count that includes everyone, regardless of citizenship status.

Concerns about the abuse of Census data are not new. Throughout history, misuse of Census data has led to gross constitutional abuses. During World War II, despite existing federal confidentiality protections, the Census Bureau shared demographic information about Japanese Americans with the military, which led to the forced round-up and internment of Japanese

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<sup>3</sup> *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

<sup>4</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

<sup>5</sup> *Evans*, 536 U.S. at 500, 510, 507 (Thomas, J., concurring in part and dissenting in part); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring in part) (refusing to construe Census Clause “to give the party controlling Congress the power to distort representation in its own favor”).

<sup>6</sup> *Evans*, 536 U.S. at 452, 473-79 (upholding use of “hot-deck imputation” to fill in gaps in information and resolve conflicts in Census data); *Dep’t of Commerce*, 525 U.S. at 334-344 (holding that the Census Act forbids use of statistical sampling for purposes of apportionment).

<sup>7</sup> Br. of Former Dirs. of the U.S. Census Bureau as *Amici Curiae* at 23, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

<sup>8</sup> Mikelyn Meyers, U.S. Census Bureau, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census* 15 (Nov. 2, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf>.

<sup>9</sup> Memorandum from Ctr. for Survey Measurement to the Assoc. Directorate for Research & Methodology, Re: Respondent Confidentiality Concerns 1 (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.



Americans.<sup>10</sup> In early 1942, Census Director J.C. Capt noted that “[w]e’re by law required to keep confidential information by individuals. But in the end, if the defense authorities found 200 Japs [sic] missing and they wanted the names of Japs [sic] in that area, I would give them further means of checking individuals.”<sup>11</sup> Despite longstanding denials by the Census Bureau, it has now been demonstrated that the Census Bureau provided direct assistance to the military, which was used in rounding up Japanese Americans. In 2004, the Census Bureau gave comprehensive reports to the Department of Homeland Security listing Arab-American populations by city and zip code.<sup>12</sup>

Fears that citizenship data might be abused are particularly intense right now, both because of the charged political climate on immigration and because there is simply no good reason for asking all persons to divulge their citizenship status as part of the Census. The Department of Justice urges that a citizenship question is necessary to ensure compliance with the Voting Rights Act, but this is transparently false. Since the passage of the Voting Rights Act in 1965, the census form sent to all residents has never asked the American people to report their citizenship. A mandatory question on citizenship has never been necessary to ensure robust protection for the right to vote. This is a specious justification for intimidating immigrant communities and ultimately undercutting what the Constitution mandates: a count of *all* the people.

This issue brief unfolds as follows. Part II examines how the Founders of our Constitution created a democratic system of government in which all persons were entitled to equal representation, and the critical role the census plays in our constitutional scheme. This was a revolutionary undertaking, mandating an official count of all persons in the Constitution and making it a critical part of our democracy. The Constitution’s original provisions governing representation, however, were directly undercut by the Constitution’s compromises with slavery. Part III examines how, following a bloody civil war fought over slavery, the Fourteenth Amendment textually redeemed the Constitution’s prior repudiation of equal representation for all African Americans, and reaffirmed the federal government’s constitutional obligation to count all persons, both citizens and non-citizens alike. Part IV argues that the mandatory citizenship question proposed by the Department of Justice would be an end-run around the Constitution and cannot be squared with the government’s constitutional obligation to ensure a national count of all persons, regardless of where they are from or their immigration status.

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<sup>10</sup> See Paul Schor, *Counting Americans: How the U.S. Census Classified the Nation* 267-68 (2017); William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War* (Mar. 8, 2000) (unpublished draft), <https://ww2.amstat.org/about/statisticianhistory/index.cfm?fuseaction=PaperInfo&PaperID=1>).

<sup>11</sup> Schor, *supra* note 10, at 267.

<sup>12</sup> See Eric Lipton, *Panel Says Census Move on Arab-Americans Recalls World War II Internments*, N.Y. Times (Nov. 10, 2004), available at <http://www.nytimes.com/2004/11/10/politics/panel-says-census-move-on-arabamericans-recalls-world-war-ii.html>.



## II. The Census Clause and Our Constitution’s Promise of Equal Representation for All Persons

In order to ensure that “the foundations of this government should be laid on the broad basis of the people,”<sup>13</sup> Article I, Section 2 provides that the “House of Representatives shall be composed of Members chosen every second Year by the People of the several States” and that “[r]epresentatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . and excluding Indians not taxed, three fifths of all other Persons.”<sup>14</sup> To ensure a proper count of the nation’s total population, Article I requires an “actual Enumeration” of the people of the nation “every . . . Term of ten Years, in such Manner as [Congress] shall by Law direct.”<sup>15</sup> Of course, the promise of equal representation for “the people” was directly contradicted by the ground rules the Framers established for the “actual Enumeration,” which fully counted “free Persons,” while only counting “three fifths of all other Persons.” As with the other accommodations made at the Founding to the institution of slavery, our charter did not live up to its stated ideals of equality until the passage of the post-Civil War amendments, as explained below.

The Constitution’s language, although grievously flawed, nonetheless marked a milestone in our democracy. “With those words, the United States became the first nation in the history of the world to take a population census and use it to allocate seats in a national assembly according to population.”<sup>16</sup> As Justice Clarence Thomas has made the point, “[w]hile other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document.”<sup>17</sup>

In choosing the total population standard, the Framers decreed that “that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives.”<sup>18</sup> Determining representation in Congress based on a count of all persons reflected that “every individual of the community at large has an equal right to the protection of government.”<sup>19</sup> Ensuring equal representation for all had deep roots in America’s bid for independence from England. The Framers were familiar with what James Madison called the “vicious representation in G. B.,”<sup>20</sup> in which “so many members were elected by a handful of easily managed voters in ‘pocket’ and ‘rotten’ boroughs, while populous towns went grossly underrepresented or not represented at all.”<sup>21</sup> Having seen the political system manipulated for partisan ends in England, the Framers strove to design a system that reflected that a “free and equal representation is the best, if not the only foundation upon which a free government can be

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<sup>13</sup> 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 21 (Jonathan Elliot ed., 2d ed., 1836) [hereinafter “Elliot’s Debates”].

<sup>14</sup> U.S. Const. art. I, § 2, cl. 1, 3.

<sup>15</sup> *Id.*

<sup>16</sup> Margo Anderson, *The Census and the Federal Statistical System: Historical Perspectives*, 631 *Annals of Am. Acad. of Poli. & Soc. Sci.* 152, 154 (2010).

<sup>17</sup> *Evans*, 536 U.S. at 510 (Thomas, J., concurring in part and dissenting in part).

<sup>18</sup> 1 *The Records of the Federal Convention of 1787*, at 179 (Max Farrand ed., 1911).

<sup>19</sup> *Id.* at 473; *id.* at 477 (“[T]he people shd. be repre[sen]ted in proportion to yr. numbers, the people then will be free.”); *Evenwel*, 136 S. Ct. at 1127.

<sup>20</sup> 1 *Records of the Federal Convention*, *supra* note 18, at 464.

<sup>21</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996).



built.”<sup>22</sup> Of all “the[] electoral safeguards for the representational system,” none “was as important to Americans as equality of representation.”<sup>23</sup>

Working hand in hand with the total population standard, the Census Clause created a structural protection for equal representation, imposing on the federal government a duty to conduct a complete and accurate count of all people residing in the nation. As the text and history of the Census Clause demonstrates, the Constitution’s Framers required a decennial Census directly in the Constitution to enforce the constitutional guarantee of equal representation and prevent partisan manipulation of our representative democracy.

The Framers provided a “conjunctural ratio” for the apportionment of representatives in the First Congress “to prevail in the outset,” but they refused to permit guesswork to be used going forward.<sup>24</sup> As George Mason argued, “a Revision from time to time according to some permanent & precise standard” was “essential to ye. fair representation required in the 1<sup>st</sup>. branch.”<sup>25</sup> Wary that those in power might try to undermine the promise of equal representation for all, the Framers insisted on an “actual Enumeration”—a national count of all inhabitants—once every ten years. As Founding-era dictionaries make clear, “an ‘enumeration’ requires an actual counting.”<sup>26</sup> As James Madison observed during debates over the First Census Act, while “there will be more difficulty attendant on taking the census, in the way required by the [C]onstitution,” a count of all persons would provide “an exact number” rather than “assertions and conjectures.”<sup>27</sup> The constitutional requirement of an “actual Enumeration” would help ensure that “every individual of the community at large has an equal right to the protection of government,”<sup>28</sup> and prevent manipulation of our democratic system of government for partisan ends.

As the debates in the Constitutional Convention over the Census Clause reflect, the Framers understood that “those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it.”<sup>29</sup> The Framers’ decision to mandate a national count of all inhabitants every 10 years to ensure equal representation for all persons “had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised.”<sup>30</sup> As Alexander Hamilton emphasized, “[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectively shuts the door to partiality or oppression.”<sup>31</sup>

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<sup>22</sup> 2 *Elliot’s Debates*, *supra* note 13, at 25.

<sup>23</sup> Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 170 (2d ed. 1998).

<sup>24</sup> 1 *Records of the Federal Convention*, *supra* note 18, at 578; *Evans*, 536 U.S. at 475 (“[T]he original allocation of seats in the House was based on a kind of ‘conjecture[e],’ in contrast to the deliberately taken count that was ordered for the future.”) (quoting 1 *Records of the Federal Convention* at 578-79).

<sup>25</sup> 1 *Records of the Federal Convention*, *supra* note 18, at 578.

<sup>26</sup> *Dep’t of Commerce*, 525 U.S. at 346 (Scalia, J., concurring in part) (collecting dictionary definitions); *Evans*, 536 U.S. at 475 (“Late-18<sup>th</sup>-century dictionaries define the word simply as an ‘act of numbering or counting over[.]’”).

<sup>27</sup> James Madison, *Census* (Feb. 2, 1790) in 13 *The Papers of James Madison* 15-16 (Charles F. Hobson & Robert A. Rutland ed. 1981).

<sup>28</sup> 1 *Records of the Federal Convention*, *supra* note 18, at 473 (Alexander Hamilton).

<sup>29</sup> *Id.* at 578.

<sup>30</sup> 2 Joseph Story, *Commentaries on the Constitution*, § 633, at 141 (1833); see also *Dep’t of Commerce*, 525 U.S. at 348-49 (Scalia, J., concurring in part) (“[G]enuine enumeration . . . may be the most accurate way of determining population with minimal possibility of partisan manipulation.”).

<sup>31</sup> *The Federalist No. 36*, at 188 (Clinton Rossiter rev. ed., 1999).





During the debate on the Census Clause in the Constitutional Convention, both supporters and opponents recognized that a fixed constitutional standard would limit opportunities for partisan manipulation of our representative democracy. Gouverneur Morris opposed the Census Clause as “fettering the Legislature too much,” but he recognized that if the mode for taking the census was “unfixt the Legislature may use such a mode as will defeat the object[] and perpetuate the inequality.”<sup>32</sup> In response, Edmund Randolph pointed out that “if the danger suggested by Mr. Govr. Morris be real, of advantage being taken of the Legislature in pressing moments, it was an additional reason for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations.”<sup>33</sup> This argument carried the day, and the Framers concluded that “the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution.”<sup>34</sup>

Article I’s rule that representatives would be apportioned based on an “actual Enumeration” of the “respective Numbers” of people—designed to guarantee equal representation for equal numbers of people—however, was undercut by the Three-Fifths Clause, which provided that, for the purpose of determining representation in Congress, enslaved persons would be counted as three-fifths of a person. “The more slaves the Deep South could import from the African continent—innocents born in freedom and kidnapped across an ocean to be sold on auction blocks—the more seats it would earn in the American Congress.”<sup>35</sup>

During the debates in the Convention, Gouverneur Morris and others argued strenuously against the adoption of the Three-Fifths Clause, pointedly asking “[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?”<sup>36</sup> Opponents of the Clause argued that Southern states should not have their representation increased on account of the enslaved population since persons forced into slavery are “no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master.”<sup>37</sup> The upshot of the Clause, Morris charged, was that “the inhabitant of Georgia and S. C. who goes to the coast of Africa, and . . . tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind.”<sup>38</sup> Despite these arguments, the Convention approved the Three-Fifths Clause, which they deemed a compromise necessary to ensure the Constitution’s ratification.

### III. The Fourteenth Amendment and the Constitutional Obligation to Count All Citizens and Non-Citizens Alike.

Nearly 80 years after the Constitution was adopted, following a bloody Civil War fought over our nation’s original sin of slavery, the Framers of the Fourteenth Amendment revisited the Constitution’s system of representation in the wake of emancipation and abolition, which rendered the Three-Fifths Clause a nullity. Finally making real the Founding-generation’s

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<sup>32</sup> 1 *Records of the Federal Convention*, *supra* note 18, at 571.

<sup>33</sup> *Id.* at 580.

<sup>34</sup> *Id.* at 582.

<sup>35</sup> Akhil Reed Amar, *America’s Constitution: A Biography* 90 (2005).

<sup>36</sup> 2 *Records of the Federal Convention*, *supra* note 18, at 222.

<sup>37</sup> 1 *id.* at 561.

<sup>38</sup> 2 *id.* at 222.



commitment to equal representation for all as determined by a national count of *all* persons, Section 2 of the Fourteenth Amendment provides that “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”<sup>39</sup>

The Fourteenth Amendment’s guarantee of equal representation for all persons emerged after seven months of heated debate. During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. The Framers of the Fourteenth Amendment decisively rejected those arguments and reaffirmed total population as the Constitution’s basis for representation. As Jacob Howard explained in introducing the Fourteenth Amendment, “numbers,” i.e., total population, is “the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.”<sup>40</sup>

When the 39th Congress met in December 1865, questions of representation were front and center. With the Three-Fifths Clause a nullity, the Framers of the Fourteenth Amendment were concerned that, as the full personhood of formerly enslaved African Americans was recognized for representation, the Southern states would gain an ill-gotten windfall: far more representation in Congress and in the Electoral College than they had before they had seceded from the Union.<sup>41</sup> As the Joint Committee on Reconstruction, which was tasked with writing the Fourteenth Amendment, explained, “[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative.”<sup>42</sup>

During debates over the Fourteenth Amendment, many urged a fundamental change in constitutional principles of equal representation, insisting that “representation shall be based on citizens of the United States who may be male adult voters” so that “every voter should be equal in political power all over the Union.”<sup>43</sup> Some even called for overhauling the Census Clause and putting in its place a “true census of the legal voters.”<sup>44</sup> Supporters of the Fourteenth Amendment argued that such a change in our Constitution’s system of representation would be “an abandonment of one of the oldest and safest landmarks of the Constitution” and would “introduce[] a new principle in our Government, whose evil tendency and results no man can

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<sup>39</sup> U.S. Const. amend. XIV, § 2. The exclusion of “Indians not taxed” is a dead letter. For nearly a century it has been settled that “all Indians” are “subject to the Federal income-tax laws.” *Exclusion of ‘Indians Not Taxed,’ When Apportioning Representatives*, 39 Op. Att’y Gen. 518, 519 (1940).

<sup>40</sup> Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

<sup>41</sup> *Id.* at 357 (“Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living?”).

<sup>42</sup> *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xiii (1866).

<sup>43</sup> Cong. Globe, 39th Cong., 1st Sess. 404 (1866).

<sup>44</sup> *Id.* at 10.



measure to-day.”<sup>45</sup> Instead, the Reconstruction Framers insisted on “leav[ing] the primary basis of representation where it was placed by our fathers, the whole body of the people.”<sup>46</sup>

Elaborating on why the basis of representation should remain total population, Rep. John Bingham argued that it would be unwise to “strike from the basis of representation the entire immigrant population not naturalized,” observing that “[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation.”<sup>47</sup> In his view, the “whole immigrant population should be numbered with the people and counted as part of them.”<sup>48</sup> Others made similar arguments, insisting that representation should be based “on the largest basis of population, counting every man, woman, and child,”<sup>49</sup> and that “the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution.”<sup>50</sup> The Fourteenth Amendment proponents refused to “throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women,” insisting that “[a] community may be represented, every man in the community may be represented, and every woman and child in the community may be represented, and yet not every man twenty-one years of age be a voter.”<sup>51</sup> “All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government.”<sup>52</sup>

Following more than seven months of debate, Congress adopted the Fourteenth Amendment, insisting that total population, not voter population, was the basis for our Constitution’s system of representation. “As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.”<sup>53</sup> The Fourteenth Amendment, which was approved by the people and became a part of the Constitution in 1868, reaffirmed that our Constitution’s system of equal representation for all depends on a count of the nation’s entire population, including non-citizens. As this history shows, the purpose of the census required by the Constitution has never been to count just citizens, but rather to count “the whole body of the people.”<sup>54</sup>

#### IV. Citizenship and the Census

Adding a question to the 2020 Census asking all persons in the United States whether they are citizens would be an end-run around our Constitution’s commitment to equal representation for all persons, citizens and non-citizens alike, reflected both in Article I and the Fourteenth Amendment. As the Census Bureau’s latest data reflects, if all persons were asked about citizenship status on the Census short form, participation in the Census by immigrants and those

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<sup>45</sup> *Id.* at 377.

<sup>46</sup> *Id.* at 385.

<sup>47</sup> *Id.* at 432.

<sup>48</sup> *Id.*; *see id.* at 411 (arguing that representation based on number of voters “takes from the basis of representation all unnaturalized foreigners”).

<sup>49</sup> *Id.* at 1280.

<sup>50</sup> *Id.* at 705.

<sup>51</sup> *Id.* at 1256, 1279-80.

<sup>52</sup> *Id.* at 2962; *see also id.* at 2987 (describing proposal to change basis of representation from total population to voting population as “a blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis”).

<sup>53</sup> *Evenwel*, 136 S. Ct. at 1132.

<sup>54</sup> Cong. Globe, 39th Cong., 1st Sess. 385.



living with immigrants would plummet.<sup>55</sup> No one doubts that the Secretary of Commerce has broad authority to choose the questions to be asked as a part of the Census.<sup>56</sup> But he has an overriding constitutional obligation to count all persons residing in the United States, regardless of their citizenship and immigration status. Adding a citizenship question to the 2020 Census—given the overwhelming evidence that it will chill participation and produce inaccurate responses—would break faith with the Constitution’s mandate for a head count of the entire nation. This is exactly the kind of manipulation of population data that the Framers wrote the Census Clause to prevent.

The Census Act of 1790 required U.S. marshals to take an oath to “truly cause to be made a just and perfect enumeration and description of all persons resident within [their] districts,”<sup>57</sup> regardless of legal status. Questions asking all persons to divulge their citizenship status have appeared on the Census in the past, but they have been rare.<sup>58</sup> More commonly, the Census has asked whether foreign-born persons were naturalized, but that is not the same as asking a person’s legal status. Persons born overseas, for example, may be citizens even if they have not been naturalized if their parents were U.S. citizens.<sup>59</sup> Currently, “the decennial census form does not even ask for the respondent’s citizenship, for fear that doing so would chill participation by noncitizens and citizens alike. Instead, such a question had historically been asked on the ‘long form’ of the decennial census given to one sixth of U.S. households, and is now only asked of 2.5% of households in the yearly American Community Survey.”<sup>60</sup> As the Census Bureau has long recognized, “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count.”<sup>61</sup> It is the universal understanding of those most closely involved in conducting the Census that “a one-by-one citizenship inquiry would invariably lead to a lower response rate to the Census in general” and “would seriously frustrate the Census Bureau’s ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the States.”<sup>62</sup> The Census Bureau’s most recent data powerfully confirms these conclusions. Indeed, it shows that fears about turning over citizenship data is now at an all-time high.

The Department of Justice urges the addition of a citizenship question to the 2020 Census, but it offers no reason to doubt what the latest Census Bureau data shows: asking all persons to divulge their citizenship status will chill participation by noncitizens and citizens alike and produce inaccurate data. Instead, the DOJ maintains that a new citizenship question will ensure

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<sup>55</sup> See *supra* text accompanying notes 8-9.

<sup>56</sup> See 13 U.S.C. § 141(a) (delegating to Secretary the responsibility to conduct census “in such form and content as he may determine”).

<sup>57</sup> Act of March 1, 1790, ch.2, § 1, 1 Stat. 101, 101.

<sup>58</sup> See U.S. Census Bureau, Index of Questions, [https://www.census.gov/history/www/through\\_the\\_decades/index\\_of\\_questions/](https://www.census.gov/history/www/through_the_decades/index_of_questions/).

<sup>59</sup> See, e.g., Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen,”* 128 Harv. L. Rev. F. 161, 164 (2015) (“[A]s Congress has recognized since the Founding, a person born abroad to a U.S. citizen parent is generally a U.S. citizen from birth with no need for naturalization.”).

<sup>60</sup> Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 773-74 (2011).

<sup>61</sup> *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (three-judge court); see also *Census Equity Act: Hearings Before the Subcomm. On Census & Population of H. Comm. On Post Off. & Civ. Serv.*, 101st Cong. 43-45 (1989) (statement of C. Louis Kincannon, Deputy Dir., Census Bureau) (raising concerns that asking persons whether they are legal residents or citizens “could seriously jeopardize the accuracy of the census”).

<sup>62</sup> Br. of Former Dir. of the U.S. Census Bureau as *Amici Curiae*, *Evenwel*, *supra* note 7, at 25.



better enforcement of the Voting Rights Act. Even if this were true, better enforcement of a statute—even one as foundational as the Voting Rights Act—is no basis for shirking the constitutional obligation to count all persons, no matter their legal status. In any event, the Justice Department’s claim is transparently false. Since the passage of the Voting Rights Act in 1965, the short form census or the census questionnaire has never asked the American people to report their citizenship. In other words, a mandatory question on citizenship has never been necessary to ensure robust protection of the right to vote.

Section 2 of the Voting Rights Act provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>63</sup> In vote dilution cases brought under Section 2, a plaintiff must show that members of racial minorities are sufficiently large to form a majority in a single-district.<sup>64</sup> The Supreme Court has recognized that “the relevant numbers must include citizenship . . . because only eligible voters affect a group’s opportunity to elect candidates,”<sup>65</sup> but census data, including the data currently provided by the American Community Survey, is only the “starting point.”<sup>66</sup> “[M]uch more information is necessary for courts to assess compliance with section 2. Data regarding citizenship, voter turnout, primary and general election returns, voter registration, and any number of other sociopolitical variables concerning the community at issue will be relevant to the litigation.”<sup>67</sup> Citizenship data is relevant, but it is only one piece of data among many that courts analyze in vote dilution cases. For that reason, a Census question asking all persons to divulge their citizenship status has never been essential to proving a violation of the Voting Rights Act. That is just as true now as it was in 1965 when the Voting Rights Act was passed, and as in 1982 when the results test was added to the statute.

Furthermore, adding a Census question that will chill participation by immigrant communities and result in inaccurate data will frustrate the goal of securing equal representation for all. It would likely shift political power away from urban areas of the States—where immigrants and members of racial minorities are concentrated—in favor of whiter, more rural ones.<sup>68</sup> That could undo many of the gains in minority representation achieved by the Voting Rights Act.

## V. Conclusion

The Constitution requires the federal government to count all persons residing in the nation every ten years. This constitutionally-required national count of the people determines how many members of Congress each state will elect, how many votes each state will have in the Electoral College, and how state, local, and congressional districts will be drawn. The federal

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<sup>63</sup> 52 U.S.C. § 10301(a).

<sup>64</sup> *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

<sup>65</sup> *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006).

<sup>66</sup> Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. Davis L. Rev. 1395, 1416 (2017).

<sup>67</sup> *Id.*

<sup>68</sup> See Michael Scherer, *Potential Citizenship Question in 2020 Census Could Shift Power To Rural America*, Wash. Post (Jan. 24, 2018), [https://www.washingtonpost.com/politics/potential-citizenship-question-in-2020-census-could-shift-power-to-rural-america/2018/01/23/c4e6d2c6-f57c-11e7-beb6-c8d48830c54d\\_story.html?utm\\_term=.a5a8241b15aa](https://www.washingtonpost.com/politics/potential-citizenship-question-in-2020-census-could-shift-power-to-rural-america/2018/01/23/c4e6d2c6-f57c-11e7-beb6-c8d48830c54d_story.html?utm_term=.a5a8241b15aa)



government also uses census figures to allocate billions of dollars of federal funds to local communities.

Despite the critical role the Census plays, President Trump's Department of Justice is seeking to sabotage the Census with an untested citizenship question, which will result in a massive undercount of immigrant communities and produce bad data, biasing congressional apportionment, redistricting, and funding decisions, for an entire decade, and producing harmful inequalities which would last even longer. Adding a citizenship question to the 2020 Census would set back progress made toward ensuring equal representation for all. This effort to game the Census and manipulate the national head count our Framers wrote into the Constitution should be rejected. Failing to count *all* persons in the United States, as the Constitution mandates, would deal a huge blow to our democracy. The stakes are high, and there are no do-overs permitted—we must get it right, and get it right now.

