



## Primer: Fixing the Weaponized Redistricting Process

By: Benjamin Osborne

*Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of . . . Persons. . . . The actual Enumeration shall be made within . . . every subsequent Term of ten Years, in such Manner as they shall by Law direct.*<sup>1</sup>

—U.S. Constitution, Article I, Section 2, Clause 3

### Argument

This paper argues the legal and constitutional bases for excluding noncitizens from congressional redistricting. While we believe many of the same arguments can be made for excluding noncitizens from congressional apportionment, as it pertains to the allocation of the number of congressional seats, for the purposes of this paper we do not foreclose such exclusions; we leave those arguments open for discussion.

### Introduction

The federal government has both the constitutional duty and the administrative authority to ensure that congressional redistricting is based on a lawful and representative population. This means that only citizens should be counted in the political jurisdictions of the states. The decennial census, mandated by Article I, Section 2 and governed by 13 U.S.C. § 141, provides the data that is to be used for redistricting.<sup>2</sup> Yet the meaning of “total population” within Section 141 has never been definitively construed by the courts. Properly understood, that term refers to those lawfully present and subject to the political jurisdiction of the United States—citizens and lawful permanent residents—because the law must always be read on the assumption that other laws are being followed. The statute covering the process of redistricting that presupposes the Constitution’s “actual enumeration”

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<sup>1</sup> U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

<sup>2</sup> *Id.*; 13 U.S.C. § 141.

cannot be read to require the inclusion of individuals whose very presence contravenes federal law. For purposes of political representation, “persons” as defined in Article I and the Fourteenth Amendment of the Constitution and subsequent statutes referring to the Census Act has always meant those owing allegiance and lawful obedience to the United States, not those outside its jurisdiction or legal protection.<sup>3</sup>

To correct existing constitutional and data deficiencies in congressional redistricting, the federal government could adopt a coordinated framework grounded in citizen-only representation. Under the Elections Clause, states have authority to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives,”<sup>4</sup> but that authority operates within the framework of federal law and data administration. The president could issue an executive order directing the Department of Commerce and the Census Bureau to produce and certify citizen-only population datasets for redistricting, thereby ensuring that states receive no alternative federal data that includes noncitizens. Congress could reinforce this directive by amending 13 U.S.C. § 141(c) to require the bureau to provide citizen voting-age population (CVAP) tabulations as the official redistricting files. Simultaneously, the Census Bureau could still comply with privacy laws while eliminating its use of differential privacy algorithms, which distort block-level accuracy and undermine compliance with equal-representation principles, and could republish corrected 2020 Census data to restore administrative integrity and establish a clean record for future redistricting cycles. Together, these reforms would align state and federal practices with the constitutional standard of “one citizen, one vote” while preserving the lawful balance between federal authority and state discretion under the Elections Clause. This would end the unconstitutional distortion caused by past practices in the redistricting process.

## **I. Constitutional and Statutory Framework**

### **A. The Enumeration and Apportionment Clause**

Article I, Section 2, Clause 3 of the U.S. Constitution, as modified by the Fourteenth Amendment, requires an “actual Enumeration” of the “whole number of persons in each State” to apportion representatives among the states.<sup>5</sup> This enumeration is carried out through the decennial census administered by the U.S. Census Bureau. Once the total population of each state is determined, the secretary of commerce

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<sup>3</sup> See *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>4</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>5</sup> *Id.* art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

reports those figures to the president, who then transmits an official apportionment statement to Congress indicating the number of representatives each state shall receive, as prescribed by 2 U.S.C. § 2a. Upon completion of apportionment, each state undertakes its own redistricting process to redraw congressional and state legislative district boundaries in accordance with population shifts and equal representation requirements. Separately, numerous federal funding formulas governing programs such as Medicaid, education grants, and infrastructure funding are statutorily tied to total population counts reported in the census, independent of the datasets used for redistricting.

The statutory framework for implementing these constitutional commands is outlined in 13 U.S.C. § 141, which governs the planning, execution, and reporting of the decennial census. Subsection (a) vests in the secretary of commerce the duty to “take a decennial census of population” and authorizes the collection of “other census information as necessary,” delegating the operational management of enumeration to the Census Bureau.<sup>6</sup> Subsection (b) then requires the secretary, upon completing the tabulation, to report to the president “the tabulation of total population by States,” which the president must transmit to Congress for apportionment of representatives among the several states.<sup>7</sup> After that step, Subsection (c) directs the secretary to provide to each state, within one year after Census Day, the population tabulations to be used for redistricting within that state.<sup>8</sup> This third stage marks the transfer from the federal apportionment process to the state-level redistricting process; the states use these Section 141(c) tabulations as the authoritative baseline for drawing congressional and legislative districts.<sup>9</sup>

It is important to note that while Section 141(b) expressly references “total population,” Section 141(c) does not. This omission reflects Congress’s intent to distinguish between and not merge the federal apportionment function and the state redistricting function or Subsections (b) and (c). Further, states are to enact redistricting plans in accordance with “criteria” established by the secretary of commerce.<sup>10</sup> The secretary also has the “final authority” for “determining the geographic format” of states’ redistricting plans conforming to his “criteria.”<sup>11</sup> If a state declines to redistrict promptly, Congress’s default rules in 2 U.S.C. § 2a(c)

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<sup>6</sup> 13 U.S.C. § 141(a).

<sup>7</sup> *Id.* § 141(b); *see also* 2 U.S.C. § 2a(a).

<sup>8</sup> 13 U.S.C. § 141(c).

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

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

<sup>11</sup> *Id.*

apply (at-large elections, etc.). These rules underscore Congress’s authority to structure the federal handoff while preserving state control over the drawing of the map itself.<sup>12</sup>

Notably, the term “persons” in Article I, Section 2, Clause 3 is not statutorily or judicially defined to require the inclusion of illegal aliens. Furthermore, historical practice excluded individuals not subject to U.S. political jurisdiction in one critical constitutional measure: “Indians not taxed,” a distinction that is based not on mere physical presence but on allegiance and legal standing. The phrase “Indians not taxed,” which appears in Article I, Section 2 of the Constitution and is carried forward in Section 2 of the Fourteenth Amendment, has long been understood as a jurisdictional limitation on who must be counted for purposes of apportioning representatives. Historically, it excluded Native Americans who were not subject to U.S. political jurisdiction and taxation because they were living in tribal relations, a distinction that underscores that not all persons physically present in the United States were deemed countable for representation.<sup>13</sup>

The Supreme Court affirmed this understanding in *Elk v. Wilkins*, holding that a Native American who maintained tribal allegiance was not a citizen under the Fourteenth Amendment because he was not fully “subject to the jurisdiction” of the United States.<sup>14</sup> The Court explained that the Citizenship Clause requires complete political jurisdiction, meaning a relationship of full allegiance and sovereign authority, not mere physical presence within U.S. territory.<sup>15</sup> Individuals who owed allegiance to another sovereign or who were not fully governed by the United States therefore fell outside the political community and could be excluded from the representational base.<sup>16</sup>

Congress later enacted the Indian Citizenship Act of 1924, granting statutory citizenship to all Native Americans born within the United States.<sup>17</sup> But that legislation did not overturn *Elk*’s constitutional holding. Congress has authority to naturalize persons not made citizens by the Constitution, but it cannot revise the meaning of the Fourteenth Amendment’s jurisdiction requirement.<sup>18</sup> The Supreme Court has never reversed *Elk*, and its articulation of “political jurisdiction” as a constitutional limitation remains binding precedent.

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<sup>12</sup> 2 U.S.C. § 2a(c).

<sup>13</sup> U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

<sup>14</sup> 112 U.S. 94 (1884).

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

<sup>16</sup> *Id.*

<sup>17</sup> Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 4.

This history shows that political representation has always required more than presence on U.S. soil; it requires lawful allegiance and full jurisdiction. That framework supports the exclusion of illegal aliens, whom, unlike Native Americans after 1924, Congress has never naturalized for the purposes of redistricting.

That standard remains relevant today and supports the legal framework under which unlawfully present aliens, who are not citizens and who lack full allegiance to and jurisdiction under the United States, may constitutionally be excluded from congressional redistricting data. The Court in *Trump v. New York* did not rule on the lawfulness of excluding illegal aliens due to the timing of the case, but it did leave open the possibility that the executive branch could pursue such a policy in the future if supported by a valid constitutional or statutory basis.<sup>19</sup>

The Constitution's exclusion of "Indians not taxed" illustrates the principle that only those fully subject to U.S. political jurisdiction, those owing allegiance and entitled to constitutional protections, are properly included for representational purposes. That jurisdictional limitation provides a close constitutional analogy for excluding those who are unlawfully present. The principles of jurisdiction and consent reinforce that representation under the Constitution properly extends only to citizens, consistent with both the Equal Protection Clause's "one person, one vote" principle and the Guarantee Clause's demand for republican forms of government.<sup>20</sup>

Recent Supreme Court rulings further strengthen the constitutional basis for citizen-only redistricting. In *Louisiana v. Callais*, argued in October 2025, the Court signaled a willingness to curtail Section 2 of the Voting Rights Act, which has long been interpreted to permit race-based redistricting remedies.<sup>21</sup> Several justices suggested that such remedies may conflict with the Equal Protection Clause and that any consideration of race in redistricting must be narrowly confined and temporary.<sup>22</sup> This trend underscores the Court's increasing emphasis on neutral and jurisdictional criteria for representation, which are precisely the constitutional principles underlying a citizen-based redistricting framework. If Section 2's race-based requirements are narrowed or struck down, states will face fewer federal constraints and will be granted greater discretion to adopt redistricting bases grounded in citizenship, political jurisdiction, and consent of the governed.

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<sup>19</sup> 592 U.S. 125 (2020).

<sup>20</sup> See U.S. CONST. art. IV, § 4.

<sup>21</sup> *Louisiana v. Callais*, 606 U.S. \_\_\_\_ (2025).

<sup>22</sup> *Id.*

## B. Legal Distinction Between Redistricting and Congressional Apportionment

Unlike representational apportionment, as it pertains to the allocation of the number of congressional seats, which is a federal function, redistricting is primarily a state responsibility governed by constitutional equal representation principles and subject to judicial review.<sup>23</sup> Crucially, the Constitution does not require states to use the total population for redistricting. In *Evenwel v. Abbott*, the Supreme Court held that using the total population for redistricting is permissible, but not required, and expressly left open the question of whether using citizen voting-age population is also constitutional.<sup>24</sup> In *Burns v. Richardson*, the Court upheld Hawaii's use of a registered-voter population base, recognizing that states may adopt alternative population metrics if consistent with the principle of equal representation.<sup>25</sup> The Court confirmed that the Equal Protection Clause "does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured,"<sup>26</sup> thereby clarifying that *Reynolds v. Sims* did not constitutionally mandate any fixed population base for redistricting. The Court noted that in *Reynolds* it had "carefully left open the question what population was being referred to" and at times discussed equivalence in terms of "voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."<sup>27</sup> Most significantly, the Court declared that "neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured."<sup>28</sup> Instead, "the decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."<sup>29</sup> Thus, *Burns* confirms that the Constitution leaves to the states broad discretion to define their redistricting

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<sup>23</sup> *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964) (noting that while the Constitution requires states to structure legislative districts based on population to ensure equal representation, it leaves the mechanics of redistricting primarily to the states, subject to constitutional limitations).

<sup>24</sup> 578 U.S. 54, 74 (2016).

<sup>25</sup> 384 U.S. 73 (1966).

<sup>26</sup> *Id.* at 91–92.

<sup>27</sup> *Id.* at 92.

<sup>28</sup> *Id.*

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

population base, whether total, citizen, or voter population, so long as that choice does not violate another constitutional prohibition.<sup>30</sup>

This principle accords with *Reynolds v. Sims*, which requires only substantial equality in representation,<sup>31</sup> not a fixed population base, and with *Gaffney v. Cummings* and *Mahan v. Howell*, both of which affirmed state discretion to pursue legitimate representational policies even with population deviations from the total population.<sup>32</sup> *Evenwel* reaffirmed that while states may use total population, the Constitution does not require them to do so, leaving open the permissibility of citizen-only redistricting.<sup>33</sup> Collectively, these cases confirm that states have discretion to adopt citizen-only redistricting standards. The inclusion of illegal aliens or legal noncitizens in redistricting data is not constitutionally required and, as we argue, should be deemed constitutionally impermissible.

### C. Executive Interpretation and Administrative Practice

Past executive orders confirm that the president may direct how the Department of Commerce and the Census Bureau compile and furnish census-related data, even though those directives did not yet resolve the constitutional question of who must be counted for redistricting. President Donald Trump’s 2020 memorandum ordered the secretary of commerce to exclude “illegal aliens” from the apportionment base. President Joe Biden revoked that policy in Executive Order 13,986, and Trump later revoked that revocation in Executive Order 14,148.<sup>34</sup> While the Office of Personnel Management has issued some guidance that revoking the revocation of an executive

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<sup>30</sup> *Id.* at 93 (citing *Carrington v. Rash*, 380 U.S. 89 (1965)).

<sup>31</sup> 377 U.S. 533 (1964).

<sup>32</sup> 412 U.S. 735 (1973); 410 U.S. 315 (1973).

<sup>33</sup> 578 U.S. 54 (2016).

<sup>34</sup> Exec. Order No. 13,880, *Collecting Information About Citizenship Status in Connection with the Decennial Census*, 84 Fed. Reg. 33,821 (July 11, 2019), <https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connection-with-the-decennial-census#page-33822> (directing the secretary of commerce to obtain citizenship data for use in connection with the decennial census); *Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 21, 2020), <https://www.federalregister.gov/documents/2020/07/23/2020-16216/excluding-illegal-aliens-from-the-apportionment-base-following-the-2020-census>; Exec. Order No. 13,986, *Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census*, 86 Fed. Reg. 7015, (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01755/ensuring-a-lawful-and-accurate-enumeration-and-apportionment-pursuant-to-the-decennial-census>; Exec. Order No. 14,148, *Initial Rescissions of Harmful Executive Orders and Actions*, 90 Fed. Reg. 8,237, (Jan. 20, 2025), <https://www.federalregister.gov/documents/2025/01/28/2025-01901/initial-rescissions-of-harmful-executive-orders-and-actions>.

order does not itself revive the earlier order’s substantive provisions to make the order operative again,<sup>35</sup> there is enough legal authority to understand that the earlier Trump executive order is already back in effect.

In any event, a new executive order that expressly specifies the data deliverables required under Section 141(c) would eliminate ambiguity.

## **II. A Novel Constitutional Interpretation: The Guarantee Clause and “One Citizen, One Vote”**

We believe that the legal framework for redistricting is rooted in the Guarantee Clause, which obliges the United States to guarantee a republican form of government.<sup>36</sup> A core feature of republican government is representative consent, a system in which political power is derived from the governed, meaning the citizens. Combining this requirement with the Equal Protection Clause, we advance a “one citizen, one vote” standard: Political representation should and can be divided among citizens, not the general population. Including noncitizen immigrants and illegal aliens—who by definition are not part of the political community—distorts representational equality and dilutes the voting power of lawful citizens.<sup>37</sup>

Compared to jurisdictions with large illegal immigrant populations, areas that have fewer immigrants effectively receive less representation per vote, a discrepancy that violates the core democratic principle of equal sovereignty. This imbalance results in citizens in districts with more illegal immigrants having significantly more voting power than citizens in districts with far fewer legal and illegal immigrants.

Article IV, Section 4 provides that “the United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>38</sup> Although the Supreme Court has generally treated this clause as nonjusticiable,<sup>39</sup> it has recognized that the principles underlying it inform constitutional guarantees of representative equality.

In *Baker v. Carr*, the Supreme Court held that claims of legislative malapportionment were justiciable under the Equal Protection Clause, distinguishing them from nonjusticiable Guarantee Clause claims.<sup>40</sup> The Court

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<sup>35</sup> Office of Pers. Mgmt., *Guidance on Revocation of Executive Order 14003* (Feb. 7, 2021), <https://www.opm.gov/chcoc/latest-memos/guidance-on-revocation-of-eo-14003.pdf>.

<sup>36</sup> U.S. CONST. art. IV, § 4.

<sup>37</sup> Benjamin Osborne, *Primer: Republishing the 2020 Census*, CTR. FOR RENEWING AM. (Aug. 8, 2025), <https://americarenewing.com/issues/primer-republishing-the-2020-census/>.

<sup>38</sup> U.S. CONST. art. IV, § 4.

<sup>39</sup> See *Luther v. Borden*, 48 U.S. 1 (1849).

<sup>40</sup> 369 U.S. 186 (1962).

explained that while Article IV, Section 4 provides the textual basis for ensuring a “republican form of government,” the Equal Protection Clause supplies the enforceable standard for representational equality.<sup>41</sup> This reasoning grounded the later “one person, one vote” cases in the same structural ideal that animates the Guarantee Clause: the principle that government derives its legitimacy from equal participation and the consent of the governed. Two years after *Baker* was decided, the *Reynolds* court made that link explicit, holding that the Equal Protection Clause requires “substantially equal” legislative representation as an essential element of “a government based on the consent of the governed.”<sup>42</sup>

While courts have not yet ruled on this precise “one citizen, one vote” theory regarding the removal of illegal aliens and legal immigrants from redistricting, neither have they foreclosed it. To the contrary, existing precedent leaves the question open and ripe for litigation and administrative action. Adopting this interpretation would allow all redistricting efforts to exclude those not lawfully in the United States, particularly illegal aliens, thereby making the case for legislative representation to be held solely by those who consent to be governed.

### **III. Why Redistricting Cannot Include Illegal Aliens**

Illegal aliens are not within the political jurisdiction of the United States. They do not owe allegiance to the United States, are not authorized to participate in civil life, and have no role in the democratic process. The phrase “subject to the jurisdiction” in the Fourteenth Amendment has long been understood to refer to complete political allegiance to and governance by the United States and not simply physical presence in its territory. As shown above in *Elk*, the Court held that Native Americans maintaining tribal relations were not automatically citizens because they were not fully subject to U.S. jurisdiction. Later, in *United States v. Wong Kim Ark*, the Court described the Fourteenth Amendment as conferring citizenship on those subject to the laws of the United States and not owing allegiance to any other power,<sup>43</sup> a ruling that confirmed that the concept turns on lawful allegiance and protection. Contemporary analysis continues to interpret “political jurisdiction” as a reciprocal relationship of obedience and protection between individuals and the sovereign, a view consistent with the debates surrounding the Civil Rights Act of 1866 and the framers’ intention that the Citizenship Clause apply only to those

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<sup>41</sup> *Id.*

<sup>42</sup> *See Reynolds*, 377 U.S. at 568.

<sup>43</sup> 169 U.S. 649 (1898).

fully subject to U.S. law.<sup>44</sup> This historical and textual understanding provides context for how the term “political jurisdiction” operates in constitutional analysis of representation and equal-protection principles.

Including illegal aliens in redistricting maps distorts the fabric of the constitutional republic and grants disproportionate power to jurisdictions with large illegal immigrant populations, often at the expense of smaller or more rural districts populated almost entirely by citizens.<sup>45</sup>

Under the framework of *Reynolds*, districts must contain substantially equal numbers of people, but the ruling does not define who counts as a person.<sup>46</sup> States that use total population, including illegal aliens, are effectively violating the principle of “one person, one vote” as that standard is applied to citizen voters. This creates a legal and constitutional contradiction. Only citizens can join in the political society through voting and be subject to full constitutional “jurisdiction.”

#### **IV. Recommendations**

To restore constitutional and administrative integrity to congressional redistricting and correct existing constitutional and data deficiencies, we recommend that the president and Congress take the following actions: (1) direct the Department of Commerce and Census Bureau to produce citizen-only redistricting data and reinstate the Administrative Records Project; (2) authorize citizen voting-age population data for redistricting; (3) end the Census Bureau’s use of differential privacy in redistricting datasets to preserve accuracy and compliance with equal-representation principles; and (4) republish corrected, citizen-only data to provide a reliable record for future redistricting cycles. Together, these measures would align redistricting with the constitutional standard of “one citizen, one vote” and ensure representation is based on lawful population.

##### **A. Issuing a Citizen-Only Redistricting Executive Order**

To remedy the constitutional defect in redistricting and provide administrative clarity, the administration could issue an executive order directing the Department of Commerce and the Census Bureau to do the following:

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<sup>44</sup> Ken Cuccinelli, *Primer: Ending Birthright Citizenship Is Imperative for Preserving the United States*, CTR. FOR RENEWING AM. (Feb. 11, 2025), <https://americarenewing.com/issues/primer-ending-birthright-citizenship-is-imperative-for-preserving-the-united-states/>.

<sup>45</sup> See Osborne, *supra* note 37, Section III.B.

<sup>46</sup> See *Reynolds*, 377 U.S. 533.

- **Develop and Provide Block-Level CVAP Data:** The Census Bureau should produce accurate, block-level citizen voting-age population data to serve as the foundation for redistricting. Providing this data will allow states to draw districts based solely on citizen populations, ensuring compliance with equal representation principles and enabling verifiable, constitutionally sound redistricting. The bureau should also designate those datasets as the sole federal redistricting tabulations furnished under Section 141(c).
- **Instruct States to Use Citizen-Only Redistricting Baselines:** Federal guidance should make clear that only citizens may be included in the population base for congressional and state legislative redistricting. This directive would ensure that representation reflects the consent of the governed and would uphold the constitutional principle of “one citizen, one vote.” This approach would not change state law; it would lawfully channel federal data production so that when states do what they always do when using the bureau’s official Section 141(c) redistricting files, they use the citizen-based files the order requires. While Congress and the executive branch control the collection and dissemination of census data under 13 U.S.C. § 141, states retain primary constitutional authority to conduct redistricting. Federal direction of census methodology or tabulation content therefore complements rather than displaces the states’ lawmaking authority under the Elections Clause.<sup>47</sup> Alternatively, short of issuing specific guidance, the federal government could achieve the same result by providing only citizen-based datasets for redistricting purposes. Because states rely exclusively on federally furnished Section 141(c) data, limiting that data to citizen populations would, as a practical and legal matter, ensure that redistricting proceeds on a citizen-only basis without imposing a direct mandate.
- **Reinstate the Administrative Records Project:** The president could also reinstate and expand the Administrative Records Project, first established

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<sup>47</sup> This division of responsibility between the federal government and the states accords with the Supreme Court’s interpretation of the Elections Clause in *Ariz. State Legislature v. Ariz. Independent Redistricting Comm’n*, 576 U.S. 787 (2015). There, the Court held that the term “Legislature” in Article I, Section 4 encompasses a state’s lawmaking processes as defined by its own constitution, including voter initiatives, independent commissions, and the people themselves. *Id.* at 808. The Court reaffirmed that the Elections Clause was intended to grant states authority to provide the “complete code” for congressional elections while preserving Congress’s power to “make or alter such regulations.” *Id.* at 807–09 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932); see also U.S. CONST. art. I, § 4, cl. 1).

during his first term under Executive Order 13,880, to build a reliable, privacy-protective database of citizenship data for this purpose.<sup>48</sup>

Any Census Bureau or Department of Commerce regulations that have historically assumed “total population” tabulations for purposes of 13 U.S.C. § 141(c) rest on policy preference rather than statutory command. Section 141(c) requires only that the secretary provide each state with “population tabulations to be used for apportioning districts within that State,” a phrase that omits the “total population” qualifier found in Section 141(b).<sup>49</sup> After *Loper Bright Enterprises v. Raimondo*, courts no longer defer to agency interpretations merely because a statute is ambiguous; they must instead exercise independent judgment in determining the best reading of the statute.<sup>50</sup> Consequently, any agency rule or practice that treats total population as mandatory under Section 141(c) would receive no special judicial deference and would stand or fall on the text of the statute itself.

## **B. Amending the Statutory Provisions of the Census**

Another solution to clear up any ambiguity could be for Congress to amend 13 U.S.C. § 141 to expressly distinguish apportionment under Subsection (b) from redistricting under Subsection (c) and to authorize the provision of citizen-only data for redistricting purposes. The following amendments and reforms could be pursued:

- **Clarify That “Total Population” Applies Only to Citizens:** Congress could amend Section 141(b) to clarify that the term “total population” governs only the decennial apportionment of congressional seats among the states, consistent with the Fourteenth Amendment’s reference to the “whole number of persons in each State.”<sup>51</sup> Historically, that phrase has been understood to apply only to those “subject to the jurisdiction” of the United States, meaning

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<sup>48</sup> Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019).

<sup>49</sup> 13 U.S.C. § 141(c).

<sup>50</sup> 603 U.S. \_\_ (2024).

<sup>51</sup> U.S. CONST. amend. XIV, § 2.

those who owe the United States full political allegiance.<sup>52</sup> Those not subject to U.S. jurisdiction “form no part of the people entitled to representation.”<sup>53</sup> The Supreme Court’s later decision in *Wong Kim Ark* expanded that definition to include nearly all individuals born on U.S. soil, but that interpretation has been widely criticized as inconsistent with the original meaning of the Fourteenth Amendment and with *Elk*’s jurisdictional standard.<sup>54</sup> Subsection (c), which directs the secretary to furnish “population tabulations to be used for apportioning districts within each State,” notably omits the “total population” language found in subsection (b).<sup>55</sup> That omission provides Congress discretion to authorize the bureau to use citizen-only or citizenship-based data for redistricting purposes. A jurisdictional reading of “persons” consistent with *Elk*, and not the overbroad interpretation of *Wong Kim Ark*, would therefore reinforce that redistricting should reflect those who are part of the political community and owe allegiance to the United States, aligning the redistricting process with the Guarantee Clause’s republican principles.<sup>56</sup>

- **Mandate Citizen and CVAP Data for Redistricting:** Congress could amend Section 141(c) to require the Census Bureau to provide block-level citizen and CVAP tabulations for all states. These datasets can serve as the official redistricting files under Section 141(c). This amendment would ensure

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<sup>52</sup> See *Elk*, 112 U.S. at 102–03 (showing “all persons born or naturalized in the United States, and subject to the jurisdiction thereof.’ The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired. Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indiana tribes (an alien though dependent power), although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the Fourteenth Amendment, which provides that Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed”).

<sup>53</sup> *Id.* at. 103.

<sup>54</sup> See 169 U.S. 649 (1898).

<sup>55</sup> 13 U.S.C. § 141(b)–(c).

<sup>56</sup> See U.S. CONST. art. IV, § 4.

consistency with the Elections Clause and Supreme Court precedent affirming state discretion in redistricting.<sup>57</sup>

- **Preempt and Harmonize Conflicting Regulations:** Congress could include an express preemption clause requiring the Department of Commerce and the Census Bureau to align all regulations and practices with the amended statute. Any regulation assuming total-population tabulations under Section 141(c) rests on policy preference, not statutory command. After *Loper Bright*, courts may not defer to such agency interpretations, and the best reading of an amended Section 141(c) will prevail.<sup>58</sup>
- **Reinstate the Administrative Records Project by Statute:** Congress could codify the Administrative Records Project, first implemented under Executive Order 13,880, to improve the accuracy of citizenship data through the matching of administrative records while maintaining Title 13 privacy protections.<sup>59</sup> This approach would allow the bureau to develop citizen-level data without resorting to unreliable statistical estimation or privacy algorithms that distort redistricting results.

There is already contemporary legislative momentum toward these goals with the Safeguard American Voters (SAVE) Act, which passed the House of Representatives earlier this year.<sup>60</sup> The act would require documentary proof of U.S. citizenship for voter registration in federal elections and mandate that states remove noncitizens from their voter rolls.<sup>61</sup> By codifying citizenship verification at the electoral stage, Congress has already embraced the same constitutional logic that underlies citizen-only redistricting: Political representation must be derived exclusively from those who owe allegiance to and are fully subject to the jurisdiction of the United States.<sup>62</sup> The SAVE Act thus complements the reforms proposed in this paper by affirming Congress's authority and duty to ensure that both the franchise and representation are reserved to citizens. Its passage in the House shows that Congress has a willingness to enact these statutory amendments.

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<sup>57</sup> See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 807–09; see also *Smiley v. Holm*, 285 U.S. at 365–66.

<sup>58</sup> See *Loper Bright Enterprises v. Raimondo*, 603 U.S. \_\_ (2024).

<sup>59</sup> Exec. Order No. 13,880, *Collecting Information About Citizenship Status in Connection with the Decennial Census*, 84 Fed. Reg. 33,821 (July 11, 2019), <https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connection-with-the-decennial-census#page-33822>.

<sup>60</sup> H.R. 22, 119th Cong. § 2 (2025).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

### C. Eliminating Differential Privacy

Another essential reform is the elimination of differential privacy from all redistricting datasets. The Census Bureau’s application of differential privacy, an algorithmic method that injects statistical “noise” into small-area population counts to mask individual data, severely distorted the accuracy of the 2020 Census at the block level.<sup>63</sup> This distortion undermines the precision necessary for redistricting, especially when drawing citizen-only districts.<sup>64</sup> Because differential privacy intentionally alters actual population counts, it prevents states from verifying block-level totals, disrupts compliance with the Equal Protection Clause’s “substantial equality” standard, and introduces unpredictable demographic biases into the core constitutional process of representation.<sup>65</sup>

Although differential privacy was intended to safeguard respondents’ confidentiality, the methodology produced severe distortions in small-area population counts, particularly at the census-block level. A 2021 Harvard University study analyzing the Census Bureau’s demonstration data found that the algorithm moves population counts across geographies in ways that artificially reduce racial and partisan heterogeneity and make it “impossible to accurately comply with the One Person, One Vote principle as currently interpreted and implemented.”<sup>66</sup> These distortions introduce systematic biases in racial, ethnic, and age-based distributions and thus undermine the accuracy of redistricting.

- **Eliminate Differential Privacy:** Congress and the executive branch could direct the Census Bureau to suspend the use of differential privacy for all datasets furnished under 13 U.S.C. § 141(c) and to revert to traditional methods that preserve respondents’ privacy without altering total counts. Removing differential privacy is essential to ensure the integrity of redistricting data, protect the equal-representation guarantees of the Constitution, and permit the lawful implementation of citizen-only redistricting consistent with the principle of “one citizen, one vote.”

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<sup>63</sup> See Osborne, *supra* note 37; see also Wade Miller & Andrew White, *Policy Brief: The Census Bureau Is Defrauding American Voters*, CTR. FOR RENEWING AM. (Aug. 7, 2025), <https://americarenewing.com/issues/policy-brief-the-census-bureau-is-defrauding-american-voters/> (showing that the census’s use of differential privacy in 2020 distorted the actual enumeration).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Christopher Kenny et al., *The Impact of the U.S. Census Disclosure Avoidance System on Redistricting and Voting Rights Analysis*, HARV. UNIV. INST. FOR QUANTITATIVE SOC. SCI. (Aug. 23, 2021), <https://arxiv.org/pdf/2105.14197>.

## **D. Republishing the 2020 Census**

As a matter of constitutional integrity and legal necessity, we also recommend that the 2020 Census be republished,<sup>67</sup> with corrections made for the following:

- Block-level data miscounts and errors.
- Differential privacy distortions.<sup>68</sup>
- The inclusion of noncitizens in datasets used for redistricting.

## **VI. Conclusion**

The legal and constitutional foundations are in place to implement citizen-only redistricting and to exclude illegal aliens and noncitizen immigrants from redistricting. Courts have not closed the door on these reforms. To the contrary, existing precedent supports state discretion, and constitutional principles of equal representation demand it. The Guarantee Clause, Equal Protection Clause, and enumeration framework all point to one conclusion: Representation must be grounded in citizenship. The president and Congress can act on that mandate through executive order and statutory amendment to require citizen-only redistricting for all future elections and thereby enact a constitutional safeguard to address the serious imbalance between those who are unlawfully present in the United States and those who actually consent to be governed.

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<sup>67</sup> See Osborne, *supra* note 37; see also Miller & White, *supra* note 63.

<sup>68</sup> See Kenny et al., *supra* note 66.