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THE CENSUS, CITIZENSHIP, AND IMPROVED LEGISLATION: A CONSTITUTIONAL COMPROMISE

Kaitlyn A. Marquis¹

“Taken individually, each step [of government intrusion] may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man’s life at will.”²
Justice Douglas [Osborn v. United States]

Why should the census avoid asking a question concerning citizenship? Are there alternatives in providing information to aid government functions while still protecting the rights of residents? In early 2019, the Trump administration requested that the 2020 census include an inquiry concerning the citizenship status of residents, for claimed reasons of better legislation (i.e. the allocation of government funds to the states and the drawing of electoral districts). The Supreme Court considered this issue in *Dept. of Commerce v. New York*. In sum, their opinion was, “not yet.”³ The Supreme Court did not definitively conclude that it was unconstitutional to inquire about citizenship. Instead, they determined that the reason provided was

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2 *Osborn v. United States*, 385 U.S. 323, 343 (1966).

3 *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2564-2565 (2019).

insufficient to justify such an inquiry. Surely there is a better solution that more appropriately fulfills the constitutional demands of the census, while still satisfying the administration's claim to certain information.

The decennial census is as old as the Constitution itself, and it enumerates the purpose of the census: to collect a count for the residents of the United States every ten years. The data collected is used to help government better meet the needs of residents based on population and region, allocate government funds to the states, and draw electoral districts. The Constitution gives Congress the authority to collect statistics through inquiries unrelated to counting residents can be included if they are lawfully considered as "necessary and proper for the intelligent exercise of other powers enumerated in the Constitution."⁴ Based on this statement, the *intended purpose* behind including an additional inquiry in the census holds more weight than *what* the inquiry is. Neither the census nor Congress have claim over the personal information of residents. A question inquiring about citizenship tied to individuals and households could have negative consequences impacting the accuracy of the overall count of people currently residing in the United States. A question about citizenship causes the census to fail in its prescribed purpose of acquiring an accurate count of all residents in the United States. This does not mean that all government inquiries for certain information are illegal, though it does require that the specific inquiry meets the legal standards which prioritizes the privacy and security of all United States residents. Additionally, it shows that specific means by which the government acquires information are more appropriate than other potential processes. A government-issued survey, separate from the decennial census (similar to the American Community Survey, discussed below), collects data anonymously and reports it by region for the true purpose of better-suited legislation and improved appropriations. This solution is both legal and appropriate, and it does not interfere with the constitutional purpose of the census.

4 U.S. Census Bureau, *Census in the Constitution*, <https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html> (last visited January 20, 2020).

The summer of 2019 was filled with dialogue about ICE raids, comparisons between immigration centers and concentration camps, and few legislative solutions. Many immigrants—both documented and undocumented—fear deportation and would rather live a life under the radar than a life returning to the circumstances from which they fled. The individuals impacted by these raids are the same individuals that would likely abstain from the census, even if they are naturalized or legally residing in the United States. Even though the Census Bureau cannot legally share one's citizenship status for the purpose of enforcing deportation, the ambiguity behind *why* an inquiry of citizenship is necessary continues to strike fear in the hearts of both documented and undocumented United States residents. Government certainly has a responsibility to protect citizens, but there is also a line between what is appropriate legal enforcement and what is unnecessary and invasive questioning of individuals. This article offers reasons arguing why the government should refrain from including a citizenship question on the census. It prescribes a solution, based on historical and legal evidence, that satisfies the demands and claims of the Trump administration for government access to certain information from residents.

I. BACKGROUND

A historical background of the census, including previous questions that have appeared on the census, provides context as to why the census appears as it does today. Additional context is given by explanations about the processes of other government surveys, such as the American Community Survey, and both the long form and short form of the decennial census. This background information includes concerns from states that would suffer greater consequences relating to a high volume of immigrants, as well as background information for how the census influences legislation and the legislative processes that follow the census.

As previously mentioned, an inquiry concerning citizenship has appeared on the census in previous decades. Censuses between

1820 and 1830 all featured questions regarding naturalization.⁵ After 1950, the census was administered in two forms, a long form and a short form, with only the long form including any questions relating to citizenship.⁶ In 2010, the long form was replaced by the American Community Survey, and the actual census was administered only in one form consisting of ten questions.⁷ The census has evolved through each presidential administration in conjunction to the changing needs and progression of society. These adjustments are not justified by a presidential administration's agenda. Many inquiries and methods used to gather information from the 1800s are irrelevant and would be considered inappropriate today. For example, enumerators used to go door to door to collect census information. It was the enumerators who would determine one's race based on physical appearance and skin color, rather than actual nationality.⁸ Just because a method was used in the past does not classify it as an effective, accurate, or ethical practice. Likewise, many of today's needs are not reflected in census questionnaires of the past. It is essential that the census questionnaire and the methods by which information is collected evolve and improve over time, in order to best meet the intended purpose of the census.

Some may argue that there is no reason to separate the citizenship question from the census, as it has previously been included while the census still fulfilled its purpose. The facts suggest that historical precedent is not reason enough for something to remain in effect. The purpose of an adaptable government is to improve and reform government functions as needed. If the government could not evolve, no amendments would exist, and blatantly harmful statutes would still be in law. Thus, the issue at stake is not whether citizenship can permissibly appear on the census, but rather, whether including

5 U.S. Census Bureau, *Index of Questions*, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited January 20, 2020).

6 *Id.*

7 *Id.*

8 U.S. Census Bureau, *Through the Decades*, https://www.census.gov/history/www/through_the_decades/ (last visited February 27, 2020).

a citizenship question on the census is an improvement. Including a question about citizenship on the decennial census could have the side effects of causing a misrepresentation of actual population.⁹ Mentioning citizenship would “invariably lead to a lower response rate,”¹⁰ and the census would fail to fulfill its prescribed purpose.

Misrepresentation is unduly problematic for states with large immigrant populations, such as California and Texas. Because the government relies heavily on census data to allocate state funding, a population undercount in states with a large immigrant population feasibly leads to under-funding and misappropriation of funding. There would be less money to support public schools, community maintenance, and construction projects, which would negatively affect both citizens and non-citizens alike.

Another concern for those in favor of including the citizenship question on the census is that the states with large undocumented immigrant populations would unfairly receive additional Representatives. However, this argument is convincingly refuted by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.¹¹ Under this amendment, the controversial interpretation of the principal “one person, one vote” was ruled to mean that the total population, not just total voting-eligible population, can be used to draw electoral districts.¹² Nonetheless, it would be constitutional for the United States government to distribute and require residents to participate anonymously in a survey for the purpose of gathering data when government-requested inquiries are not appropriate to include on the census. This is justified so long as the information is assessed by region rather than household. The Equal Protection Clause additionally declares that states can “more accurately” draw their own legislative districts to better reflect the ratio of the actual

9 *Evenwel v. Abbott*, S. Ct. Docket No. 14-940, 4 (filed September 25, 2015).

10 Brief for the States of New York, et. al as Amici Curiae Supporting Appellees at 11-12, 25 (2018).

11 *Evenwel v. Abbott*, supra note 10.

12 *Id.*

voting population if they so choose.¹³ Anonymous surveys would aid in this process for states that are especially concerned about having a more precise representation of eligible voters in their own electoral district.

The culmination of the facts supports the idea that the census should strictly follow constitutional restrictions, as well as strong support for the legality of an anonymous, regionally-reported survey for the purpose of satisfying government demands to better legislate and appropriate. Although there is no blatant violation of the Constitution by inclusion of a citizenship question, the purpose of the census calls for no additional inquiries beyond that of enumeration.

This article explores the legal precedent surrounding the United States Census as well as specific doctrines concerning a right to privacy and a compromise between government demands for information and the protection of citizens. The Constitution states that, “the actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”¹⁴ The implications following this constitutional doctrine display few guidelines as to how far the scope of the census may reach. The support of additional legal doctrines, such as the right to privacy, lead to the conclusion that the census does not extend to infringe upon personal rights of any person in the United States. The Fourteenth Amendment directs that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁵ This last inclusion, “nor to deny to any person within its jurisdiction the equal protection of the laws” guarantees equal protection to all persons within the United States. The constitutional guidelines surrounding the census as well as the right to privacy as stated in the Fourteenth Amendment support each other in a way such that a question

13 *Id.*, at 2-3.

14 U.S. Const. art II, § 1, cl. 3.

15 U.S. Const. amend XIV, § 1.

concerning citizenship both diverges from the constitutional purpose of the census and violates the right to privacy granted to all people.

II. PROOF OF CLAIM

The word “privacy” is never explicitly stated in the United States Constitution, yet by judicial review it is now a legal standard and a right protected under United States’ law. The right to privacy was first legally used by the Supreme Court in support of an opinion in 1965. The case of *Griswold v. Connecticut*¹⁶ introduces the right to privacy by protecting the right to make personal decisions. Citing *Poe v. Ullman*, Justice Goldberg concurs in *Griswold v. Connecticut* with the opinion of the court, stating, the right of privacy is a fundamental personal right, “[emanating] from the totality of the constitutional scheme under which we live.”¹⁷ Based on the First, Third, Fourth, and Fifth Amendments there is an implicit right to privacy. The wording of these amendments as found in the Constitution implies that these protections apply to all “persons,” and not just “citizens.” Thus, a right to privacy is granted and protected by law to all persons under the jurisdiction of United States law. The Fifth Amendment creates “a zone of privacy which government may not force him to surrender to his detriment.”¹⁸ Surely, governmental force that could potentially result in a violation of rights upon which an individual or family has built a world can be considered a “surrender to his detriment,” and a violation of “the sanctity of a man’s home and the privacies of life.”¹⁹ *Whalen v. Roe*²⁰ expands the scope to which the right to privacy applies by reaffirming the right to not disclose personal information. While these cases are based on questions of medical relevance, the principles behind a right to privacy do not change.

16 *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

17 *Poe v. Ullman*, 367 U.S. 479, 521 (1961).

18 *Griswold v. Connecticut*, supra note 17.

19 *Id.*

20 *See Whalen v. Roe*, 429 U.S. 589 (1977).

In *Snyder v. Massachusetts* the opinion of the court reaffirmed judicial authority in the claim that protection of rights “rooted in the traditions and conscience of our people [is] to be ranked fundamental.”²¹ The conscience of the people today affirms that fundamental rights include protection and security within one’s home, and a decennial violation of those personal privacies is not something that would improve society, regardless of whether or not it is constitutional. The *Freedom of Information Act*²² and *FOIA Improvement Act of 2016*²³ provide clarification in regard to regulations the Census Bureau must follow in order to protect these rights.

In defending the proposal to include a citizenship inquiry on the 2020 Census, the Trump administration claimed: “It is essential that we have a clear breakdown of the number of citizens and non-citizens that make up the U.S. populations. Imperative. Knowing this information is vital to formulating sound public policy, whether the issue is healthcare, education, civil rights, or immigration.”²⁴ While there was great rhetorical weight given to the necessity of this information, there were not sufficient substantive claims made in support of this “imperative” need. Claiming a need is not the same as giving reasons for a need, and this claim by the Trump administration is therefore incomplete and fails to meet the legal standard. The Supreme Court determined that a question regarding citizenship on the census was not inherently in violation of the constitutional sphere of the census,²⁵ but reasonable justification for including the question is still required. Regardless of both the potential and historical legality to include an inquiry of citizenship on the census, the Trump administration’s inability to provide proper justification

21 *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

22 *See* The Freedom and Information Act, 5 U.S.C. § 552 As Amended By Public Law No. 110-175, 121 Stat. 2524.

23 An Act to improve the Freedom of Information Act of 2016, S. 337, 114 Congress. § 5 (2016).

24 White House, *Remarks by President Trump on Citizenship and the Census*, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/> (last visited February 26, 2020).

25 *Dept. of Commerce v. New York*, *supra* note 5.

for such a question is what ultimately resulted in the denial of their request. The proclaimed motives behind the inclusion of a citizenship question could still be met by introduction of a survey that follows proper conditions. Thus, by protecting all persons' right to privacy and in being separate from the census, the constitutional design of the census is protected from potential future corruption in any administration. If the intentions of including the question are as stated, the proposed survey satisfies the demands of the executive for maximizing administering the law, while still protecting a citizen's right to privacy and right to not disclose personal information.

Introduction of an additional government-administered survey that follows these regulations is not beyond constitutional limits, so long as this survey remains separate from any official census processes. If the government feels certain information is necessary, relevant, and helpful for the performance of prescribed duties, then a survey administered in addition to, but separate from, the decennial census is appropriate under certain restrictions. In order to protect a citizen's right to privacy as previously mentioned, the survey must be anonymous. Respondents will not have to provide any personal information, and all that is required is an anonymous response to the approved questions. Questions asked are not to infringe upon the privacy of any respondent and must be justified and relevant to the listed purposes of the survey. In addition to these requirements, the reporting of the survey must follow a regional pattern, rather than reporting following household jurisdiction. By separating these two questionnaires, resident's right to privacy is protected while the government is still able to reach the desired goal of meeting the needs of residents.

With the introduction of a new government survey, multiple potential concerns arise. Some critiques may protest that the supplemental survey is a violation of privacy. Arguments asserting that privacy is violated through this action are refuted by the restrictions the government must follow in administration of the survey. Both the anonymity and regional reporting required in administration and reporting of the census protect respondents' information and right to privacy, as defined by the Supreme Court.

In addition to violations of privacy, concerns about the incentive for honest and accurate responses may develop. Just because something is a law—such as following the speed limit, or a civic duty, such as voting—does not mean that people will comply to the government’s ideals. Many arguments against including citizenship questions on the census follow the logic that respondents may feel the need to respond dishonestly in order to protect themselves and their families. If this is an issue for the census, how could different consequences be expected of another government-issued questionnaire? Furthermore, what would motivate one to respond in the first place? This issue is not new or unique. It is fairly common for non-compliance by citizens to cause government programs or intentions to fall short. Because regulation is difficult with national programs, noncompliance and free riding lead to said programs having results that differ from the intended ideal. When citizens do not comply with the directions that are imposed in order to foster ideal functioning of programs and resources, the potential and purpose of the programs cannot be met. A government-regulated and administered survey is no exception to this pattern. While there is no perfect solution, common methods of incentivization, such as monetary rewards and other government-provided benefits, would increase, though not guarantee, a stronger response rate. In addition to incentives, emphasizing the purpose and protection behind the questionnaire would motivate individuals to respond as they understand that results of the survey are for the ultimate purpose of creating better-suited legislation on a more localized, regional level. Additionally, granting protection guarantees—and articulating said guarantees—to all respondents is a necessary component to the success of the survey. If protections of respondents are not made clear, response rates will fail to reflect the surveyed population and the entire purpose of the survey would not be satisfied. Mentioning literal and realistic outcomes such as increased funding for city parks, school programs, and infrastructure motivate voters to vote, so similar tactics that create a positive air surrounding the survey would ensure higher and accurate response rates.

Restrictions placed on the government in creating, distributing, and reporting the survey protect the rights of both citizens and

residents of the United States, while the administration of the survey still satisfies the claims of the government to gain “imperative” information for legislative purposes. No new legislation is required to guarantee protection of respondents’ rights, since adequate protection is already offered under the law.

Most arguments against this prescription for a new survey will use the right to privacy argument. The right to privacy is not violated through introduction of this survey. So long as set guidelines are followed, right to privacy is protected and there is no reason for which a respondent should fear their personal information is not protected or that their right to privacy is violated.

Arguments may also be made questioning why these two questionnaires are not coupled together for purposes of simpler distribution. The census and the survey could still follow the set legal guidelines, and the census maintains its strict constitutional purpose of a decennial enumeration, and the survey comes with it and is still returned anonymously and reported by region. While this is possible, it defeats the purpose of maintaining strict adherence to constitutional prescriptions for the census. Additionally, when practical considerations are made for how these two questionnaires would realistically be returned, the census is distributed and reported by household and the protections granted in the survey following anonymous and regional restrictions would be weakened.

Aside from practical success of the survey, a much more fundamental question must be addressed: is fostering trust between government and residents even a requirement of a successful government? That depends on what the ideal government looks like according to the people under the jurisdiction of the government in question. While this is a more normative consideration, it is relevant and necessary to consider in order to guarantee the validity behind a requirement imposed upon the people by the government. Trust between a government and its people is not considered necessary to obtain success for countless regimes throughout the world. In the United States, this is not the case. Instilling an un-revocable level of both protection and amiability between the government and its people are the fundamental ideas upon which this country was founded and built, that ought to be reflected by every government institution.

Again, the issue is not whether there is protection of privacy in the census, but whether a citizenship question is relevant to the purpose of the census. The simple answer is that there is no relevance between a citizenship question and the enumeration of a population. Additionally, the Census Bureau is limited by the law that protects privacy, including personal information.

There is an additional argument claiming that the census precedes budget legislation and funding bills appropriately. Similar to the previously discussed arguments, this interest is irrelevant to the question at hand. A question on citizenship should have no impact on the distribution of funds, and excluding such a question would improve response rates. Offering a more accurate report and analysis of a population will allow appropriation processes to more appropriately meet the needs of communities nationwide.

Introducing a survey in order to support the strict constitutional regulations of the census also introduces additional costs, including the literal monetary cost of producing, distributing, and analyzing the survey. Beyond the costs of the government are the costs to the respondents, which include the additional time and effort of responding to more government inquiries. The benefits outweigh these real costs, as the result of response is appropriate government aid and benefits.

III. CONCLUSION

The Trump administration and Department of Justice have made claims about the necessity and relevance of including a citizenship question on the census, but even the arguments made by top Census Department of Officials in the nation were not sufficient to justify such inclusion.²⁶ Because “the Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies,”²⁷ exporting data concerning citizenship would be illegal. If the Supreme Court cannot be convinced by the arguments

26 *Dept. of Commerce v. New York*, supra note 4.

27 *Id.*

that the Department of Commerce has to offer, there is no reasonable argument that is reason enough to include the citizenship question on the census.

A question about citizenship has little to no relevance to the purpose of the census and including it will have the side effects of misrepresentation and potential violation of right to privacy. The administration claims a need to know citizenship, and there exists an institutionalized constitutional method for obtaining that information that appears to be an opportune means by which to obtain that end. Regardless, solutions are ideal when they support the fundamental values of society, as well as the protection of rights and defense of the Constitution. This is only attainable if the bounds to which the Constitution reaches are not stretched. The basic idea that the census and inquiries concerning citizenship ought to be kept separate is a much more complex issue when given more consideration. There are major implications following whichever course of conduct is pursued. The issue of right to privacy is one more broadly discussed in cases such as *Griswold v. Connecticut*,²⁸ *Whalen v. Roe*,²⁹ *Roe v. Wade*,³⁰ and other major cases that establish protection of personal liberties concerning privacy. This right to privacy protects resident's rights and personal information from unduly intrusive inquiries.

A broader consideration of the issue strengthens the fundamental rights that need protection such as privacy rights and information protection. The consequences of including the question satisfies the demands of the Trump administration but fails to remain loyal to the census in its constitutional purpose. By separating the questionnaires, the issues with including a citizenship question are wholly avoided, and by introducing a survey, the demands of the administration are met without potential violation of constitutional guidelines. This solution preserves the integrity of the Constitution and protects residents' rights, while still allowing government processes that ultimately maximize public benefits.

28 *Griswold v. Connecticut*, supra note 16.

29 *Whalen v. Roe*, supra note 20.

30 *Roe v. Wade*, 410 U.S. 113 (1973).