

A Critical History of the United States Census and Citizenship Questions

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On March 26, 2018, Commerce Secretary Wilbur Ross announced that the 2020 Census would ask about the citizenship status of every person in the country. Since this announcement, the Trump Administration has relied heavily on broad historical arguments to defend Secretary Ross's decision. In both the courts of law and the court of public opinion, the Administration has repeatedly insisted that Secretary Ross's "citizenship question" has a deep historical pedigree stretching back more than two centuries. This historical narrative, however, is misleading where it is not outright false.

This Article—the first scholarly rejoinder to the Trump Administration's use of history in the citizenship question cases—demonstrates that the Administration's historical account is flawed in at least two significant respects.

First, the census has never asked for the citizenship status of everyone in the country. Secretary Ross's proposal is therefore historically unprecedented.

Second, the Administration relies on an impoverished view of census history to suggest that Secretary Ross can find a historical warrant for his decision in citizenship questions that were posed only to small subsets of the population at various points in American history. Viewed in context, these citizenship questions originated as sporadic components of an approach to census-taking that the Census Bureau long ago rejected as incompatible with its foundational, constitutional goal of actual enumeration. These early citizenship questions were part of an increasingly sprawling census that was attempting—with mounting difficulties—to pursue two objectives at once: first, counting everyone; and second, collecting additional information that was used for a mixture of collateral statistical, political, and economic objectives. In the wake of the 1950 Census, the Census Bureau rejected this older paradigm of census practice in favor of a radically different model. Indeed, once social science techniques like sampling granted the Bureau the technical ability to identify and remedy substantial problems in its approach to the enumeration, the

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Bureau overhauled its approach dramatically. As part of this overhaul, the Census Bureau rebuffed citizenship questions as viable items for any census survey designed to obtain a complete count of the population. Due to intervening developments in the American immigration environment, these questions have never been deemed fit to return to the complete-count form; they have been confined solely to sample surveys sent only to subsets of the population.

This Article will show that under these circumstances, the Administration cannot plausibly invoke census history to justify its current decision to add a new, untested citizenship question to the 2020 Census under either the Enumeration Clause or the Administrative Procedure Act. History instead creates a broad presumption against Secretary Ross's proposal, one which the Administration has not succeeded in rebutting.

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INTRODUCTION

On March 26, 2018, Commerce Secretary Wilbur Ross announced that the 2020 Census would ask about the citizenship status of every person in the country.¹ Secretary Ross’s decision to add a “citizenship question” to the census provoked strong outcry and immediate litigation. Over the course of the spring 2018, six separate lawsuits were filed, with plaintiffs ranging from state, county, and local governments to civil rights groups and immigrant advocacy organizations.² Linking these suits was a common goal: to block the citizenship question, which threatens a massive undercount of vulnerable groups as well as a dramatic skewing of both the allocation of congressional seats and the distribution of hundreds of billions of dollars in federal funds.³

¹ Letter from Wilbur L. Ross, Sec’y of Commerce, U.S. Dep’t of Commerce, to Karen Dunn Kelley, Under Sec’y for Econ. Affairs, U.S. Dep’t of Commerce (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf. Under Secretary Ross’s proposal, the 2020 Census would ask the following question about citizenship status:

Is this person a citizen of the United States?

- Yes, born in the United States
- Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas
- Yes, born abroad of U.S. citizen parent or parents
- Yes, U.S. citizen by naturalization
- No, not a U.S. citizen

CENSUS BUREAU, U.S. DEP’T OF COMMERCE, QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY: FEDERAL LEGISLATIVE AND PROGRAM USES 7 (2018), <https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf>.

² Complaint for Declaratory and Injunctive Relief, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 1; Complaint, *New York Immigr. Coal. v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-05025-JMF), ECF No. 1; Complaint for Declaratory and Injunctive Relief, *La Unión Del Pueblo Entero v. Ross*, No. 8:18-cv-01570-GJH (D. Md. May 31, 2018), ECF No. 1; Complaint for Declaratory and Injunctive Relief, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Apr. 17, 2018), ECF No. 1; Complaint for Declaratory and Injunctive Relief, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041-GJH (D. Md. Apr. 11, 2018), ECF No. 1; Complaint for Declaratory and Injunctive Relief, *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. Mar. 26, 2018), ECF No. 1.

³ For a thorough account of the stakes of the citizenship question and a critical analysis of its political and legal rationale, see Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. (forthcoming 2019).

The Trump Administration has relied on broad historical arguments to defend Secretary Ross's decision. In the courts, it has taken the position that, among other things, the "decision . . . is consistent with the longstanding historical practice of asking about citizenship and other demographic information."⁴ In the press, it has asserted that "the government [has] asked a citizenship question in the census for most of the last 200 years."⁵ And in a speech delivered shortly before submitting his resignation letter, former United States Attorney General Jeff Sessions proclaimed that the "Census [citizenship] question . . . has appeared in one form or another on the Census for over a hundred years."⁶

However, this historical account is misleading where it is not demonstrably false.

The Administration's misrepresentations of the historical record have had real consequences. One federal district court has already relied on them to dismiss claims from two lawsuits.⁷ In troubling foreshadowing of a rapidly approaching Supreme Court showdown, Justice Gorsuch and Justice Thomas have proclaimed that "[m]ost censuses in our history have asked about citizenship."⁸ And this idea has spread through media coverage—the main window through which the public will view this dispute.⁹

⁴ Memorandum of Law in Support of Defendants' Motion to Dismiss at 2, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 155; *see also, e.g.*, Defendants' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 20, *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. Nov. 2, 2018), ECF No. 89 (noting that "collection of citizenship data by the census has been a long-standing historical practice") (internal quotations omitted).

⁵ Hansi Lo Wang (@hansilowang), TWITTER (Nov. 27, 2018, 2:14 PM), <https://twitter.com/hansilowang/status/1067542118950944768> [<https://perma.cc/S8XB-SSUV>].

⁶ Charles S. Clark, *Attorney General Calls Out Judge on Census Citizenship Question*, GOV'T EXECUTIVE, (Oct. 16, 2018), <https://www.govexec.com/management/2018/10/attorney-general-calls-out-judge-census-citizenship-question/152076/> [<https://perma.cc/K7HW-J5TE>].

⁷ *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 799–806 (S.D.N.Y. 2018).

⁸ *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (mem.) (Gorsuch, J., concurring in part and dissenting in part).

⁹ *See, e.g.*, Steve Brusk & Gregory Wallace, *Commerce Department Says Citizenship Question Will Be Reinstated in 2020 Census*, CNN (Mar. 27, 2018), <https://www.cnn.com/2018/03/26/politics/census-citizenship-question/index.html> [<https://perma.cc/D4RG-A449>]; Chris Dolmetsch, *Are You a Citizen? The Trump Census Question on Trial*, BLOOMBERG (Nov. 9, 2018), <https://www.bloomberg.com/news/articles/2018-11-09/are-you-a-citizen-the-trump-census-question-on-trial-quicktake> [<https://perma.cc/JT4Y-MPSB>]; Deanna Paul, *The Supreme Court Agreed to Hear the Census Citizenship Case. Here's Why That Matters*, WASH. POST, (Nov. 20, 2018), https://www.washingtonpost.com/politics/2018/11/20/supreme-court-agreed-hear-census-citizenship-case-heres-why-that-matters/?utm_term=.da0c9136c0af [<https://perma.cc/8C6C-RUZH>].

History undoubtedly has a role to play in informing our understanding of the legality of citizenship questions.¹⁰ But that history must be properly understood. In that vein, this Article provides a corrective to the Administration's historical account of citizenship questions on the census. Drawing on both primary and secondary sources, it challenges the Administration's representation of the basic facts, as well as the broader historical lessons that the Administration has urged upon the courts and the public.

This Article will not address whether the Administration can invoke other legal or factual bases—as distinct from history—to justify Secretary Ross's decision. Those issues have been addressed in significant depth in the current litigation.

Instead, this Article poses a narrower question—whether census history provides a warrant for Secretary Ross's decision, as the Administration contends—and provides the historical context necessary to resolve it. As our research demonstrates, the answer to that question is a resounding “no.” Indeed, a critical evaluation of census history dissolves any historical warrant for a citizenship question on the 2020 Census.

The Administration has argued for a checklist-style approach to the history, reducing it to simplistic questions of *what* subjects the census asked about *when*, and asserting that the overwhelming balance of censuses have asked about citizenship. This approach is flawed in at least two significant respects.

First, it suggests a deep historical pedigree for a universal citizenship question—that is, a question designed to ascertain the citizenship status of everyone in the country—where there is, in fact, none. Indeed, the census has *never* asked for the citizenship status of *everyone* in the country. This basic historical fact—which has been overlooked in current litigation—is legally significant for both the constitutional and statutory considerations at play in these cases. The Administration cannot insulate itself from liability under the Enumeration Clause by claiming a long historical precedent for universal citizenship questions; this Article will show that there is no such precedent. And it cannot shield itself from claims under the Administrative Procedure Act (APA)¹¹ that Secretary Ross's decision was arbitrary and capricious by claiming a long track record for a universal citizenship question; this Article will show that the federal government has never before implemented such a question. To the extent that there is a history of the census asking citizenship questions of a subset of the population (that is, *non-universal* citizenship questions), this history is spottier than the Administration has suggested, casting further doubt on the constitutional and statutory soundness of Secretary Ross's decision.

¹⁰ See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (affirming that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”) (internal quotations omitted).

¹¹ 5 U.S.C. §§ 500–96 (2012).

There is a second, more systemic flaw with the Administration's checklist-style approach to census history. And it negates the precedential value of any *non-universal* citizenship questions that the census has asked in past eras.

The Administration's account assumes that every decade of census practice is equally instructive for the legality of contemporary census practices. But stepping back to take in the broader census history—not just the *what* and *when*, but the *why* and *how* of the decennial head count—fatally undercuts that assumption.

Census practice underwent a paradigm shift in the mid-twentieth century. Between the 1820 Census and the 1950 Census, citizenship questions appeared sporadically, served markedly different purposes from the ones envisioned by Secretary Ross's proposal, and—most importantly—reflected historical census practices that the Census Bureau ultimately rejected. In the wake of the 1950 Census, the Census Bureau was able to apply emerging social science techniques like statistical sampling to evaluate how well it was fulfilling its constitutional duty to count everyone, and to unlock new, more cost-effective methods for collecting necessary data. Informed by the results of these evaluations, the Bureau acknowledged that its long-running approach to the census—which attempted to balance the constitutional requirement of counting everyone with the assorted policy goals of collecting other information about the population, such as citizenship or naturalization status—was not geared for an accurate, cost-effective enumeration. The Census Bureau then adopted a new census-taking paradigm. As part of this mid-twentieth-century paradigm shift, the Bureau in 1960 removed citizenship questions from the survey that it used for conducting a complete head count and transferred them to sample surveys—that is, surveys targeted at small subsets of the population for other statistical purposes.¹² After this paradigm shift, citizenship questions never returned to the forms used to count everyone due to their increased association with exclusionary politics that would depress the count.

This historical narrative—which has also been overlooked in the citizenship question cases—is significant for both Enumeration Clause and APA purposes. The Administration cannot point to the pre-1960 history of citizenship questions to demonstrate the constitutionally necessary “reasonable relationship” to an accurate headcount or to establish the reasonableness (or non-arbitrariness) of Secretary Ross's proposal because relying on that history requires relying on an entire body of census practice that the Bureau long ago rejected as inadequate to achieve the

¹² We use the term “complete-count form” to refer to the census questionnaire used for complete-count purposes up through the 1950 Census. Following the 1950 Census, as discussed further in Part II and Section III.C.1, *infra*, the Census Bureau introduced the “short form” census and a series of sample population surveys. From the 1960 Census onward, the short form census has been the instrument that the Census Bureau has used to obtain the constitutionally required complete count. For purposes of drawing analogies across eras, then, the short form—rather than the sample population surveys—is the heir to the pre-1960 complete-count forms' project of counting everyone.

constitutionally required enumeration. And, census history from 1960 forward establishes a presumption *against* the permissibility of citizenship questions for any sufficient enumeration process.

Under these circumstances, this Article will show, the Administration cannot rely on census history to add a new, untested citizenship question to the 2020 Census.

I. EXPLAINING THE ADMINISTRATION’S HISTORICAL DEFENSE AND ITS ROLE IN THE PENDING CITIZENSHIP QUESTION SUITS

Before delving into the merits of the Administration’s historical defense, it is useful to have some familiarity with the basic contours of the citizenship question suits, the fundamentals of the Administration’s defense, and the role that this defense plays in these suits.

The Administration has designed its historical account to respond to claims under the Enumeration Clause of the United States Constitution, as well as claims under the APA. The Enumeration Clause combines with the Fourteenth Amendment to require an “actual Enumeration” of the “whole number of persons” in the United States so that congressional representatives may be “apportioned among the several States according to their respective numbers.”¹³ The United States Supreme Court has held that the conduct of the census must bear “a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census” to count everyone.¹⁴ The thrust of the plaintiffs’ claims under the Enumeration Clause is that the citizenship question is not “reasonably related” to an “actual enumeration.” They argue, and substantial evidence shows, that the question will lead to a massive undercounting of certain populations, including noncitizens and citizens living in housing units with noncitizens.¹⁵

Meanwhile, the APA requires federal agencies to make their decisions on reasoned bases and in accordance with federal law and policy.¹⁶ Across the six pending cases, the plaintiffs have put all the prongs of the APA’s agency review standard into play, challenging Secretary Ross’s decision as “arbitrary and capricious,” “contrary to constitutional right,” “in excess of statutory . . . authority,” and “without observance of procedure required by

¹³ U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

¹⁴ *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).

¹⁵ *See, e.g.*, Brief of Amici Curiae Former Census Bureau Directors in Support of Plaintiffs’ Trial Position at 9–12, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 423-1; J. David Brown et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census 2* (Ctr. for Econ. Studies, U.S. Census Bureau, Working Paper No. 18-38, 2018), <https://www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf>.

¹⁶ *See supra* note 11 (agency action is unlawful when it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

law.”¹⁷ The primary allegations underpinning these claims are two-fold: first, plaintiffs allege that the Census Bureau failed to adequately test and vet the citizenship question before adding it to the form used for the decennial headcount; and second, they allege that Secretary Ross hid malign motives behind the pretext of gathering citizenship data to help the Department of Justice enforce the Voting Rights Act of 1965.¹⁸ According to the plaintiffs, Secretary Ross trammelled not only well-established Census Bureau procedures, but also federal laws governing census development and information collection.

In response to the Enumeration Clause claims, the Administration has argued, *inter alia*, that Secretary Ross’s “decision to reinstate a citizenship question is consistent with the longstanding historical practice of asking about citizenship and other demographic information.”¹⁹ Or, as the Administration recently told the Supreme Court, there is “a nearly unbroken practice over two centuries of including a citizenship question on the census.”²⁰ According to the earliest versions of the Administration’s account, “[t]he census . . . asked citizenship-related questions as early as 1820, and in many enumerations since then.”²¹ Expanding on this headline, the Administration has offered the courts a chronological checklist of census topics, listing on a decade-by-decade basis what the census

¹⁷ Second Amended Complaint at 3, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 214; Complaint at 4, *New York Immigration Coal. v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-05025-JMF), ECF No. 1; Third Amended Complaint for Declaratory and Injunctive Relief at 56–59, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041-GJH (D. Md. Dec. 28, 2018), ECF No. 86; Amended Complaint for Declaratory and Injunctive Relief at 108, *La Unión Del Pueblo Entero v. Ross*, No. 8:18-cv-01570-GJH (D. Md. July 9, 2018), ECF No. 42; Complaint for Declaratory and Injunctive Relief at 3, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Apr. 17, 2018), ECF No. 1; First Amended Complaint for Declaratory and Injunctive Relief at 14–15, *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. May 4, 2018), ECF No. 12.

¹⁸ See Second Amended Complaint at 3, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 214; Complaint at 2, *New York Immigration Coal. v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-05025-JMF), ECF No. 1; Third Amended Complaint for Declaratory and Injunctive Relief at 56–59, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041-GJH (D. Md. Dec. 28, 2018), ECF No. 86; Amended Complaint for Declaratory and Injunctive Relief at 109, *La Unión Del Pueblo Entero v. Ross*, No. 8:18-cv-01570-GJH (D. Md. July 9, 2018), ECF No. 42; Complaint for Declaratory and Injunctive Relief at 3, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Apr. 17, 2018), ECF No. 1; First Amended Complaint for Declaratory and Injunctive Relief at 14–15, *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. May 4, 2018), ECF No. 12.

¹⁹ Memorandum of Law in Support of Defendants’ Motion to Dismiss at 2, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 155.

²⁰ Brief for the Petitioners at 54, *Dep’t of Commerce v. New York*, No. 18-966 (S. Ct. Mar. 6, 2019) (internal quotations omitted).

²¹ Memorandum of Law in Support of Defendants’ Motion to Dismiss at 30–31, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 155.

purportedly asked of respondents.²² In the course of doing so, the Administration's briefing has included many flawed caveats and footnotes, in an apparent admission that the history is not, in fact, as simple as the Administration suggests. But the overall purpose and effect of the Administration's briefing and argument has been to obscure material differences and to suggest—as the United States District Court for the Southern District of New York concluded—that the census has followed an almost “unbroken practice” of asking everyone about their citizenship status.²³ The Administration has since abandoned all attempts at nuance (however misleading), and has presented only this simplified headline (however false) to the Supreme Court.²⁴

Under the Administration's reading of the history, the Enumeration Clause cannot possibly bar a practice that has persisted for the entirety of the census's history. And, correspondingly, the Administration posits that a ruling that the citizenship question is unconstitutional “would deem virtually every census questionnaire in the Nation's history unconstitutional,” an improbable and intolerable result.²⁵

Similarly, in response to APA claims, the Administration has cast citizenship questions as “common” features of censuses.²⁶ By extension, the Administration claims “it simply cannot be arbitrary and capricious . . . to reinstate to the decennial census a question whose pedigree dates back nearly 200 years.”²⁷ Indeed, the Administration argues that placing a citizenship question on the form to count everyone “represents a return to the traditional status quo.”²⁸ Likewise, this argument runs, the plaintiffs cannot argue that the question had not been adequately tested, “given the long history of the question on the decennial census and [sample surveys

²² See the Appendix, *infra*, for a compressed version of the Administration's decade-by-decade account.

²³ *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 803 (S.D.N.Y. 2018).

²⁴ See, e.g., Brief for the Petitioners at 2, 22, 28–29, 38–40, 46–47, 54., *Dep't of Commerce v. New York*, No. 18-966 (S. Ct. Mar. 6, 2019). In order to be most generous to the Administration's position, this Article addresses not just the simple version of the Administration's thesis currently before the Supreme Court, but also the more elaborate version of its thesis as presented to the district courts. Either version of the Administration's thesis is meritless for the reasons discussed in this Article.

²⁵ Memorandum of Law in Support of Defendants' Motion to Dismiss at 34–35, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 155; see also *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 805 (S.D.N.Y. 2018) (noting that if the citizenship question is unconstitutional, “every census . . . has been conducted in violation of the Enumeration Clause” which is “absurd”) (internal quotations omitted).

²⁶ Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 19, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Nov. 16, 2018), ECF No. 104 (internal citation omitted).

²⁷ Brief for the Petitioners at 28–29, *Dep't of Commerce v. New York*, No. 18-966 (S. Ct. Mar. 6, 2019) (internal citation omitted).

²⁸ *Id.* at 39.

conducted by the Census Bureau, like the American Community Survey].”²⁹

The plaintiffs in the pending cases did not address the Administration’s historical arguments in appreciable depth. To the extent that the plaintiffs offered their own historical arguments in their briefing, they pointed primarily to the lack of a citizenship question on the census forms used to obtain a complete count since the 1950 Census.³⁰

In the absence of detailed counter-briefing on the history of the citizenship question from the plaintiffs in the New York cases, the Southern District of New York took judicial notice of the Administration’s historical account and, “particularly” on that basis, dismissed the plaintiffs’ Enumeration Clause claims.³¹ The Northern District of California and the District of Maryland did not follow the Southern District’s approach and permitted the Enumeration Clause claims to proceed to discovery and trial.³²

In many respects, the New York court’s account goes further than the Administration’s, taking in not just the history of citizenship questions, but also the broader history of so-called “demographic questions” on the census.³³ As the court reasoned, because the census had from its beginnings done more than record the number of heads in each household, the Commerce Secretary could ask a wide array of questions without violating the Enumeration Clause.³⁴ Also important, from the court’s perspective, was its conclusion that this practice had been “blessed” by all three branches of government.³⁵ To reach these conclusions, however, the district court had to focus exclusively on the narrow question of *what* was asked on each census and screen out broader contextual evidence. That evidence would, among other things, show census practice evolving over time to presumptively reject citizenship questions as components of the once-a-decade enumeration as Congress, the Census Bureau, and other

²⁹ *Id.* at 40.

³⁰ Plaintiffs’ Opposition to Motion to Dismiss at 1, *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. July 17, 2018), ECF No. 53; Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 7, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. July 17, 2018), ECF No. 68; Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at 6, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041-GJH (D. Md. June 22, 2018), ECF No. 29.

³¹ *New York v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766, 776 n.3, 800–04 (S.D.N.Y. 2018). The court reiterated this history in its post-trial opinion ruling for the plaintiffs on their APA claims. *See, e.g.*, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 515, 524–25 (S.D.N.Y. 2019).

³² *California v. Ross*, No. 18-CV-01865-RS, 2018 WL 7142097 (N.D. Cal. Dec. 14, 2018); *City of San Jose v. Ross*, No. 18-CV-02279-RS, 2018 WL 7142097 (N.D. Cal. Dec. 14, 2018); *Kravitz v. U.S. Dep’t of Commerce*, 336 F. Supp. 3d 545 (D. Md. 2018) (No. 8:18-cv-01041-GJH); *La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018) (No. 8:18-cv-01570-GJH).

³³ *New York*, 315 F. Supp. 3d at 801–02.

³⁴ *Id.*

³⁵ *Id.* at 801–04.

stakeholders gained a fuller understanding of that practice's inconsistency with an accurate count.³⁶

Justice Gorsuch boiled this history down even further. Writing in partial dissent from an order of the Supreme Court regarding an evidentiary dispute in the cases, Justice Gorsuch, joined by Justice Thomas, asserted that “[m]ost censuses in our history have asked about citizenship.”³⁷ Justice Gorsuch did not elaborate on the history, but his comments have cast an ominous shadow over the suits, which the Court will take up on April 23 when it hears oral argument in the New York cases.³⁸ Justice Gorsuch's nutshell account reduces the history to its barest, most flawed, and maximally harmful form. Missing are all the details crucial for understanding how the census has changed over time in response to its long-standing efficiency and accuracy problems and, in the process, minimize the potentially harmful effects of citizenship-related questions on the count.

II. CORRECTING THE PARTICULARS OF THE ADMINISTRATION'S HISTORICAL ACCOUNT

Bracketing briefly the broader problems with the Administration's checklist-style approach to history, its historical account is flawed in its particulars. These flaws have significant ramifications for both the constitutional and statutory arguments in these cases.

To assert an unbroken chain of historical practice, the Administration makes three obscuring moves. First, it conflates questions regarding citizenship or naturalization status with a broad array of “citizenship-related” questions—including birthplace, year of immigration, and parents' birthplaces—none of which are synonymous with “citizenship” or are good proxies for identifying noncitizens.³⁹ Second, it downplays the extent to which the census asked questions about naturalization or citizenship only to subsets of the population, when such questions were asked at all, attempting to justify the presence of a universal citizenship question on the 2020 Census by reference to instances of decidedly non-universal questions on

³⁶ *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). This Article does not evaluate the legal correctness of the Southern District's decision. Instead, it focuses on factual historical questions. Nonetheless, the district court's legal analysis warrants further scrutiny.

³⁷ *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (mem.) (Gorsuch, J., concurring in part and dissenting in part).

³⁸ *Supreme Court of the United States, October Term 2018—For the Session Beginning April 15, 2019*, SUPREME COURT OF THE UNITED STATES (amended Feb. 22, 2019), https://www.supremecourt.gov/oral_arguments/calendars/MonthlyArgumentCalApril2019.html [<https://perma.cc/MNA9-UDUY>]. The Supreme Court granted certiorari before judgment in the New York cases. *Order, Dep't of Commerce v. New York*, No. 18-966 (S. Ct. Feb. 15, 2019). As a result, an appeal of the district court's ruling was not briefed or argued before the Second Circuit. *See* Motion Order, *New York v. U.S. Dep't of Commerce*, No. 19-212 (2d Cir. Feb. 19, 2019), ECF No. BL-50.

³⁹ *See* Memorandum of Law in Support of Defendants' Motion to Dismiss at 30, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 155.

some older censuses. Third, it elides crucial differences between the forms used in the wake of the 1950 Census to obtain a complete count of the population and sample population surveys—such as the long-form census, and later, the American Community Survey—that are used for other purposes.⁴⁰

The seriousness of this final move cannot be overstated. First, as former census officials and leading social science organizations have both recognized, the questionnaire that is now sent to every household for complete-count purposes—the “short form”—is fundamentally different from sample population surveys.⁴¹ The short form is sent to every housing unit; the sample population surveys have historically only been sent to a small percentage of housing units in any given decade or year.⁴² The short form serves a different purpose—enumerating the population, “along with [collecting a small amount of] data . . . [used] for districting purposes.”⁴³ It is also much shorter—it has only collected somewhere between five and six population data items from 1960 forward.⁴⁴ Indeed, as discussed at greater length in Section III.C, *infra*, the Census Bureau created sample surveys and placed most of its “demographic questions” on those instruments in order to insulate the short form—and, by extension, the head count—from extraneous questions that complicated the decennial enumeration. That citizenship questions were relegated to sample surveys after the Bureau introduced the short form is a testament to the potential problems they posed

⁴⁰ See the Appendix, *infra*, for our corrected account. For a description of the content of the sample surveys, see Levitt, *supra* note 3, at 5–7.

⁴¹ See, e.g., Brief of Amici Curiae Former Census Bureau Directors in Support of Plaintiffs’ Trial Position at 3–4, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 423-1; see also Brown, *supra* note 15, at 39.

⁴² See Brief of Amici Curiae Former Census Bureau Directors in Support of Plaintiffs’ Trial Position at 3–4, 8, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 423-1; see generally Constance F. Citro, *Long Form*, in *ENCYCLOPEDIA OF THE U.S. CENSUS: FROM THE CONSTITUTION TO THE AMERICAN COMMUNITY SURVEY* 306 (Margo J. Anderson et al. eds., 2012).

⁴³ See Brief of Amici Curiae Former Census Bureau Directors in Support of Plaintiffs’ Trial Position at 3–4, 6, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 423-1.

⁴⁴ See *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. 5 (2018) (statement of Justin Levitt, Professor, Loyola Law School); JENNIFER D. WILLIAMS, CONG. RESEARCH SERV., R40551, *THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES* 3 (2011), <https://www.census.gov/history/pdf/2010-background-crs.pdf> (noting that the 2010 Census had six population data items on the short form, not including name); see generally CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *CENSUS BUREAU, HISTORY: 2000 CENSUS OF POPULATION AND HOUSING (VOLUME 1)*, at 106 (2009) [hereinafter CENSUS BUREAU, HISTORY: 2000 CENSUS], <http://www.census.gov/history/pdf/Census2000v1.pdf> (noting that the 2000 Census had six population data items on the short form, not including name); CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *200 YEARS OF U.S. CENSUS TAKING: POPULATION AND HOUSING QUESTIONS, 1790-1990*, at 5 (1989) [hereinafter CENSUS BUREAU, 200 YEARS], <https://www.census.gov/history/pdf/200years.pdf>.

for the constitutionally required count rather than a sign of their compatibility with the count.

Moreover, as with any survey, the precise content and sequence of questions, the method of administration, and the particular environment in which the survey is administered all affect the accuracy of the results. Because context matters, the short form's parts cannot be swapped in and out without rigorous testing.⁴⁵ As a result—from a survey-design perspective—the simple presence of a citizenship question on alternative surveys cannot support a citizenship question on the short form.

Correcting for the flaws in the Administration's account presents a much less robust history for citizenship questions than the Administration asserts. In the period between 1820 and 1880, the questionnaire used to obtain the constitutionally required complete-count (the "complete-count" form) once asked about the citizenship of males who were twenty-one years or older (1870) and only twice inquired about the *number* of foreign-born persons within the household who were not naturalized (1820 and 1830). Between 1890 and 1910, the complete-count form asked about the naturalization status of foreign-born males who were twenty-one years or older. In 1920, the complete-count form asked about the naturalization status of all foreign-born persons, whatever their age (with the exception of married women, whose husbands' naturalization status was imputed to them). In 1930, 1940, and 1950, the complete-count form asked all foreign-born individuals their citizenship (1940) or naturalization (1930, 1950) status regardless of their marital status and age. And, from 1960 forward, the newly initiated short form—the heir to the complete-count form⁴⁶—no longer asked *anyone* about their citizenship or naturalization status; any citizenship questions were asked of only small subsets of the population via sample population surveys.⁴⁷

In other words, *never* in the census's 230-year history has the census sought the citizenship status of *every person* in the country, let alone done

⁴⁵ See Letter from Former Directors of the U.S. Census Bureau to Wilbur L. Ross, Sec'y of Commerce, U.S. Dep't of Commerce (Jan. 26, 2018), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_ques_request_Former_Directors_ltr_to_Ross.pdf; see also Brief of the American Statistical Association, American Sociological Association, and Population Association of America as Amici Curiae in Support of the Plaintiffs' Position at Trial at 5–6, 9–10, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 420; Brief of Amici Curiae Former Census Bureau Directors in Support of Plaintiffs' Trial Position at 15–17, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 423-1; Levitt, *supra* note 3, at 7–9.

⁴⁶ See *supra* note 12 and accompanying text.

⁴⁷ The sole exception to the new short-form practice occurred during the 1960 Census when the forms distributed in New York and Puerto Rico included a citizenship question for redistricting purposes. See CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1960 CENSUSES OF POPULATION AND HOUSING: PROCEDURAL HISTORY, at 194 (1966) [hereinafter CENSUS BUREAU, 1960 CENSUSES], https://www.census.gov/history/www/through_the_decades/overview/1960.html [<https://perma.cc/B8GK-EDNQ>].

so via the forms or questionnaires used to obtain the constitutionally required complete count of the country's population.⁴⁸ Secretary Ross's proposal to do just that is, therefore, historically unprecedented.

The closest the census has ever come to a universal citizenship question was on the 1930, 1940, and 1950 Censuses, which asked about the citizenship or naturalization status of all foreign-born people.⁴⁹ But none of the censuses between 1930 and 1950 even vaguely approximated a universal citizenship question, either in the way they were administered or in the way they functioned.

First, during these censuses, most respondents were not presented with questions about their citizenship or naturalization status. Contrary to contemporary practice—where the Bureau mails forms to housing units, requests heads of households to fill those forms out, and permits the return of completed forms by mail—censuses from 1930 through 1950 were conducted principally by enumerators. These enumerators travelled door to door, narrating questions to household heads and recording the answers themselves.⁵⁰ The enumerators' instructions advised that if a respondent did not indicate that her household included foreign-born people, the enumerator was not to inquire about citizenship or naturalization.⁵¹ This is markedly different from Secretary Ross's proposed approach to the 2020 Census, which would compel every respondent to view, consider, and respond to a question about the citizenship status of every member of her household.⁵²

Second, the 1930–1950s method of collecting information from residents—where place of birth was asked of everyone and citizenship was

⁴⁸ Cf. Expert Report of Margo Anderson, Ph.D. at 17, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Dec. 28, 2018), ECF No. 133 (stating that “even during the ‘complete count era’ through 1950, the citizenship question was not a universal population inquiry”).

⁴⁹ See CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ENUMERATORS' REFERENCE MANUAL 1-470 (1950) <https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-documentation/questionnaires/1950instructions.pdf>; CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SIXTEENTH DECENNIAL CENSUS OF THE UNITED STATES: INSTRUCTIONS TO ENUMERATORS, POPULATION AND AGRICULTURE 1940 47 (1940), <https://www.census.gov/history/pdf/1940instructions.pdf>; CENSUS BUREAU, U.S. DEP'T OF COMMERCE, FIFTEENTH CENSUS: INSTRUCTIONS TO ENUMERATORS, POPULATION AND AGRICULTURE 31 (1930), <https://www.census.gov/history/pdf/1930instructions.pdf>.

⁵⁰ See CENSUS BUREAU, U.S. DEP't of Commerce, Counting the Population, https://www.census.gov/history/www/innovations/data_collection/counting_the_population.html.

⁵¹ See CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ENUMERATORS' REFERENCE MANUAL 1-470 (1950) <https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-documentation/questionnaires/1950instructions.pdf>; CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SIXTEENTH DECENNIAL CENSUS OF THE UNITED STATES: INSTRUCTIONS TO ENUMERATORS, POPULATION AND AGRICULTURE 1940, at 47 (1940), <https://www.census.gov/history/pdf/1940instructions.pdf>; CENSUS BUREAU, U.S. DEP'T OF COMMERCE, FIFTEENTH CENSUS: INSTRUCTIONS TO ENUMERATORS, POPULATION AND AGRICULTURE 31 (1930), <https://www.census.gov/history/pdf/1930instructions.pdf>.

⁵² See Letter from Wilbur L. Ross, *supra* note 1.

asked only of the foreign born—was not the functional equivalent of a universal citizenship question. This is the case *even if* the Bureau could have imputed citizenship to everyone who answered that they were born in America.

An example from recent censuses helps shed light on the reason why. Recent short forms have included both a question about race and a question about ethnicity. Even as early as 2008, the Bureau explored the possibility of combining these questions into one question for the 2020 Census, and it spent nearly a decade testing this possibility.⁵³ The Bureau's 2015 study on the issue revealed that "[t]he percentage of respondents not providing a valid response to the race/ethnicity question was *significantly higher*" on forms that presented race and ethnicity as separate questions than on forms that asked about race and ethnicity together in a combined question.⁵⁴ In other words, the difference between a two-step and a one-step process has meaningful, material impacts on the kind and quality of data that census questions produce. The Census Bureau's decision to ask for everyone's birthplace and the naturalization status of foreign-born individuals was no more functionally equivalent to a single citizenship question than a combined race-ethnicity question is functionally equivalent to separate race and ethnicity questions. In surveys, wording, sequencing, and other small details have significant consequences.

Under these circumstances, the Administration cannot plausibly contend that there is a long tradition of universal citizenship questions to insulate itself from liability under the Enumeration Clause. No such tradition exists. Nor can it claim that there is an objective track record of universal citizenship questions sufficient to render Secretary Ross's decision reasonable or non-arbitrary for APA purposes. No such track record exists.

At most, the Administration is left with a spotty history of *non-universal* citizenship questions. In an attempt to salvage the historical warrant for Secretary Ross's decision, the Administration thus must lean heavily on the sporadic appearance of such questions on some complete-count forms prior to 1960. As we discuss next, even this spotty history cannot save the Administration. It would require the Administration to rely on a whole paradigm of census-taking that the Census Bureau long ago definitively rejected as incompatible with the constitutionally required count.

⁵³ See Amended Declaration of John H. Thompson at 10–11, *New York Immigration Coal. v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-05025-JMF), ECF No. 516-1.

⁵⁴ CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2015 NATIONAL CONTENT TEST: RACE AND ETHNICITY ANALYSIS REPORT 49 (2017) (emphasis added); see also *id.* at 58 (noting that "[t]he combined question formats had significantly lower percentages of . . . invalid responses, as well as . . . missing response[s] than the [s]eparate [q]uestions format).

III. EXAMINING THE GREATER HISTORICAL CONTEXT FOR CITIZENSHIP QUESTIONS

The non-existent precedent for a universal citizenship question on the census casts significant doubt on the legality of Secretary Ross's decision. Further damning, however, are the lessons we can draw from a broader-gauged history, one that considers not just *what* was asked in any given decade, but also *why* and *how* it was asked. This broader-gauged history first shows that the historical examples of citizenship questions being included in the enumeration process—all of which predated the 1960 Census—are part of an entire census-taking approach that the Bureau long ago rejected as a viable model for counting everyone. And second, it shows that census practice in the wake of the 1960 Census has treated citizenship questions as inconsonant with an accurate count.

In a nutshell: the earliest manifestations of citizenship questions were part of an increasingly sprawling census that was attempting—with mounting difficulties—to pursue two objectives at once: (1) counting everyone; and (2) collecting additional information that was considered useful for miscellaneous collateral statistical, political, and economic objectives. The problems with this approach manifested early and often. Beginning in 1850 and extending well into the twentieth century, Congress cycled through a series of attempted reforms to the census, none of which succeeded in reining in its scope. Indeed, even with the introduction of a full-time, professionalized Census Bureau in 1902 and the passage of legislation to limit the topics that would appear on the decennial questionnaire, the census continued to struggle with overly ambitious information-gathering goals, substantial respondent burdens, and troubling accuracy issues.

In the wake of the 1950 Census, the Census Bureau rejected this older paradigm of census practice. Indeed, social science innovations like statistical sampling helped the Bureau detect just how deficient its traditional approach to census-taking had been, and begin to adjust its census-taking practices to optimize them for a viable count. So equipped, the Bureau installed a radically different census-taking model. The Bureau differentiated the small number of questions necessary for the constitutionally required head count from questions that served other statistical purposes. The Bureau placed the former into a new questionnaire intended for the complete count (the short form) and placed the latter on sample surveys, which reduced the burdens on census respondents and increased the enumeration's accuracy. Citizenship questions were consigned to these alternative sample surveys, and have been confined there ever since. Indeed, since 1960, citizenship questions have never appeared on the short form census—that is, the questionnaire used to obtain the complete count. Since that time, they have acquired negative valences that would heavily complicate their inclusion on the short form.

Consequently, a more complete census history provides no warrant for Secretary Ross's citizenship question under either the Enumeration Clause

or the APA. Indeed, history teaches that the pre-1960 census practice on which the Administration relies to justify its decision under the Enumeration Clause proved insufficient to meet that Clause's command. Similarly, the "traditional status quo" to which the Administration appeals to shield itself from APA liability represents an entire state of affairs that the reigning norms of census practice were created to avoid. Post-1960 census history, moreover, features frequent acknowledgments by census professionals that attempts to ascertain everyone's citizenship status would not be conducive to an accurate count.

What follows unpacks this history, describing the census's struggles through the nineteenth century (III.A) and into the early twentieth century (III.B) under an older paradigm of census practice, spotlighting the key drivers and relevant characteristics of the Bureau's mid-century reforms that ushered in a new paradigm (III.C), and explaining the fraught relationship between the new paradigm and citizenship questions (III.D).

A. THE INCREASINGLY SPRAWLING NINETEENTH-CENTURY CENSUS

Over the course of the nineteenth century, the census evolved from a short set of questions designed simply to count heads into an unwieldy, all-purpose information-collection apparatus.⁵⁵ The earliest censuses asked little of respondents. The first, conducted in 1790, consisted of only six questions. In addition to asking for the name of the head of the household, the first census asked the number of: free white males sixteen years and older; free white males under sixteen years; free white females; all other free persons; and slaves.⁵⁶ By the fourth census, however, Congress recognized the census's unique status as one of the few tools for collecting demographic information on the developing nation and expanded its scope to include all types of tangential questions about the population. The 1820 Census included nearly thirty new classifications—including a question asking for the number, but not the names, of "[f]oreigners not naturalized"

⁵⁵ Cf. CARROLL D. WRIGHT & WILLIAM C. HUNT, THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS, S. DOC. NO. 56-194, at 8 (1900) (explaining that "[t]he number and extent of . . . census inquiries, starting in 1790 . . . have been a matter of steady growth from decade to decade . . . until they have culminated at the [end of the nineteenth century] in a very great variety of topics of investigation, comprising many different schedules and an almost endless number of inquiries"); Steven Ruggles & Diana L. Magnuson, *Capturing the American People: Census Technology and Institutional Change, 1790-2020* 7–11 (Univ. of Minn., Minn. Population Ctr., Working Paper No. 2018-2, 2018) (describing the expansion of census schedules through 1850).

⁵⁶ *1790 Overview*, U.S. CENSUS BUREAU, http://www.census.gov/history/www/through_the_decades/overview/1790.html (last visited Feb. 2, 2019).

in the respondents' household.⁵⁷ The 1840 Census included additional questions about insanity, occupation, and school attendance.⁵⁸

This rapid expansion in the census's scope reflected, among other things, the census's under-defined administrative structure and its corresponding exposure to the vagaries of politics. The Framers' express instructions for the census were limited to the Enumeration Clause's mandate that an "actual [e]numeration . . . be made within three [y]ears after the first [m]eeting of the Congress of the United States, and within every subsequent [t]erm of ten [y]ears, in such [m]anner as they shall by [l]aw direct."⁵⁹ The Framers did not create a full-time civil service component to administer the census. Instead, they left both the census's design and its administration to Congress. Every ten years, Congress assigned federal marshals to conduct the census under the supervision of either the Secretary of State (1790–1840) or a temporary "Census Office" in the Interior Department (1850–1900).⁶⁰ Each census and its necessary administrative structures, in turn, had to be reauthorized through periodic legislation, often passed just months before the enumeration started. In this environment, the census became a target for early legislative lobbyists, who pushed members of Congress to add questions—including the earliest iterations of citizenship questions—to satisfy emergent exigencies.⁶¹

These increasingly extensive censuses encountered substantial administrative difficulties. Former Census Bureau statistician Miriam D. Rosenthal described this first phase of the census as a time of "[r]eenumerations, protracted enumeration periods, lengthy questionnaires, poor questionnaire design, nepotism, and bureaucracy."⁶² The 1840 Census brought these tensions to a head and is still considered one of the greatest administrative bumbles in census history.⁶³ Low pay, overly long census schedules, and lack of effective management led to tabulation errors.⁶⁴ The most controversial error was the reported rate of insanity in the Northern free black population: 1 in every 162 free blacks in the Northern states was marked as "insane" or an "idiot" (a substantial deviation from the South,

⁵⁷An Act to Provide for Taking the Fourth Census, or Enumeration of the Inhabitants of the United States, and for Other Purposes, ch. 24, 3 Stat. 548, 548–50 (1820).

⁵⁸*Index of Questions: 1840*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1840_1.html [https://perma.cc/YE68-BZQ3] (last visited Feb. 5, 2019).

⁵⁹U.S. CONST. art. I, § 2, cl. 3.

⁶⁰CENSUS BUREAU, 200 YEARS, *supra* note 44, at 1, 5.

⁶¹See Constance F. Citro, *Content Determination*, in ENCYCLOPEDIA OF THE U.S. CENSUS: FROM THE CONSTITUTION TO THE AMERICAN COMMUNITY SURVEY 105 (Margo J. Anderson et al. eds., 2012); see also Expert Report of Margo Anderson, Ph.D. at 3, City of San Jose v. Ross, No. 3:18-cv-02279-RS (N.D. Cal. Dec. 28, 2018), ECF No. 133; Ruggles & Magnuson, *supra* note 55, at 6–7.

⁶²Miriam D. Rosenthal, *Striving for Perfection: A Brief History of Advances and Undercounts in the U.S. Census*, 17 GOV'T INFO. Q. 193, 197 (2000).

⁶³*Id.* at 196.

⁶⁴WRIGHT & HUNT, *supra* note 55, at 38.

where 1 in every 1,558 blacks was so marked).⁶⁵ Although this was discovered to be a tallying error, these and other errors cast doubt on the reliability of census data.⁶⁶

Following the 1840 Census, Congress altered the census' administrative structure with an eye towards pursuing a more manageable and scientific enumeration.⁶⁷ For the first time, the 1850 Census saw Congress turn the enumeration over to a Census Board comprised of secretaries of state and other experts.⁶⁸

This new approach, however, did not produce a simpler census. At the behest of the Census Board, Congress not only added new population questions, but also adopted six different census schedules and began asking questions of all free persons in each household.⁶⁹ This combination gave rise to what was known as the "encyclopedic census"—which only increased the burden on respondents and exacerbated survey errors.⁷⁰

Over the remainder of the century, the census continued to grow in complexity, until it had become essentially inadministrable. The 1890 census contained over 13,000 possible questions among the different census schedules.⁷¹ Carroll D. Wright, the first Commissioner of Labor, described this census as a "complete farce" for both the enumerator and respondent.⁷² Wright further explained that the "work of the enumerator is now so increased through the multiplicity of inquiries that it is almost impossible for him to be faithful in his work."⁷³ As a result, it took officials nearly seven years to publish the final volume of results.⁷⁴

During this phase of the census's history, citizenship questions were not a fixture. Like many other questions, they would appear for brief intervals, only to disappear from subsequent censuses. And, as they appeared, disappeared, and reappeared, their purposes shifted. In many ways, these

⁶⁵ MARGO J. ANDERSON, *AMERICAN CENSUS: A SOCIAL HISTORY* 38 (2d ed. 2015).

⁶⁶ See generally PATRICIA CLINE COHEN, *A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA* (1999); see also ANDERSON, *supra* note 65, at 38–39 ("In 1840, Americans learned that the census itself could produce incorrect results . . . [which] prompted further thinking about the census and apportionment process.").

⁶⁷ See COHEN, *supra* note 66, at 178.

⁶⁸ ANDERSON, *supra* note 65, at 42; COHEN, *supra* note 66, at 178.

⁶⁹ J. D. B. DEBOW, *COMPENDIUM OF THE SEVENTH CENSUS* 12 (1854), <https://www2.census.gov/library/publications/decennial/1850/1850c/1850c-01.pdf>. Prior to 1850, questions such as the naturalization question were only asked of the head of the household. See Rosenthal, *supra* note 62, at 197. Thus, foreigners not naturalized were not identified on the individual level.

⁷⁰ *The Twelfth Census and a Permanent Census Service: Informal Hearing Before the S. Comm. on the Census*, 54th Cong. 4 (1897) (statement of Carroll D. Wright).

⁷¹ MICHAEL R. LAVIN, *UNDERSTANDING THE CENSUS: A GUIDE FOR MARKETERS, PLANNERS, GRANT WRITERS AND OTHER DATA USERS* 21 (1996).

⁷² *The Twelfth Census and a Permanent Census Service*, *supra* note 70, at 16.

⁷³ Carroll D. Wright, *The Federal Census*, in 20 *FORUM* 614 (1896).

⁷⁴ WRIGHT & HUNT, *supra* note 55, at 75.

questions were symptomatic of the comparatively fluid nineteenth-century census practice.

At times, the census collected basic information and vital statistics from the foreign-born population to determine the migration patterns of newly-arrived immigrants.⁷⁵ These efforts reflect the absence of a federal system for maintaining naturalization records at this stage in the nation's history.⁷⁶ As part of these efforts, the census twice asked heads of households for the number of foreign-born persons not naturalized (1820 and 1830), and once asked about the naturalization status of foreign-born males who were twenty-one years or older (1890).⁷⁷ The 1870 manifestation of a citizenship question, however, served a much different purpose: measuring the effects of emancipation and the Fourteenth Amendment on the civil rights of former slaves.⁷⁸

Reflecting their shifting purposes, the nineteenth-century citizenship questions assumed different phrasing across the decades. The 1820 Census, for example, asked for the number of "foreigners not naturalized."⁷⁹ In marked contrast to censuses from 1850 onward, the 1820 form only asked for the name of the head of the household.⁸⁰ As a result, foreigners not naturalized were not identified on an individual level. The 1870 citizenship question, meanwhile, signaled its civil rights purpose on its face, seeking for "constitutional relations" the names of "[m]ale [c]itizens of U.S. of 21 years of age and upwards," followed by "[m]ale [c]itizens of U.S. of 21 years of age and upwards, whose right to vote is denied or abridged on other grounds than rebellion or other crime."⁸¹ The corresponding enumerators' instructions reinforced the question's different purpose, providing that "[e]very male person born within the United States, who has attained the age of 21 years, is a citizen of the United States by the force of the Fourteenth Amendment to the Constitution."⁸²

B. THE TURN-OF-THE-CENTURY EFFORTS AT REFORM

The turn of the twentieth century saw Congress strive to enforce further order on the census through a combination of legislative and administrative reforms. After the problems with the 1890 Census, Congress passed legislation that limited the decennial census topics to population, mortality,

⁷⁵ CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 1, 97–104 (1975) [hereinafter CENSUS BUREAU, HISTORICAL STATISTICS]; J. D. B. DEBOW, *supra* note 69, at 16.

⁷⁶ U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS, *supra* note 75, at 101. ("prior to 1906, individual courts kept records of naturalizations, but no national data were compiled").

⁷⁷ See generally CENSUS BUREAU, 200 YEARS, *supra* note 44, at 19–20, 37.

⁷⁸ See generally ANDERSON, *supra* note 65.

⁷⁹ CENSUS BUREAU, 200 YEARS, *supra* note 44, at 19.

⁸⁰ *Id.*

⁸¹ *Id.* at 27.

⁸² *Id.*

agriculture, and manufacturing.⁸³ Any other statistics were to be collected through alternative means.⁸⁴ Subsequent legislation governing the 1920 Census placed similar congressional limits on the population schedule.⁸⁵ Congress also established a permanent Census Bureau staffed full time by census professionals in 1902.⁸⁶ By 1929, Congress had authorized the Census Director and Commerce Department to determine what items were included in the census.⁸⁷

These changes helped institutionalize the census process, but not simplify it. When Congress shifted the burden of selecting questions for the decennial census to the newly empowered Census Bureau, the Bureau faced the difficult task of keeping the census simple while still accommodating new demands for contemporary data.⁸⁸ After the 1929 Census Act, the 1930 Census expanded to include questions about housing values and attached a supplementary form for unemployment.⁸⁹ In 1939, Congress introduced yet another census schedule—this time, on housing—and tacked an additional seven questions onto the population schedule.⁹⁰ Between the 1910 Census and the 1950 Census, the number of questions on the population schedule alone ping-ponged between a low of 20 questions (the 1950 Census) and a high of 34 questions (the 1940 Census).⁹¹

As noted, these population schedules *did* include citizenship or naturalization questions for a subset of the population, a trend that began in 1890 as immigration levels increased.⁹² These questions, however, became vestigial almost as soon as they were added. Immigration to the United States reached a high between 1905 and 1914, when nearly nine million people migrated to the United States.⁹³ Just as rapidly as immigration peaked, however, it began to decline. Congress introduced strict immigration controls—chiefly by barring all Asian immigrants and adopting a national origin quota system, which favored immigrants from

⁸³ Rosenthal, *supra* note 62, at 198.

⁸⁴ *Id.*; see also An Act to Provide for a Permanent Census Office, Pub. L. No. 57-27, § 7, 32 Stat. 51, 52 (1902).

⁸⁵ An Act to Provide for the Fourteenth and Subsequent Decennial Censuses, Pub. L. No. 65-325, § 8, 40 Stat. 1291, 1294 (1919).

⁸⁶ An Act to Provide for a Permanent Census Office, Pub. L. No. 57-27, §§ 1–4, 32 Stat. 51, 51 (1902).

⁸⁷ An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for Apportionment of Representatives in Congress, Pub. L. No. 71-13, § 4, 46 Stat. 21, 22 (1929).

⁸⁸ Citro, *Content Determination*, *supra* note 61, at 105.

⁸⁹ JOSEPH W. DUNCAN & WILLIAM C. SHELTON, *REVOLUTION IN UNITED STATES GOVERNMENT STATISTICS, 1926-1976* 22 (1978).

⁹⁰ ANDERSON, *supra* note 65, at 181; see also Expert Report of Margo Anderson, Ph.D. at 9, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Dec. 28, 2018), ECF No. 133.

⁹¹ See CENSUS BUREAU, *200 YEARS*, *supra* note 44, at 48–75.

⁹² See *supra* Section III.A.

⁹³ Jeffrey S. Passel, *Immigration*, in *ENCYCLOPEDIA OF THE U.S. CENSUS: FROM THE CONSTITUTION TO THE AMERICAN COMMUNITY SURVEY* 277 (Margo J. Anderson et al. eds., 2012).

northern and western Europe.⁹⁴ The Great Depression and the World Wars further ratcheted down the movement of people.⁹⁵ Over the course of the 1940s, only one million immigrants arrived in America.⁹⁶ The McCarran–Walter Act of 1952 encouraged immigration again by eliminating the bar on Asian immigrants and implementing a system of preferences, despite keeping the restrictive national origin quota system of 1924.⁹⁷ By the 1950s, there was a slight increase in legal immigrants to approximately 250,000 per year, but that represented a substantially lower level of immigration than the country had grown accustomed to decades earlier.⁹⁸ With immigration rates declining and the proportion of the American population that was naturalized rising, citizenship information was unimportant as a policy matter by the time of the 1950 Census.⁹⁹ These questions remained on the census merely because of inertia bred by the census’s sprawl.

C. THE STATISTICAL REVOLUTION, THE RISE OF THE “MODERN CENSUS,” AND THE FALL OF THE CITIZENSHIP QUESTION

The Census Bureau’s professionalization proceeded apace with a revolution in statistical practice across federal agencies. This statistical revolution laid the foundation for what recent former Census Directors have dubbed the “[m]odern [c]ensus.”¹⁰⁰ Social science developments that had taken root at the Bureau by mid-century—chief among them, statistical sampling—exposed fundamental problems with the way the federal government had conducted the census up to that point. Indeed, as Joseph Waksberg and Leon Pritzker explained it, “[m]uch of the census history of the [period between 1944 and 1969 was] a history of discovery of how inaccurate the counts of population ha[d] been, and how difficult the problems of counting [were].”¹⁰¹

As this Part shows, the Census Bureau was finally able to use new statistical methods and computing power in the wake of the 1950 Census to quantify the scale of the inaccuracies in the enumeration and develop new, more cost-effective methods for collecting necessary data. As a result, the Census Bureau changed its approach to the census dramatically, disaggregating the complete-count process from the census’s other data-gathering functions. As a key part of this paradigm shift, the Bureau

⁹⁴ *Id.* at 275, 277.

⁹⁵ *Id.* at 277–78.

⁹⁶ *Id.* at 278.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ By 1950, 78.7% of foreign-born residents were already naturalized. Arun Peter Lobo & Ellen Percy Kraly, *Foreign Born Population of the United States*, in *ENCYCLOPEDIA OF THE U.S. CENSUS: FROM THE CONSTITUTION TO THE AMERICAN COMMUNITY SURVEY* 243 (Margo J. Anderson et al. eds., 2012).

¹⁰⁰ Brief of Amici Curiae Former Census Bureau Directors in Support of Plaintiffs’ Trial Position at 3, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 423-1; Rosenthal, *supra* note 62, at 205–06.

¹⁰¹ Joseph Waksberg & Leon Pritzker, *Changes in Census Methods*, 64 *J. AM. STAT. ASS’N* 1141, 1142 (1969).

removed citizenship questions and many other questions that it deemed unnecessary to “count” people from the complete-count form and placed those questions on alternative population survey instruments (the previously-discussed sample surveys). With these decisions, the Census Bureau made a significant break from its past practice and set a new framework for obtaining a complete count that it has followed to the present day. And in the process, the Bureau dramatically downgraded the value of pre-1960 Census practice for our—and the courts’—understanding of sound census-taking methods.

1. The Statistical Revolution Visits the Census Bureau

Just as the Bureau was becoming legally empowered to administer the census, statistical developments emerged that enhanced its technical abilities. Spearheading this statistical revolution was the Committee on Government Statistics and Information Services (COGSIS), which was formed in 1933.¹⁰² COGSIS set out to “furnish immediate assistance and advice in the reorganization and improvement of the statistical and information services of the [f]ederal [g]overnment.”¹⁰³ In 1934, COGSIS analyzed several divisions of the Census Bureau, including the division responsible for creating the 1940 Population Census.¹⁰⁴ Based on its analysis, COGSIS laid out three principles for the content of future population censuses, loosely paraphrased:

1. There is nothing irrevocable about a census question just because it has been asked on previous censuses.
2. There is no reason why every question needs to be asked of everyone in the entire country.
3. Even when a question is asked of everyone, it is not essential that the data be tabulated for the entire country.¹⁰⁵

Applying these principles, COGSIS recommended that several questions—including citizenship questions—be eliminated in future censuses, or at least eliminated in part, to reduce respondent burden.¹⁰⁶

COGSIS’S push to restructure the Census Bureau and promote coordination among the different statistical agencies led to rapid research developments. Chief among these developments were probability sampling—that is, methods for collecting certain information from only a

¹⁰² SOC. SCI. RESEARCH COUNCIL, GOVERNMENT STATISTICS: A REPORT OF THE COMMITTEE ON GOVERNMENT STATISTICS AND INFORMATION SERVICES 77 (1937), <https://hdl.handle.net/2027/uc1.32106000787868> [<https://perma.cc/C3RW-6NKJ>].

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 81.

¹⁰⁵ *Id.* at 82.

¹⁰⁶ *Id.*

subset of the population—and standardized post-enumeration tools to measure undercounts—that is, how many people were missing from the initial census count.¹⁰⁷

First, probability sampling. COGSIS, the Bureau of Labor Statistics, and the Central Statistical Board first experimented with probability sampling to measure unemployment in a 1934 Civil Works Administration Census of Unemployment.¹⁰⁸ After this successful attempt to use sampling, the Central Statistical Board recommended that the Census Bureau use sampling in the 1940 Census.¹⁰⁹ The 1940 Census adopted six new questions to collect additional demographic information from a 5% sample of the population.¹¹⁰ The Census Bureau continued to expand its sampling operations in the 1950s, with the 1950 Census introducing a 20% sample and a roughly 3% sample.¹¹¹

The results of the 1950 Census gave the Bureau's statisticians confidence in the reliability of sampling techniques. In the post-1950 census evaluation studies, the Bureau found that sample data was of higher quality than complete-count data.¹¹² In particular, the Enumerator Variance Study demonstrated that the total survey error resulting from collection errors in the complete-count data—such as variances in enumerator responses and interviewer mistakes (collectively called “non-sampling error”)—was substantial.¹¹³ Waksberg and Pritzker reported that these errors were so large that sample surveys could introduce “sampling error . . . even in small areas, with very little additional impact on the quality [of coverage].”¹¹⁴

Developments in probability sampling paved the way for another important innovation: the post-enumeration survey. It was no secret that the

¹⁰⁷ Rosenthal, *supra* note 62, at 200–02.

¹⁰⁸ SOC. SCI. RESEARCH COUNCIL, *supra* note 102, at 95.

¹⁰⁹ *Id.*

¹¹⁰ Rosenthal, *supra* note 62, at 200. The 1940 and 1950 sample questions were not applied to all members in a specific household. LAVIN, *supra* note 71, at 55. It was not until the 1960 Census that the sample questions were asked of all members in a household. *Id.*

¹¹¹ DUNCAN & SHELTON, *supra* note 89, at 60–61.

¹¹² *See id.* at 63–64.

¹¹³ *Id.*

¹¹⁴ Waksberg & Pritzker, *supra* note 101, at 1145; *see also id.* at 1143 (advising that “[f]or most subjects sample surveys can produce at least as accurate data for [the nation as a whole and even for large subdivisions of the nation] and in most cases superior information”). Waksberg elsewhere stated that the accuracy benefits of sampling were borne out by the results of the 1960 Census, observing that “there was a reduction in [several specified] sources of errors, as a result of improvements in procedures and greater emphasis on field supervision and control. This was made possible by the lower costs that resulted from the use of sampling.” Joseph Waksberg, *The Role of Sampling in Population Censuses: Its Effect on Timeliness and Accuracy*, 5 *Demography* 362, 371 (1968). As Waksberg's comments suggest, cost-effectiveness and accuracy were positively interrelated in the Bureau's historical experience, insofar as reduced costs could free up resources for other initiatives that could further improve accuracy. *See id.* at 369.

census had a history of undercounting the population.¹¹⁵ Census officials long considered the undercount to be an inevitable product of enumerator and mechanical error. It was not until the advent of sampling, however, that census officials could evaluate the pervasiveness of the undercount through post-enumeration surveys and demographic analyses. Early deployments of these techniques raised significant reasons to worry about the accuracy of the count. A 1947 study on census quality, for example, reported an undercount of 2.81% for men of draft age by comparing the 1940 Census data with Selective Service registration records.¹¹⁶ The study reported that the census missed 13% of black men of draft age.¹¹⁷

The 1950 Census was the first census to have a post-enumeration survey that provided the Bureau with scientifically measured undercount estimates at the national level.¹¹⁸ The 1950 post-enumeration survey originally estimated the net undercount to be 2.1 million, while later demographic analyses estimated the net undercount to be 5–5.5 million.¹¹⁹ There was not merely a net undercount, but also a *differential* undercount—that is, an undercount of certain communities at a higher rate than other communities. Estimates were that “nonwhites” were undercounted by 12 to 13%, particularly within poor urban areas.¹²⁰

These statistical developments led to a radical change in the census. The Census Bureau determined that it could collect more accurate information, eliminate three-fourths of processing expenses, and reduce the burden on respondents by moving most of the questions on the existing complete-count form—including citizenship questions—to an expanded sample questionnaire.¹²¹

For the 1960 Census, the Bureau used two different forms: the “short form” questionnaire to conduct the once-a-decade complete count of the population; and a “long form” questionnaire sent to only a sample of housing units to collect additional information beyond that needed for the complete count.¹²² In the 1960 Census, only five demographic questions were asked on the short form: the individual’s relationship to the head of

¹¹⁵ See MARGO ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS? THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 29 (2001).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Rosenthal, *supra* note 62, at 202.

¹¹⁹ Edwin D. Goldfield & David M. Pemberton, *Decennial Censuses: 1950 Census*, in ENCYCLOPEDIA OF THE U.S. CENSUS: FROM THE CONSTITUTION TO THE AMERICAN COMMUNITY SURVEY 153 (Margo J. Anderson et al. eds., 2012).

¹²⁰ ANDERSON & FIENBERG, *supra* note 115, at 30, 33.

¹²¹ See *Plans for Taking the 1960 Census: Hearing Before the Subcomm. on Census & Gov’t Statistics of H. Comm. on Post Office & Civil Serv.*, 86th Cong. 5–7 (1959) (statement of Dr. Robert W. Burgess, Director, Census Bureau); Paul C. Glick, *Plans for the 1960 Census of Population*, 25 POPULATION INDEX 289, 291–92 (1959).

¹²² Glick, *supra* note 121, at 291–92.

the household, sex, race, month and year of birth, and marital status.¹²³ Another thirty-one questions were included in the long form.¹²⁴ For the first time, the long form had most of the population questions.¹²⁵

By separating the questions in this manner, the Bureau paved the way for an enumeration process that it hoped would “provid[e] improved counts of people and housing units” by allowing enumerators to focus on enhancing their coverage for the complete-count questions.¹²⁶ This was a “major objective,” the Bureau noted, in light of post-enumeration survey results that “indicated that there might have been as much as 2 or 3% net underestimation of population and housing units in the 1950 censuses.”¹²⁷

At this juncture, in other words, the Census Bureau rejected the “traditional status quo” on which the Administration relies in its constitutional and statutory defenses. In its place, the Bureau installed a new approach to the decennial head count that was intentionally created to alleviate the problems that had long characterized that status quo and compromised the Bureau’s ability to carry out its constitutional duty.

2. The Citizenship Question is Removed from the Decennial

The citizenship question was one of the first casualties of this new census-taking paradigm. The Census Bureau did not include the citizenship question in either the short form or long form in 1960.¹²⁸ Broadly speaking, the statistical innovations discussed above pushed the Census Bureau to reexamine critically each question it had been asking of the whole population. With these background commitments to reducing respondent burdens and increasing census accuracy in mind, the Census Bureau rejected the citizenship question as unnecessary.

The Census Bureau retrospectively explained its decision to remove the citizenship question from the 1960 Census in the following way:

“general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for

¹²³ *Index of Questions: 1960 (Population)*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1960_population.html [<https://perma.cc/K65H-NE9G>] (last visited Feb. 5, 2019).

¹²⁴ ANDERSON, *supra* note 65, at 207.

¹²⁵ *Id.* at 206.

¹²⁶ CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 1960 CENSUSES OF POPULATION AND HOUSING: PROCEDURAL HISTORY 6 (1966), https://www.census.gov/history/www/through_the_decades/overview/1960.html. As Census Director Robert W. Burgess explained to Congress in the lead up to the 1960 Census, “For a long time the Census Bureau has believed that enumerators were being burdened with more instructions and work than they could effectively handle, with the result that both coverage and content suffered.” *Plans for Taking the 1960 Census*, *supra* note 121, at 7.

¹²⁷ *Id.*

¹²⁸ Glick, *supra* note 121, at 295. There was one exception: the forms distributed in New York and Puerto Rico asked the citizenship question as part of their redistricting processes. See CENSUS BUREAU, 1960 CENSUSES, *supra* note 47, at 194.

annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it needed.”¹²⁹

The Bureau here was referring to new federal administrative surveys that provided citizenship data to the Immigration and Naturalization Service.¹³⁰

Also important to the Bureau’s decision, however, were the United States’ plummeting immigration levels.¹³¹ In the midst of these developments, Census official Paul Glick reported a “lack of evidence of extensive use of the [citizenship question] from the 1950 Census for research purposes.”¹³² Given these considerations, the Census Bureau replaced the citizenship question with more contemporary questions.¹³³ A citizenship question would never again appear on the short form.

3. The Relegation of the Citizenship Question to Sample Surveys

Although the Bureau removed the citizenship question from the short form following the 1950 Census, it did not abandon collecting citizenship data altogether. Developments in the Bureau’s statistical capabilities permitted it to introduce a citizenship question to the 1970 Census long form. But the Bureau resisted attempts to put a citizenship question back on the short form.

The 1970 Census built upon the success of the 1960 Census and divided the long form into 5%, 15%, and 20% sample surveys.¹³⁴ By further expanding the sample size, the Bureau could “accommodate additional subjects within the available resources and without imposing an unreasonable burden on any particular householder.”¹³⁵ To decide what questions would be on each survey, the Bureau coordinated with other federal agencies to separate questions that were necessary for enumeration from those that would supply data for policy purposes.¹³⁶

In the lead-up to the 1970 Census, pressures emerged to include a citizenship question in some form. The passage of the 1965 Immigration and Naturalization Act restructured the immigration system, repealing the

¹²⁹ *Id.*

¹³⁰ By this time, the Immigration and Naturalization Service compiled naturalization statistics which were published in the *Annual Report of Immigration and Naturalization Service*. See U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS, *supra* note 75, at 101.

¹³¹ See *supra* Section III.B.

¹³² Paul C. Glick, *supra* note 121.

¹³³ See Edwin D. Goldfield & David M. Pemberton, *Decennial Censuses: 1960 Census*, in *ENCYCLOPEDIA OF THE U.S. CENSUS: FROM THE CONSTITUTION TO THE AMERICAN COMMUNITY SURVEY* 155 (Margo J. Anderson et al. eds., 2012).

¹³⁴ CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 1970 CENSUS OF POPULATION AND HOUSING: PROCEDURAL HISTORY 1-3 (1976), [hereinafter CENSUS BUREAU, 1970 CENSUS] https://www.census.gov/history/www/through_the_decades/overview/1970.html [https://perma.cc/ES2E-BHWG].

¹³⁵ *Id.*

¹³⁶ See *id.*

national origins quota system, expanding family reunification, and creating a global cap on immigration.¹³⁷ This new system increased the volume of immigrants to 450,000 per year in the 1970s.¹³⁸ After the 1965 immigration overhaul, there was a renewed interest in collecting “basic data on citizenship and the characteristics of aliens.”¹³⁹ In a 1967 hearing, Representative Arnold Olsen, a member of the House Subcommittee on Census and Statistics, advocated for reinstating a citizenship question, citing the new wave of immigration and arguing that “[i]nformation on citizens is useful in the measurement of the extent which people entitled to vote actually do so and of the assimilation of various categories of the foreign born by naturalization.”¹⁴⁰ The Department of Labor and the Immigration and Naturalization Service also expressed an interest in recording respondents’ citizenship status and year of immigration.¹⁴¹

Census Bureau leadership, however, advised against including questions aimed at foreign-born people on the short form. In a hearing before the House Subcommittee on Census and Statistics, Census Bureau Director A. Ross Eckler explained that “information on foreign born is of less importance than it used to be. We had tremendous immigration into the country in the early years of the century. That has tapered off so that the information on the foreign born applies to a smaller and smaller percent of the total.”¹⁴²

A compromise was ultimately reached, with the Census Bureau adding the citizenship question to the 1970 5% sample, which was sent to the smallest number of housing units of all the sample questionnaires.¹⁴³

D. THE CHANGED IMMIGRATION CONTEXT FOR CITIZENSHIP QUESTIONS

The Census Bureau’s new status quo has been averse to citizenship questions as part of the enumeration process. This aversion owes in no small part to changes in the nation’s immigration context over the course of the closing decades of the twentieth century. Indeed, in the face of these changes, the Bureau consistently asserted the threat that attempts to ascertain everyone’s citizenship posed to accurate counts. Given its problematic dimensions, a citizenship question never succeeded in returning to the complete-count questionnaire.

¹³⁷ See Passel, *supra* note 93, at 276.

¹³⁸ *Id.* at 279.

¹³⁹ *Limit Categories of Questions in Decennial Censuses: Hearing on H.R. 10952 Before the Subcomm. on Census & Statistics of the H. Comm. on Post Office & Civil Serv.*, 90th Cong. 81 (1967) (statement of Rep. Arnold Olsen, Member, H. Subcomm. on Census and Statistics).

¹⁴⁰ *Id.*

¹⁴¹ *1970 Census and Legislation Related Thereto (Part I): Hearings Before the Subcomm. on Census & Statistics of the H. Comm. on Post Office & Civil Serv.*, 91st Cong. 25 (1969).

¹⁴² *1970 Census Plans: Hearings Before the Subcomm. on Census & Statistics of the H. Comm. on Post Office & Civil Serv.*, 90th Cong. 54 (1967) (statement of Dr. A. Ross Eckler, Director, Census Bureau).

¹⁴³ CENSUS BUREAU, 1970 CENSUS, *supra* note 134 at 15–16.

The 1970s saw a dramatic shift in the perceived purpose of citizenship questions. In their earliest manifestations, questions about citizenship and naturalization were tools for ensuring inclusion and assimilation.¹⁴⁴ By the 1970s, however, data about citizenship had gained additional valences as tools for political exclusion.

After the overhaul of the national quota system in 1965, the percentage of naturalized foreign-born residents dropped to 50.5% by 1980 and 40.5% by 1990, as overall immigration levels increased.¹⁴⁵ At the same time that immigration levels were ramping up, crucial shifts in the law that threatened the traditional balance of political power in the country were coming into full effect. Chief among these changes were the civil rights movement—which expanded the rights of these new immigrant populations and others—and the emergence of the “one man, one vote” principle for redistricting—which required equal populations in electoral districts and thus promised to increase the political power of jurisdictions whose populations were expanding due to immigration.¹⁴⁶ Concerned by these developments, anti-immigrant groups and their allied lawmakers sought to monitor and exclude noncitizens from the total enumeration of the population. In 1980, this movement manifested in S. 2366, a bill that would have adjusted census total population figures to eliminate noncitizens in the United States illegally.¹⁴⁷

The Census Bureau opposed this move. Before the 1980 Census, Census Bureau Director Vincent Barabba testified at a hearing about S. 2366, expressing concerns that attempts to ascertain the citizenship status of individual respondents in order to execute S. 2366’s command could be perceived as a “law-enforcement problem.”¹⁴⁸ At a separate hearing on the same subject, he explained further that the Bureau considered it “unrealistic to expect unlawful residents to cooperate fully in an interview dealing with their legal status . . . This fact may greatly limit the possibilities for obtaining direct measures of the size of the unlawful resident population.”¹⁴⁹ He continued, asserting, that the “census is just not designed for this particular problem,” and even if it was:

Passage of this legislation would make it more difficult for [the Census Bureau] to get the cooperation that [it] need[s] from members of [the] minority groups who are legal

¹⁴⁴ See *supra* Section III.A.

¹⁴⁵ Lobo & Kraly, *supra* note 99, at 243.

¹⁴⁶ See ANDERSON & FIENBERG, *supra* note 115, at 32.

¹⁴⁷ A Bill to require adjustments in census population figures for aliens in the United States illegally so as to prevent distortions in the reapportionment of the House of Representatives, the legislative apportionment and districting of the States, and the allocation of funds under Federal assistance programs, S. 2366, 96th Cong. (2d Sess. 1980).

¹⁴⁸ State, Justice, Commerce, Judiciary, and Related Agencies Appropriations, FY81, Part 3, 96th Cong. 259 (1980).

¹⁴⁹ 1980 Census: Counting Illegal Aliens: Hearing on S.2366 before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the S. Comm. on Governmental Affairs, 96th Cong. 67-68 (1980) (statement of Vincent Barabba, Director, Census Bureau).

citizens or legally resident aliens in this country. Thus, the credibility of the Bureau, and more importantly, the credibility and public confidence in—and, indeed, the accuracy of—the figures embodied in the final census results would be eroded.¹⁵⁰

In a related lawsuit, *Federation for American Immigration Reform (FAIR) v. Klutznick*, the Census Bureau took a similar stand: “[A]ny effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. . . . Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.”¹⁵¹

In the lead up to the 1990 Census, the Bureau also faced down other initiatives that would have required it to ascertain the citizenship status of residents. This time, the issue arose amid legal disputes over the Census Bureau’s ability to adjust the final reported population figures to compensate for undercounts of some communities. In a 1985 Senate hearing, Census Bureau Director John Keane echoed the concerns of his predecessor and concluded:

[T]he Constitution requires that [the Census Bureau] enumerate[s] residents. Even if the Congress and the states were to change this requirement, technical and practical considerations must be addressed. [The Census Bureau] would be required to ask every person a citizenship question, and then determine the legal status of each one. This involves legal considerations for which the Census Bureau has neither expertise nor responsibility. Furthermore, the Census Bureau could be perceived as an enforcement agency, and this could have a major effect on census coverage.¹⁵²

The Census Bureau held firm to this position. The only adjustments it made to the 1990 Census with respect to a citizenship question were to modify the question’s wording on the long form and expand its coverage to all sample households.¹⁵³ These adjustments were a response to difficulties respondents had in accurately answering the citizenship question that appeared on the 1980 long form.¹⁵⁴ This adjusted 1990 version of the

¹⁵⁰ *Id.* at 68–69.

¹⁵¹ 486 F. Supp. 564, 568 (D.D.C. 1980).

¹⁵² *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation & Fed. Servs. of the S. Comm. on Gov’t Affairs*, 99th Cong. 31–32 (1985) (statement of John G. Keane, Director, Census Bureau).

¹⁵³ Expert Report of Margo Anderson, Ph.D. at 13, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Dec. 28, 2018), ECF No. 133.

¹⁵⁴ See CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING—HISTORY 14–20 (1990), <https://www.census.gov/history/pdf/1990proceduralhistory.pdf>; see also Expert Report of Margo Anderson, Ph.D. at 12–13,

citizenship question—the same that Secretary Ross has proposed adding to the 2020 Census—appeared on the long form through 2000, at which point the Bureau transferred it to the American Community Survey (ACS) which replaced the long form in 2005.¹⁵⁵ The ACS, which is issued to only 3.5 million addresses each year, is another form of sample survey.¹⁵⁶ It continues the Bureau’s practice of separating socioeconomic questions from questions necessary for collecting basic information to “count” a person in the total count.

Nothing in the nation’s immigration environment has changed to lessen the Census Bureau’s longstanding skepticism toward citizenship questions as a universal inquiry. Indeed, if anything, the environment has deteriorated even further, as the Administration’s immigration policy and President Trump’s rhetoric actively have stoked the fears of immigrants, their families, and others that the federal government will somehow use their census responses against them.¹⁵⁷ The citizenship question’s promise to suppress the count derives principally from the way in which it has plugged into, and amplified, long-running distrust of the federal government and newer concerns about the Trump Administration specifically.¹⁵⁸ The Administration’s decision to move forward with the question despite this climate of fear is itself a sufficient basis for an “arbitrary and capricious” determination, separate and apart from the lessons recent history teaches us.

Ultimately, as this broader gauged history of the census establishes, the Trump Administration cannot point to census history to escape either an Enumeration Clause or an APA challenge, for comparatively similar reasons. If the measure of the constitutionality of a question is a “reasonable relationship to . . . an actual enumeration,”¹⁵⁹ history establishes no such relationship: the old census practice—or “traditional status quo,” as the Administration calls it¹⁶⁰—of bundling citizenship and other questions together with the enumeration was long ago rejected as incompatible with a

17, *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. Dec. 28, 2018), ECF No. 133 (explaining that misreporting problems led to a change of the citizenship question).

¹⁵⁵ CENSUS BUREAU, HISTORY: 2000 CENSUS, *supra* note 44, at 106; AMERICAN COMMUNITY SURVEY Why We Ask: Place of Birth, Citizenship and Year of Entry, <https://www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf>.

¹⁵⁶ *American Community Survey*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/programs.xhtml?program=acs> [<https://perma.cc/NY2D-22KQ>] (last visited Feb. 5, 2019).

¹⁵⁷ *See, e.g.*, CENSUS BUREAU U.S. DEP’T OF COMMERCE, 2020 CENSUS BARRIERS, ATTITUDES, AND MOTIVATORS STUDY (CBAMS) FOCUS GROUP FINAL REPORT 41–43, 45–49 (2019) [hereinafter CENSUS BUREAU, 2020 CENSUS BARRIERS], <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-focus-group.pdf>; Hansi Lo Wang & Marisa Peñaloza, *Many Noncitizens Plan to Avoid the 2020 Census, Test Run Indicates*, NPR (May 11, 2018), <https://www.npr.org/2018/05/11/610492880/many-noncitizens-plan-to-avoid-the-2020-census-test-run-indicates> [<https://perma.cc/7ZVM-58Z6>].

¹⁵⁸ *See* CENSUS BUREAU, 2020 CENSUS BARRIERS, *supra* note 157, at 50–60.

¹⁵⁹ *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).

¹⁶⁰ Brief for the Petitioners at 39, *Dep’t of Commerce v. New York*, No. 18-966 (S. Ct. Mar. 6, 2019).

full count. And census practice from 1960 forward has been consistently hostile to efforts to ascertain the citizenship status of everyone. Likewise, history offers no basis to conclude that introducing a citizenship question to the 2020 Census would be a reasonable exercise of the Commerce Department's power. Indeed, citizenship-related questions through 1950 were a sporadic part of a flaw-ridden census-taking paradigm. Since then, all reliable signs indicate that reintroducing questions about citizenship would compromise the count.

CONCLUSION

This history leaves the Administration without any historical warrant for including a citizenship question on the 2020 Census. As this Article has shown, the Administration's checklist-style approach to the history is weak on its own terms: it obscures material differences in the ways that the census has—and has not—asked about citizenship over time and suggests a precedent for universal citizenship questions in the enumeration process where there is, in fact, none.

But the Administration's account suffers from a deeper, more systemic issue: It excludes the context necessary to make sense both of historical census practice and the lessons that practice holds for today. A broader view of census history—one that includes not just the *what* and *when*, but also the *why* and *how* of the decennial count—does not demonstrate the compatibility of citizenship questions with the full enumeration that the Constitution requires. To the extent that early censuses inquired as to citizenship or naturalization, these inquiries were sporadic ones, tied to census practices that the Census Bureau ultimately rejected as inconsonant with an accurate count. Once the Census Bureau developed the technical ability in the mid-twentieth century to evaluate its own performance and identified substantial deficiencies, it radically overhauled its approach, discarding citizenship questions and a whole host of other questions from the enumeration process. The fate of citizenship questions was sealed from the 1970s onward, when they became avatars for exclusionary immigration policies inimical to an accurate count.

Nothing in this history suggests that a citizenship question on the 2020 Census would be a responsible use of the Commerce Department's power. Quite the opposite: in light of their freighted history, citizenship questions arrive with a substantial historical presumption in favor of their *exclusion* from the enumeration. Secretary Ross's last-second decision has done nothing to overturn that presumption.

History's lessons should be heeded. As mounting evidence shows, the past is prologue for the census and citizenship questions. Already, the fears of long-marginalized communities are mounting, and their willingness to participate in the census is hovering at alarmingly low levels.¹⁶¹ Recent

¹⁶¹ See, e.g., Brief of Central Valley Immigrant Integration Collaborative, United Farm Worker Foundation, National Immigration Law Center, et al. as Amici Curiae In Support

news about the Census Bureau's attempts to gather citizenship information from other sources is only exacerbating these concerns.¹⁶² Declining response rates will set off a chain reaction, complicating everything from congressional seat allocations and federal funding allocations to voting rights enforcement and social service provision. These are not mere questions of bureaucracy or statistics: they go to the core functions of our constitutional democracy. There is still time for the courts to salvage this situation, but the clock is ticking.

of Plaintiffs at 4–13, *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal. Feb. 1, 2019), ECF No. 197-1.

¹⁶² Garance Burke & Frank Bajak, *Ahead of Court Ruling, Census Bureau Seeks Citizenship Data*, ASSOCIATED PRESS (Mar. 7, 2019), <https://www.apnews.com/0f33f3454d7f4fd78803455d4da672c6> [<https://perma.cc/A48B-P8XH>].

APPENDIX

CITIZENSHIP QUESTIONS: A DECADE-BY-DECADE COMPARISON

<i>Year</i>	<i>Administration's Account</i>	<i>Corrected Account</i>
1820	Naturalization status asked of foreign-born individuals	Head of household asked for number of foreign-born persons not naturalized in household
1830	Naturalization status asked of foreign-born individuals	Head of household asked for number of foreign-born white persons not naturalized in household
1840	No citizenship question asked	No citizenship question asked
1850	Birthplace asked	Birthplace asked only of free inhabitants; no citizenship question asked
1860	Birthplace asked	Birthplace asked; no citizenship question asked
1870	Citizenship status asked	Citizenship status asked only of males 21 years old or older
1880	Birthplace asked	Birthplace asked; no citizenship question asked
1890	Naturalization status asked of foreign-born males 21 years old or older	Naturalization status asked only of foreign-born males 21 years old or older
1900	Naturalization status asked of foreign-born males 21 years old or older	Naturalization status asked only of foreign-born males 21 years old or older
1910	Naturalization status asked of foreign-born males 21 years old or older	Naturalization status asked only of foreign-born males 21 years old or older
1920	Naturalization status asked of foreign-born males 21 years old or older	Naturalization status asked of all foreign-born individuals, regardless of age, with the exception of married women, whose naturalization status was imputed from their husbands
1930	Naturalization status asked of foreign-born males 21 years old or older	Naturalization status asked of all foreign-born individuals, regardless of age and marital status
1940	Citizenship status asked of all foreign-born individuals	Citizenship status asked of all foreign-born individuals

(continued)

<i>Year</i>	<i>Administration's Account</i>	<i>Corrected Account</i>
1950	Naturalization status asked of all foreign-born individuals	Naturalization status asked of all foreign-born individuals
1960	Birthplace asked of 25% of the population	Citizenship status not asked
1970	Citizenship status asked on long-form survey sent to one-fifth of households	Citizenship status asked only on long-form survey sent to 5% of households and asked only of foreign-born individuals in sample
1980	Naturalization status asked on long-form survey sent to one-sixth of households	Citizenship status asked only on long-form survey sent to 19% of housing units overall and asked only of foreign-born individuals in sample
1990	Citizenship status asked on long-form survey sent to one-sixth of households	Citizenship status asked only on long-form survey sent to 16% of housing units overall and asked of all individuals in sample
2000	Citizenship status asked on long-form survey sent to one-sixth of households	Citizenship status asked only on long-form survey sent to 16% of housing units overall; beginning in 2005, citizenship status asked on American Community Survey (representing a 3% sample of the country yearly)
2010	Citizenship status asked on American Community Survey	Citizenship status asked only on American Community Survey (representing a 3% sample of the country yearly)

Sources for Administration's Account

See Defendants' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Plaintiffs' Claims at 1–3, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 546; Memorandum of Law in Support of Defendants' Motion to Dismiss at 3–6 & n.2, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921-JMF), ECF No. 155.

Sources for Corrected Account

See WILLIAMS, *supra* note 44, at 3; CENSUS BUREAU, HISTORY: 2000 CENSUS, *supra* note 44, at 106–08; THE NAT'L ACADS. OF SCIS., ENG'G, AND MED., LETTER REPORT ON THE 2020 CENSUS 13–16 (Nat'l Acads. Press 2018), <https://www.nap.edu/read/25215/chapter/4> [<https://perma.cc/QX3B>]

-5KH4]; CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: HISTORY 9-3 (1990), <https://www.census.gov/history/pdf/1990proceduralhistory.pdf>; CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION AND HOUSING: HISTORY 1-9 (1986), https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpop802unse_bw.pdf; *see generally* CENSUS BUREAU, 200 YEARS, *supra* note 44 (containing all historical census forms).