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# THE POLITICAL (MIS)REPRESENTATION OF IMMIGRANTS IN THE CENSUS

MING HSU CHEN\*

*Who is a member of the political community? What barriers to inclusion do immigrants face as outsiders to this political community? This article describes several barriers facing immigrants that impede their political belonging. It critiques these barriers not on the basis of immigrants' rights but based on their rights as current and future members of the political community. This is the second of two Essays. The first Essay focused on voting restrictions impacting Asian American and Latino voters. The second Essay focuses on challenges to including immigrants, Asian Americans, and Latinos in the 2020 Census. Together, the Essays critique the exclusion of immigrants from the political community because this exclusion compromises representational equality.*

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## INTRODUCTION

Nations are comprised of political communities whose members become bearers of important rights and burdens. Whether a person is considered inside or outside the political community is consequential. Dividing the benefits and burdens of citizenship by immigration status is common, and it is not subject to the same scrutiny as racial classifications, even if the categories often overlap for Asians and Latinos. Who is a member of the political community in the United States? What barriers to inclusion do immigrants and other racial minorities face when considered outsiders to this political community?

Elsewhere, I have written that citizenship is broader than political belonging.<sup>1</sup> It can include political, social, economic, and legal dimensions. Yet many theorists say political rights are the *sine qua non* of citizenship and that political rights ought to be reserved for citizens.<sup>2</sup> To other theorists, citizenship consists of membership in a political community and includes both rights and participation.<sup>3</sup> J.G.A. Pocock's classic definition of citizenship contrasted Aristotle's ancient Greek notion of citizenship as direct participation in the polis with a Roman definition of citizenship based on rights.<sup>4</sup> Political participation occurs through individual voting and representation by elected

<sup>1</sup> See generally MING HSU CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* (2020).

<sup>2</sup> See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298–300 (1968 ed.) (describing the “right to have rights” as inextricably linked to political membership in a national entity); see also Leila Faghfour Azar, *Hannah Arendt: The Right to Have Rights*, *CRITICAL LEGAL THINKING* (July 12, 2019), <https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights> (describing Arendt's claim that the “right to have rights” requires national citizenship to “protect” those rights).

<sup>3</sup> See Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOB. LEGAL STUD.* 447, 452 (2000).

<sup>4</sup> J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, in *THEORIZING CITIZENSHIP* (1995); see also ELIZABETH F. COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 100–05 (2009) (citing Pocock's comparison and explaining how the Roman conception of citizenship helps inform the “genealogy of liberal citizenship”).

officials.<sup>5</sup> The focus of this Essay is political representation, wherein members of Congress cast votes on behalf of the people in their districts. Representation permits people who cannot vote, or who do not vote, to have their voices heard.<sup>6</sup> Elected representatives are obligated to look out for all of the people in their district, regardless of citizenship status. Political theorists base this universal representation on the notion that legislators represent the public interest, not merely the interests of voting constituents.<sup>7</sup> Also, since the decisions of representatives affect citizens' and noncitizens' interests, theorists believe it would be coercive to bind noncitizens to decisions made without their input or consent.<sup>8</sup>

The census count, or enumeration, shapes representation because the size of the population determines apportionment, or how many seats are available, and redistricting, or how those seats will be distributed. Representation is intertwined with voting since individual voters select the officials who fill those seats. Yet representation is distinct from voting in other ways, including that it is not restricted to citizens. Considering why immigrants participate in one realm of political life but not the other motivates the writing of these two Essays, which can be read together as a status report on political participation for immigrants.<sup>9</sup> The "immigrants" and "noncitizens" in this Essay are foreign-born persons who have not attained naturalized citizenship.<sup>10</sup> In the

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<sup>5</sup> SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 8–9 (1995).

<sup>6</sup> See generally Elizabeth F. Cohen, *Dilemmas of Representation, Citizenship, and Semi-Citizenship*, 58 ST. LOUIS U. L. REV. 1047 (2014) (arguing that representatives should include in their decisionmaking considerations important to those who cannot vote).

<sup>7</sup> See *id.* (advocating for a trustee model of representation that serves the public interest, as opposed to a delegate model that implements a quid pro quo).

<sup>8</sup> Sarah Song describes "affected interests" and the "coercion principle" in her Essay *Democracy and Noncitizen Voting Rights*, 13 *CITIZENSHIP STUD.* 607, 609–10 (2009). These principles contravene consent-based theories that posit that a lack of consent to undocumented immigrants obviates reciprocal obligations. See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT* 116–40 (1985) (arguing that society's lack of consent to the presence of undocumented immigrants implies that the Citizenship Clause should only apply to legal permanent residents).

<sup>9</sup> The first Essay in the series concerns voting. See Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 *U. COLO. L. REV.* 715 (2021).

<sup>10</sup> The terminology used to describe immigrants varies across disciplines and political valences. For purposes of this Essay, I will refer to "immigrants" and "noncitizens" interchangeably because both terms are consistent with the legal definitions and because they are the terms recommended by the U.S. federal government for official communications since the election of President Joe Biden in 2021. See, e.g., Memorandum from Troy A. Miller, Senior Off. Performing Duties of Comm'r for U.S. Customs & Border Prot. on Updated Terminology for CBP Communications and Materials (Apr. 19, 2021), <https://www.aila.org/infonet/terminology-communications> (specifying "noncitizen" and "migrant" as recommended terms).

United States, these immigrants are largely Asian and Latino racial minorities. This Essay argues that both groups have rights to be counted in the census, and yet they face barriers to political inclusion.

Who gets counted in the census reveals political inequality because immigrants who lack formal citizenship lack political rights—to vote, serve jury duty, and hold public office—even if they are supposed to be counted in the census. Many citizens are willing to accept these political inequalities, even if they seek out equality in other spheres of life, because they believe politics define the nation.<sup>11</sup> However, the political inequality of immigrants is not preordained. There is lively contestation over the composition of the population count that defines the boundaries of the political community.<sup>12</sup> On the one hand, noncitizens are persons and should be counted in the total population for the purposes of representation. On the other hand, noncitizens are not part of the voting public so perhaps they should not factor into the calculation of districts. But denying membership in the census arena because they are denied voting rights compounds inequality.<sup>13</sup> This is particularly disturbing given that the evolution of citizenship reveals a history of exclusion.<sup>14</sup> Federal laws initially qualified citizenship by racial prerequisites. African Americans did not gain citizenship until the Reconstruction Amendments implemented between 1865 and 1870.<sup>15</sup> Chinese Americans did not gain citizenship until the repeal of the Chinese Exclusion Act in 1943.<sup>16</sup> Latinos have been reclassified as citizens or noncitizens throughout history, and they are still considered an ethnicity rather than a race on official forms.<sup>17</sup>

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<sup>11</sup> See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977), in ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1381 (8th ed. 2016).

<sup>12</sup> See *infra* Part I.

<sup>13</sup> Michael Walzer argues in *Spheres of Justice* that if rights in one sphere of life do not carry over to other spheres, principles of distributive equality are violated. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 43, 75–76 (2006) (citing MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 63 (1983)).

<sup>14</sup> See generally ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997) (describing the history of America's restrictions on citizenship based on racial, ethnic, and gender distinctions).

<sup>15</sup> Martha S. Jones, *How the 14th Amendment's Promise of Birthright Citizenship Redefined America*, TIME (July 9, 2018), <https://time.com/5324440/14th-amendment-meaning-150-anniversary>.

<sup>16</sup> See Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943 (Magnuson Act), Pub. L. No. 78–199, ch. 344, 57 Stat. 600 (1943).

<sup>17</sup> *Questions Asked on the Form*, U.S. CENSUS 2020, <https://2020census.gov/en/about-questions.html> (June 8, 2021). See generally CLARA E. RODRÍGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY* 34–43 (2000) (describing the

These exclusions violate the principle that, within a community, persons owe each other associative obligations.<sup>18</sup> The Framers specified in the Constitution that the total population of the nation should be based on the number of persons residing in a state.<sup>19</sup> Critical accounts of the history of the census show there were calls to exclude people of color and noncitizens in the count of the population. From 1820 through 1950, the Census Bureau at times asked about the citizenship status within a household in some form.<sup>20</sup> But the Census Bureau avoided asking about citizenship on the decennial count of the total population for the next seventy years until the present day.<sup>21</sup> Instead, the Census Bureau reserved a version of the citizenship question for the long-form survey and only administered it selectively to a sample of the U.S. population in intervening years.<sup>22</sup> Studies demonstrate citizenship questions lead to underparticipation from immigrants and their families, resulting in inaccurate population counts.<sup>23</sup>

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perception of race and ethnicity as “two separate concepts,” and highlighting the impact that this distinction has on Latinos).

<sup>18</sup> See SARAH SONG, *IMMIGRATION AND DEMOCRACY* (2018) for an argument that citizens owe noncitizens living in their communities associative obligations by virtue of the social membership principle (living, working, raising families and building lives in the United States giving rise to a moral claim for inclusion as political members) and the fair play principle (contributing through their labor and paying taxes constitutes a scheme of social cooperation that entitles them to the benefits of that cooperation).

<sup>19</sup> U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

<sup>20</sup> Thomas P. Wolf & Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 GEO. L.J. ONLINE 1, 13–14 (2019); see also Hansi Lo Wang & Renee Klahr, *See 200 Years of Twists and Turns of Census Citizenship Questions*, NPR (Apr. 23, 2019), <https://www.npr.org/2019/04/23/630562915/see-200-years-of-twists-and-turns-of-census-citizenship-questions> (listing the particular wording of census citizenship questions from 1820 through 1950).

<sup>21</sup> Compare Wolf & Cea, *supra* note 20, at 16, 26–28 (noting that the citizenship question did not appear on the short form decennial sent to all households and only appeared on the long form sent to a subset of households), with We the People Podcast, *Is Asking About Citizenship on the Census Unconstitutional?*, NAT'L CONST. CTR. (May 2, 2019), <https://constitutioncenter.org/interactive-constitution/podcast/is-asking-about-citizenship-on-the-census-unconstitutional> (featuring an exchange where John Eastman argued that the short form and long form are “both still census forms” while Tom Wolf argued that since the long form was only sent to a subset of households, the inclusion of a citizenship question on the short form is categorically different).

<sup>22</sup> Tamara Keith, *Fact Check: Has Citizenship Been a Standard Census Question?*, NPR (Mar. 27, 2018), <https://www.npr.org/2018/03/27/597436512/fact-check-has-citizenship-been-a-standard-census-question>; see also *History: Questionnaires*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/questionnaires](https://www.census.gov/history/www/through_the_decades/questionnaires) (last visited May 28, 2020) (describing the history of “short-form only” questionnaires).

<sup>23</sup> See D'Vera Cohn, *What to Know About the Citizenship Question the Census Bureau Is Planning to Ask in 2020*, PEW RSCH. CTR.: FACT TANK (Mar. 30, 2018), <https://www.pewresearch.org/fact-tank/2018/03/30/what-to-know-about-the-citizenship-question-the-census-bureau-is-planning-to-ask-in-2020>; see also Memorandum from Ctr. for Surv. Measurement for Assoc. Directorate for Rsch. and Methodology, Respondent Confidentiality Concerns (Sept. 20, 2017) [hereinafter Memo from Ctr. for Surv.

FIGURE 1. CENSUS QUESTIONNAIRE<sup>24</sup>

## How The 'Citizenship Question' Changed Over The Decades

A question about citizenship or naturalization has been included on the census for either **all households** or **selective households**, on and off, since 1820.



Source: U.S. Census Bureau

Credit: Renee Klahr and Hansi Lo Wang/NPR

Contemporary efforts to exclude immigrants from the census should be understood in the context of this history of political contestation. Part I discusses the challenges of representational equality amid growing demographic diversity. Part II explores the social, political, and legal barriers used to block representation. Part III explains the resulting harms to immigrants and racial minorities.

Measurement], <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf> (noting, in census pre-testing, widespread concerns among noncitizen populations about confidentiality, particularly when asked citizenship and immigration questions).

<sup>24</sup> Adapted from Hansi Lo Wang & Renee Klahr, *See 200 Years of Twists and Turns of Census Citizenship Questions*, NPR (Apr. 23, 2019), <https://www.npr.org/2019/04/23/630562915/see-200-years-of-twists-and-turns-of-census-citizenship-questions>.

I  
GROWING DIVERSITY AND THE CHALLENGES OF  
REPRESENTATIONAL EQUALITY

The United States Constitution mandates that the Census Bureau count the “whole number of persons in each State” every ten years.<sup>25</sup> The Supreme Court has interpreted this command to require equal representation of all persons under the Fourteenth Amendment.<sup>26</sup> In reaching this conclusion, the Supreme Court explained that the Framers carefully considered the inclusion of persons, rather than voters, during the rebalancing of political power between the North and the South.<sup>27</sup> Specifically, notwithstanding their persistent disenfranchisement until the passage of the Fifteenth Amendment, freed slaves were counted as persons in the Fourteenth Amendment.<sup>28</sup> Moreover, the Supreme Court has consistently looked to total population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating from the elusive ideal of “perfect population equality.”<sup>29</sup> Persons, not voters, make up the relevant population because “[n]onvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies.”<sup>30</sup>

Congress tasked the Census Bureau with conducting the census count,<sup>31</sup> and the Census Bureau has exercised its mission “to count everyone once, only once, and in the right place” using a formula of

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<sup>25</sup> U.S. CONST. amend. XIV, § 2; *id.* art. I, § 2, cl. 3.

<sup>26</sup> *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (noting that “persons” includes nonvoters, sustaining Texas’s drawing of State Senate districts based on total population rather than voter population).

<sup>27</sup> *See id.* at 1127–28.

<sup>28</sup> *Id.* at 1127.

<sup>29</sup> *Id.* at 1124. In *Wesberry v. Sanders*, the Court reviewed the history of the Equal Protection Clause and declared that the Framers agreed that the House of Representatives should represent “people” on the basis of the number of inhabitants. 376 U.S. 1, 13 (1964).

<sup>30</sup> *Evenwel*, 136 S. Ct. at 1132. Challengers have argued that “we the people” refers only to persons who meet basic qualifications for voting. *See Hearing on “Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration’s Unconstitutional Attacks” Before the H. Comm. on Oversight and Reform*, 116th Cong. 3–4 (2020) (statement of Dr. John C. Eastman, Professor, Chapman University’s Dale E. Fowler School of Law) [hereinafter Eastman Testimony]. But Justice Ginsburg responds in *Evenwel*: “For every sentence appellants quote from the Court’s opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality.” 136 S. Ct. at 1131.

<sup>31</sup> Congress delegated the task of conducting the census to the Secretary of Commerce, with the aid of the Census Bureau, “in such form and content as he may determine.” 13 U.S.C. §§ 21, 141(a).

counting persons in the total population.<sup>32</sup> Counting everyone is an immense task because of the sheer number of people living in the United States. In addition, societal trends and technological limitations make it difficult to locate certain people and encourage their response.<sup>33</sup> Those challenges have only grown with increased demographic diversity: Historically, the geographic distribution of the voting population did not deviate from that of the total population to a significant degree, but the two measures have diverged with increased racial diversity and immigration since the 1960s.<sup>34</sup> The lesser diversity in older census counts explains why policymakers, while tasked to focus on “persons,” occasionally used the terms persons and voters interchangeably.<sup>35</sup> If most people are citizens, they can vote and there is no need to specify the noncitizens who cannot. Today, however, this terminology confusion is highly consequential.

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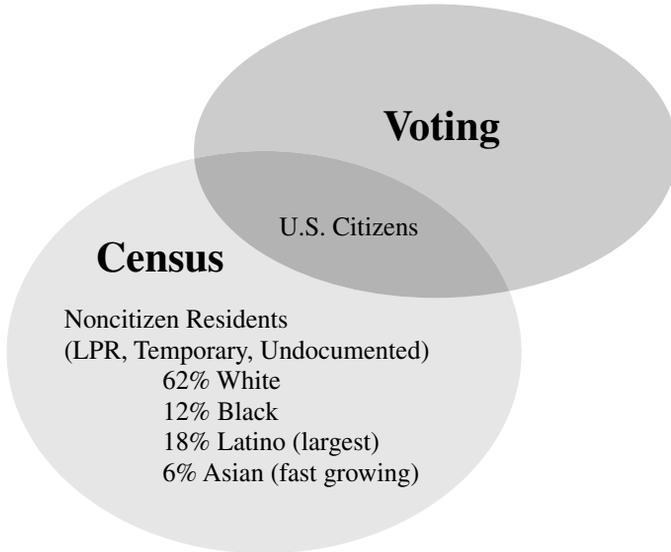
<sup>32</sup> *2020 Census: Our Mission to Count Everyone*, U.S. CENSUS BUREAU (June 22, 2020), <https://www.census.gov/content/dam/Census/library/factsheets/2020/dec/2020-census-our-mission.pdf>; *Computing Apportionment*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/public-sector/congressional-apportionment/about/computing.html> (last updated Mar. 1, 2021).

<sup>33</sup> See *2020 Census: Our Mission to Count Everyone*, *supra* note 32; COUNTING THE HARD TO COUNT IN A CENSUS: SELECT TOPICS IN INTERNATIONAL CENSUSES, U.S. CENSUS BUREAU 1, 5 (2019), <https://www.census.gov/content/dam/Census/library/working-papers/2019/demo/Hard-to-Count-Populations-Brief.pdf>.

<sup>34</sup> See Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate> (noting that the non-Hispanic white voter population has proportionally decreased across all states, with several states—most notably, California, Nevada, Florida, Arizona, and Texas—experiencing particularly pronounced decreases).

<sup>35</sup> Appellants in *Evenwel* argued that several prior Supreme Court cases supported the “equal voting power” principle that districts should have equalized eligible-voter populations, though this conclusion was rejected by the *Evenwel* Court as an overread of precedent. 136 S. Ct. at 1130–31.

FIGURE 2. CENSUS VS. VOTING POPULATION



### A. *Changing Demographics*

Nowhere has the divergence between voters and persons been more consequential than for immigrants and naturalized citizens, who are primarily Latinos and Asian Americans.<sup>36</sup> The Pew Research Center estimated that “without any post-1965 immigration, the nation’s racial and ethnic composition would be 75% white, 14% [B]lack, 8% Hispanic and less than 1% Asian.”<sup>37</sup> Instead, after extensive immigration from Latin America and Asia, by 2015 the population was 62% white, 12% Black, 18% Hispanic (Latino) and 6% Asian.<sup>38</sup> Latinos are the largest foreign-born group in the United States; Asians are now the fastest growing foreign-born group and are projected to surpass the foreign-born Latino population by 2055.<sup>39</sup> The 2020 census shows the continued trend of the U.S. population becoming more racially and ethnically diverse.<sup>40</sup>

<sup>36</sup> See Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans>.

<sup>37</sup> PEW RSCH. CTR., *MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065*, 9 (2015).

<sup>38</sup> *Id.* at 9 fig.4.

<sup>39</sup> *Id.* at 10; see also Budiman & Ruiz, *supra* note 36.

<sup>40</sup> *2020 U.S. Population More Racially and Ethnically Diverse Than Measures in 2010*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html> (last updated Sept. 1, 2021).

The growing immigrant and newly naturalized populations hold electoral significance. In particular, Latinos are concentrated in states with electoral significance. Data from the Pew Research Center shows that the nation's largest Latino populations are in California, Texas, Florida, and New York.<sup>41</sup> The two states with the greatest number of Latinos, California (15.6 million) and Texas (11.5 million), are among the most populous and delegate-rich states in the country.<sup>42</sup> Major Latino populations are also dispersed around the country. Florida's 5.7 million Latinos constitute the third-largest state Latino population in the country.<sup>43</sup> While Latino voters hold a range of political preferences, based on an Elections Eve Poll conducted by Latino Decisions in 2020, Latino voters preferred the 2020 Democratic candidate Joe Biden by an overwhelming 44% margin.<sup>44</sup> Despite the media narrative that Latinos moved significantly toward the Republican Party during the 2020 general election, there remained a strong preference for the Democratic Party among Latinos in numerous swing states that influenced the election result.<sup>45</sup>

Asian American voters are becoming an increasingly significant electoral block as well. The political heterogeneity of Asian American

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<sup>41</sup> Jens Manuel Krogstad, *Hispanics Have Accounted for More than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010>.

<sup>42</sup> *Id.*; *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> (last updated Mar. 6, 2020).

<sup>43</sup> Krogstad, *supra* note 41.

<sup>44</sup> AM. ELECTION EVE POLL, LATINO VOTERS IN THE 2020 ELECTION NATIONAL SURVEY RESULTS 7 (2020), <https://latinodecisions.com/wp-content/uploads/2020/11/Latino-EE2020-Deck.pdf>. Of the states with prominent Latino populations, Latinos in Florida favored Biden by twenty-one percent, even though the Republican preference among Cuban voters shrunk that margin as compared to past years. *Id.* at 6, 8; Carmen Sesin, *Trump Cultivated the Latino Vote in Florida, and It Paid Off*, NBC NEWS (Nov. 4, 2020), <https://www.nbcnews.com/news/latino/trump-cultivated-latino-vote-florida-it-paid-n1246226>.

<sup>45</sup> For examples of media reporting on the shift right demonstrated by Latinos, see Geraldo Cadava, *The Deep Origins of Latino Support for Trump*, NEW YORKER (Dec. 29, 2020), <https://www.newyorker.com/news/the-political-scene/the-deep-origins-of-latino-support-for-trump> (reporting on the overall Latino vote for Biden and the importance of the Arizona vote but emphasizing Trump's gains among Latinos); John Burnett, *How Texas' Longtime Democratic and Heavily Latino County Flipped Red*, NPR (Nov. 5, 2020), <https://www.npr.org/2020/11/05/931836590/how-texas-longtime-democratic-and-heavily-latino-county-flipped-red> (noting that Biden still won Zapata County, "a heavily Latino county," but emphasizing Trump's improved performance); Sesin, *supra* note 44 (describing how Trump's gains among Cubans, Venezuelans, Nicaraguans, and Colombians in Florida led to his victory in Florida). For a more granular and nuanced report on Latino voter-preference by state, see Holly K. Sonneland, *Chart: How U.S. Latinos Voted in the 2020 Presidential Election*, AMS. SOC'Y/COUNCIL OF THE AMS. (Nov. 5, 2020), <https://www.as-coa.org/articles/chart-how-us-latinos-voted-2020-presidential-election>.

voters' partisan affiliations and the relatively low partisan identification historically detracted from Asian American political influence.<sup>46</sup> These trends shifted in the 2020 election. Survey data suggests high voter turnout and favorability towards the Democratic candidate that helped Democratic candidates win.<sup>47</sup> Nationally, NPR reported 70% of Asian American voters preferred President Biden in the 2020 election.<sup>48</sup> Changes in Vietnamese leanings from Republican to Democrat contributed to this shift.<sup>49</sup>

The increased immigration since 1965 also has implications for the importance of citizenship and immigration status in electoral politics. Efforts to naturalize eligible immigrants, and then to register newly naturalized voters, are enhancing the political power of foreign-born voters. According to a Pew Research Center report, naturalized citizens accounted for 10% of the electorate in 2020.<sup>50</sup> The majority of this cohort of naturalized voters are either Latino (34%) or Asian (31%).<sup>51</sup>

Persistent undercounting will also diminish the political influence of racial groups. The racial groups with the largest undercounting in the census are the Black and Latino communities,<sup>52</sup> and Latinos and

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<sup>46</sup> See ZOLTAN L. HAJNAL & TAEKU LEE, *WHY AMERICANS DON'T JOIN THE PARTY: RACE, IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE* (2011) (describing both low partisan identification and heterogeneous political viewpoints among Asian Americans and Latinos); KARTHICK RAMAKRISHNAN, JANE JUNN, TAEKU LEE & JANELLE WONG, *INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RSCH., NATIONAL ASIAN AMERICAN SURVEY* (2008) <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/31481> (providing statistical summaries of low Asian American partisan identification and high heterogeneity).

<sup>47</sup> See AM. ELECTION EVE POLL, *ASIAN AMERICAN VOTERS IN THE 2020 ELECTION* 8, 21, 23 (2020), <https://latinodecisions.com/wp-content/uploads/2020/11/A-API-EE2020-Deck.pdf> (detailing large margins of Asian American support in the Georgia 7th District for Democratic candidates in extremely close Presidential, Senate, and House races).

<sup>48</sup> *Understanding the 2020 Electorate: AP VoteCast Survey*, NPR, <https://www.npr.org/2020/11/03/929478378/understanding-the-2020-electorate-ap-votecast-survey> (last updated May 21, 2021).

<sup>49</sup> See ANH DO, *Young Vietnamese American Progressives Lead a Generational Split with Conservative Elders*, L.A. TIMES (Nov. 2, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-11-02/vietnamese-american-progressive-movement-backs-biden-campaign>.

<sup>50</sup> ABBY BUDIMAN, LUIS NOE-BUSTAMANTE & MARK HUGO LOPEZ, PEW RSCH. CTR., *NATURALIZED CITIZENS MAKE UP RECORD ONE-IN-TEN U.S. ELIGIBLE VOTERS IN 2020*, at 5 (2020), [https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2020/02/GMD\\_2020.02.26\\_Immigrant-Eligible-Voters.pdf](https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2020/02/GMD_2020.02.26_Immigrant-Eligible-Voters.pdf). The naturalized share of the electorate could have been even larger, if not for the additional barriers to naturalization. See *generally* IMMIGRANT LEGAL RES. CTR., *DENYING THE RIGHT TO VOTE: POLITICIZATION OF THE NATURALIZATION PROCESS AS A NOVEL FORM OF VOTER SUPPRESSION* (2020).

<sup>51</sup> BUDIMAN ET AL., *supra* note 50, at 7.

<sup>52</sup> *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census*, U.S. CENSUS BUREAU (May 22, 2012), <https://www.census.gov/newsroom/releases/archives/>

Asian Americans sometimes confront language barriers.<sup>53</sup> These racial groups overwhelmingly vote Democratic.<sup>54</sup> Additionally, Latinos skew younger than the average population and consequently tend to be more progressive.<sup>55</sup> In sum, as the share of the electorate occupied by white American-born voters continues to shrink, the support for Democratic candidates is likely to grow. At the same time, however, if states receive fewer congressional seats and Electoral College votes due to census undercounting, the political power of these groups will be diminished.

### *B. How Changing Demographics Impact Political Representation*

This changing profile of the political community needs to be accurately counted with the goal of representational equality.<sup>56</sup> Whereas the divergence of individuals classified as “persons” or “inhabitants” of a particular state versus citizens used to be relatively small,<sup>57</sup> the population disparities are now enough to change the allocation of seats in Congress and state legislatures and to influence redistricting.<sup>58</sup> The Constitution and case law set out some guiding principles for capturing these demographic changes.

One principle is that the decennial census requires counting the total population. Changing from total population to voter population base, or citizen voting age population (CVAP), excludes children, some felons, and Native Americans.<sup>59</sup> The increased presence of noncitizen and younger people amplifies the importance of using total

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2010\_census/cb12-95.html (estimating a 2.1% and 1.5% undercount of Black and Latino communities, respectively, in the 2010 Census).

<sup>53</sup> The 2020 Census Questionnaire was administered in English and bilingual English-Spanish although people could also call by phone or go online to answer the questionnaire in English as well as twelve other languages. *The 2020 Census Speaks More Languages*, U.S. CENSUS BUREAU (Mar. 9, 2020), <https://www.census.gov/newsroom/press-releases/2020/languages.html>. Instructions for the census were available in fifty-nine non-English languages, but not the questionnaires. *Language Support*, U.S. CENSUS 2020, <https://2020census.gov/en/languages.html> (last visited May 22, 2021).

<sup>54</sup> See *supra* notes 36–48 and accompanying text.

<sup>55</sup> Loren Collingwood, Matt A. Barreto & Sergio I. Garcia-Rios, *Revisiting Latino Voting: Cross-Racial Mobilization in the 2012 Election*, 67 POL. RSCH. Q. 632, 632 (2014).

<sup>56</sup> See, e.g., Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1405 (2019) (portraying “representational equality” as a principle which demands that “all residents of the state are to be counted—and served—as constituents”).

<sup>57</sup> See *supra* notes 32–34 and accompanying text.

<sup>58</sup> *Id.*

<sup>59</sup> See generally Final 2020 Census Residence Criteria and Residence Situations, *supra* note 32. There are efforts in some states to restore felon voting rights. See *Felon Voting Rights*, NAT’L CONF. STATE LEGISLATURES (June 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (documenting the current status of felon voting right restoration by state).

population as the counting method for purposes of furthering representational equality.

Among immigrants, the census inclusion of dual nationals, green card holders, temporary visitors, and undocumented immigrants—without reporting the differentiation of “legal” and “illegal” immigrants—has consequences as well. The distinction between documented and undocumented immigrants is obscured through efforts to exclude noncitizens from the census. In 2020, President Trump introduced an executive order that would have specifically excluded undocumented populations from the immigrant count.<sup>60</sup> The rationale for such an exclusion is typically that a representative democracy derives its legitimacy from the consent of the governed, and that U.S. citizens have not consented to the presence of undocumented immigrants.<sup>61</sup> However, Trump’s proposal to include a citizenship question on the census questionnaire or include only the CVAP in apportionment also threatens to harm the political representation of legal immigrants, whose admission follow immigration laws adopted by Congress—without giving reasons for their exclusion.

Distinct from the theoretical objection to including undocumented immigrants in the census, there is a practical difficulty in the counting of undocumented populations: inconsistency in the meaning of undocumented. As Professor Hiroshi Motomura and immigration attorney Cyrus Mehta have explained, undocumented status is an “inconclusive” state.<sup>62</sup> Some immigrants are undocumented because they enter the country without inspection, others overstay their visas,

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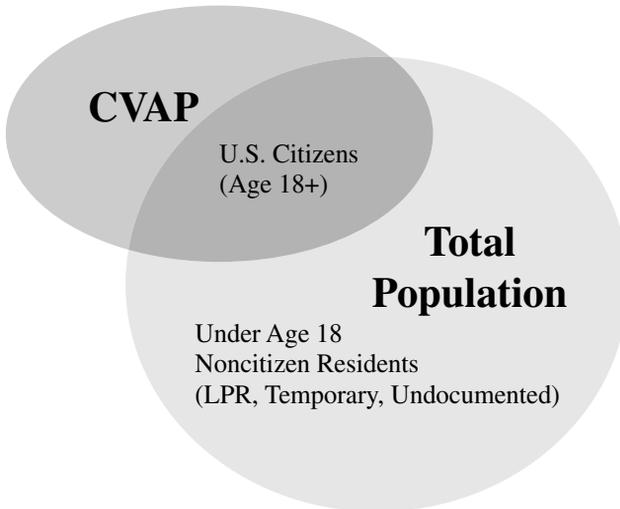
<sup>60</sup> Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 21, 2020) [hereinafter Apportionment Memo].

<sup>61</sup> See, e.g., Eastman Testimony, *supra* note 30, at 3 (noting that representatives are meant to represent those “who form the body politic” and thus only eligible voters should be counted in the census); see also SCHUCK & SMITH, *supra* note 8, at 116–40 (arguing that society’s lack of consent to the presence of undocumented immigrants implies that the Citizenship Clause should only apply to legal permanent residents). White House advisor Kris Kobach also wrote in a note to GOP officials that the absence of a citizenship question “leads to the problem that aliens who do not actually ‘reside’ in the United States are still counted for congressional apportionment purposes.” Rachael Bade, *Kobach Declines to Answer Questions About Conversations with Trump About Census*, WASH. POST (June 7, 2019), [https://www.washingtonpost.com/politics/kobach-declines-to-answer-questions-about-conversations-with-trump-about-census/2019/06/07/da6cb8a6-896c-11e9-b1a8-716c9f3332ce\\_story.html](https://www.washingtonpost.com/politics/kobach-declines-to-answer-questions-about-conversations-with-trump-about-census/2019/06/07/da6cb8a6-896c-11e9-b1a8-716c9f3332ce_story.html). For a rebuttal, see the prior discussion of affected interests and the coercion principle, *supra* note 8 and accompanying text.

<sup>62</sup> HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 52 (2014); see also Cyrus Mehta, *The Impossible Feat of Determining Who is an “Illegal Alien” Under Trump’s Unconstitutional Census Executive Order*, INSIGHTFUL IMMIGR. BLOG (Aug. 30, 2020), <http://blog.cyrusmehta.com/2020/08/the-impossible-feat-of-determining-who-is-an-illegal-alien-under-trumps-unconstitutional-census-executive-order.html> (“Who is legal or illegal defies an easy definition.”).

and others are removable because they either failed to comply with other terms of their visa or are removable on other grounds.<sup>63</sup> Depending how and when they entered the United States, undocumented immigrants may be able to adjust their status through marriage, a U-visa, or legislative relief.<sup>64</sup> Trying to broadly exclude all categories of undocumented immigrants based on an imprecise legal category leads to an inaccurate estimate of the size of the population. This would be detrimental to the communities where they reside since undocumented immigrants are often ineligible to receive public benefits.<sup>65</sup>

FIGURE 3. TOTAL POPULATION VS. CVAP



Attempts to exclude noncitizens from political life have taken many forms. In the last few years, there have been attempts to limit birthright citizenship,<sup>66</sup> exclude noncitizens from voting in local elec-

<sup>63</sup> Stephen H. Legomsky & David B. Thronson, *Immigration and Refugee Law and Policy* 1419 (7th ed., 2019).

<sup>64</sup> See, e.g., Immigration and Nationality Act § 319(a), 8 U.S.C. § 1430(a) (allowing a naturalization pathway for any person who is married to U.S. citizens or who has obtained permanent residency “by reason of his or her status as a spouse or child of a United States citizen who battered him or her or subjected him or her to extreme cruelty”); 8 CFR § 245.24 (2021) (describing federal regulations governing U-Visa adjudications).

<sup>65</sup> See *infra* notes 165–71 and accompanying text.

<sup>66</sup> Advocates for limiting birthright citizenship include former President Trump, conservative members of Congress, and the think tank the Heritage Foundation. See, e.g., Hans A. von Spakovsky, *Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment*, HERITAGE FOUND. (Oct. 30, 2018), <https://www.heritage.org/immigration/commentary/birthright-citizenship-fundamental-misunderstanding-the-14th-amendment>.

tions,<sup>67</sup> narrow the definition of constituents on the citizenship test,<sup>68</sup> and strip naturalized citizenship without due process.<sup>69</sup> Trying to omit noncitizens from the census was a defining feature of the 2020 decennial count. These contests over citizenship suggest that the boundaries of the political community are not settled. Two related episodes that illustrate the battle are further elaborated in Part II: the inclusion of a citizenship question on the census that would impose barriers to representation, in Section II.A, and litigation to change the official formula used to determine total population, in Section II.B.

## II

### BARRIERS TO POLITICAL REPRESENTATION OF IMMIGRANTS

Part II of this Essay describes why inaccurate counting of immigrants and naturalized voters in the census jeopardizes representational equality. Section II.A describes the social and political barriers to count immigrants and racial minorities which arise under existing census techniques.

#### A. *Social and Political Barriers to Representation*

The census routinely undercounts immigrants and racial minorities, especially those who live in mixed-status households or households that contain both noncitizens and citizens. This is because immigrants and racial minorities, like other vulnerable populations, are hard to enumerate and are dissuaded from participation. According to Census Bureau outreach materials, enumeration is especially challenging when “language barriers, low literacy, and lack of

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<sup>67</sup> State measures to restrict noncitizen voting passed in Alabama, Colorado, and Florida in 2020. See Patty Nieberg, *Colorado, Two Other States Pass Amendments Clarifying that “Only Citizens” Can Vote*, COLO. SUN (Nov. 8, 2020), <https://coloradosun.com/2020/11/08/amendment-76-colorado-passes>.

<sup>68</sup> *The 2020 Version of the Civics Test*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 12, 2020), <https://www.uscis.gov/citizenship/2020test>; see also Steven Lubet, *Trump’s New Citizenship Test Is Full of Conservative Bias—and Dotted with Mistakes*, POLITICO (Dec. 3, 2020, 09:40 PM), <https://www.politico.com/news/magazine/2020/12/03/trumps-new-citizenship-test-is-full-of-conservative-biasand-dotted-with-mistakes-442777> (stating that the answer to the question “Who does a member of the House of Representatives represent?” was changed from “all people of the state” to “citizens in their [congressional] district”).

<sup>69</sup> See Irina D. Manta & Cassandra Burke Robertson, *Inalienable Citizenship*, 99 N.C. L. REV. (forthcoming 2021) (manuscript at 22–34) (on file with the *New York University Law Review*) (describing denaturalization, citizenship revocation, and denial efforts by the Trump administration); Cassandra Burke Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 799–802 (2020) (arguing that heightened levels of due process are constitutionally required in citizenship cases); Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 454–60 (2019) (describing procedural due process deficiencies of civil denaturalization).

internet access” hinder participation.<sup>70</sup> These social barriers can be compounded for poorer populations that are hard to locate or contact, as with groups that are highly mobile or who live in housing units that are not in the Census Bureau’s address list.<sup>71</sup>

In addition, a political climate that is increasingly hostile to immigrants and rising immigration enforcement generates a lack of trust in the federal government.<sup>72</sup> Skepticism of the federal government translates into a greater reluctance to be counted among Asians, Latinos, and immigrant communities in general.<sup>73</sup>

### 1. *Undercounting Immigrants*

As previously explained, the Census Bureau has avoided putting a question about citizenship on the decennial form for the past forty years, from 1960–2000.<sup>74</sup> This is due to the longstanding belief of Census Bureau officials that “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count,”<sup>75</sup> because “the group being counted perceive[s] [the] possibility of the information being used against them.”<sup>76</sup> The effect was likely magnified in the political climate created by the Trump administration.<sup>77</sup>

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<sup>70</sup> MARYANN M. CHAPIN, JENNIFER KIM, JULIA LOPEZ & JUDY BELTON, U.S. CENSUS BUREAU, 2020 CENSUS: COUNTING EVERYONE ONCE, ONLY ONCE, AND IN THE RIGHT PLACE 6 (2018), <https://www2.census.gov/cac/nac/meetings/2018-11/chapin-hard-to-count.pdf>.

<sup>71</sup> See Jaboa Lake, Jae June Lee, Meghan Maury & Cara Brumfield, *Count People Where They Are: Census Miscounts Undermine Essential Funding for Homelessness Prevention*, CTR. FOR AM. PROGRESS (Oct. 5, 2020), <https://www.americanprogress.org/issues/poverty/reports/2020/10/05/491122/count-people-where-they-are>.

<sup>72</sup> See GAIL WADSWORTH, ED KISSAM, CINDY QUEZADA & JO ANN INTILI, SAN JOAQUIN VALLEY HEALTH FUND, *TROUBLED REFLECTIONS: LATINO IMMIGRANTS’ THINKING ABOUT CENSUS 2020* 24–25 (2019), [https://www.shfcenter.org/assets/SJVHF/SJVCRP\\_Troubled\\_Reflections\\_022719.pdf](https://www.shfcenter.org/assets/SJVHF/SJVCRP_Troubled_Reflections_022719.pdf) (reporting on survey responses and focus group discussions that indicate a lack of trust in the federal government).

<sup>73</sup> *Id.* at 25; see also Memo from Ctr. for Surv. Measurement, *supra* note 23 (reporting concerns about the misuse of Census data, especially among the Latino community); Jose A. Del Real, *When It Comes to the Census, the Damage Among Immigrants Is Already Done*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/supreme-court-citizenship-census-immigrants.html>.

<sup>74</sup> The majority of the twenty-three decennial censuses conducted since 1790 asked at least some of the population about their citizenship or place of birth. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2561–62 (2019). The citizenship question has since been included in intervening years in the American Community Service, a more detailed demographic survey that is administered to a sample of the total population.

<sup>75</sup> Fed’n for Am. Immigr. Reform v. Klutznick, 486 F. Supp. 564, 568 (D.D.C. 1980).

<sup>76</sup> *Id.*

<sup>77</sup> Hansi Lo Wang, *Immigration Hard-Liner Files Reveal 40-Year Bid Behind Trump’s Census Obsession*, NPR (Feb. 15, 2021), <https://www.npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession> (describing the Trump administration’s efforts to crack down on undocumented immigrants through the census).

In August 2018, a Census Bureau study conducted in response to a U.S. Department of Justice (DOJ) request concluded that “adding a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens, resulting in . . . a lower-quality population count.”<sup>78</sup> Before the completion of this study, however, Commerce Secretary Wilbur Ross decided to announce reinstatement of the citizenship question in a March 2018 memorandum.<sup>79</sup> Instead, the administrative record on which Secretary Ross based his decision consisted of the DOJ’s original letter requesting reinstatement of the citizenship question and several Census Bureau memoranda analyzing potential effects of reinstatement.<sup>80</sup> A 2019 study estimated that this would have resulted in a twelve percent reduction in the Latino population, or six million Latinos, from the numbers reported in the 2010 census.<sup>81</sup>

FIGURE 4. HISPANICS WITH NO CITIZENSHIP ANSWER ON THE 2017 AMERICAN COMMUNITY SURVEY



Source: Washington Post

<sup>78</sup> See J. David Brown, Misty L. Heggeness, Suzanne M. Dorinski, Lawrence Warren & Moises Yi, *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* 54 (U.S. Census Bureau, Working Paper CES 18-38, 2018).

<sup>79</sup> Letter from Wilbur Ross, Sec’y of Com., to Karen Dunn Kelley, Under Sec’y for Econ. Affs., Re: Reinstatement of the Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), [https://www.commerce.gov/sites/default/files/2018-03-26\\_2.pdf](https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf).

<sup>80</sup> *Dep’t of Com.*, 139 S. Ct. at 2564 (describing the administrative record submitted by the government supporting its decision to reinstate the citizenship question).

<sup>81</sup> MATTHEW A. BAUM, BRYCE J. DIETRICH, REBECCA GOLDSTEIN & MAYA SEN, SHORENSTEIN CTR., *ESTIMATING THE EFFECT OF ASKING ABOUT CITIZENSHIP ON THE U.S. CENSUS* 2–4 (2019).

## 2. *Citizenship Question on the Census: New York v. Department of Commerce*

Undercounting minority populations compromises the integrity of data that is used for many vital purposes, including academic research, policy analysis, reapportionment, and distribution of public benefits.<sup>82</sup> Secretary Ross's and President Trump's justifications for seeking citizenship information ran contrary to the goals of the Census Bureau and researchers who recognized the harms of inaccurate data. Even if it might like to have more granular data on documentation status, the Census Bureau stated that this goal could be satisfied in a "less costly, more effective, and less harmful manner," such as statistical sampling or the use of administrative records.<sup>83</sup>

Ultimately, the Trump administration's attempt to reject established conventions and instead include a citizenship question on the census questionnaire sent to all households proved unsuccessful. In *New York v. Department of Commerce*,<sup>84</sup> the Census Bureau argued against the DOJ's assertion that the citizenship question was requested for the purpose of enforcing the Voting Rights Act of 1965.<sup>85</sup> The Supreme Court agreed with lower courts that this explanation was pretextual.<sup>86</sup> The Court left open the possibility of adding a citizenship question to the census if it could be done in a manner consistent with the reasoned decisionmaking requirements of the Administrative Procedure Act.<sup>87</sup> However, the Trump administration abandoned its efforts to reintroduce the citizenship question given the impending deadline to get the census forms printed in time for the 2020 census administration.<sup>88</sup>

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<sup>82</sup> See U.S. CENSUS BUREAU, WHY WE CONDUCT THE DECENNIAL CENSUS (2020), <https://www.census.gov/programs-surveys/decennial-census/about/why.html>.

<sup>83</sup> *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 530 (S.D.N.Y. 2019), *aff'd in part, rev'd in part sub nom. Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019).

<sup>84</sup> 351 F. Supp. 3d 502 (S.D.N.Y. 2019). There were six additional lawsuits challenging the census question on Administrative Procedure Act (APA) procedural grounds, plus a Mexican American Legal Defense and Educational Fund (MALDEF) lawsuit on racial intent. *2020 Census Litigation*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation/fair-accurate-census/2020-census-litigation> (last visited June 3, 2021); *MALDEF Sues Trump Administration Over Citizenship Data Collection*, MALDEF (Sept. 13, 2019), <https://www.maldef.org/2019/09/maldef-sues-trump-administration-over-citizenship-data-collection>.

<sup>85</sup> *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d at 515.

<sup>86</sup> *Id.* at 660.

<sup>87</sup> *Id.* at 679.

<sup>88</sup> Anita Kumar & Caitlin Oprysko, *Trump Abandons Effort to Add Citizenship Question to Census*, POLITICO (July 11, 2019), <https://www.politico.com/story/2019/07/11/trump-expected-to-take-executive-action-to-add-citizenship-question-to-census-1405893>.

### 3. Executive Order on Collecting Information (2019)

In the same week that the Supreme Court struck down the Trump administration's effort to include a citizenship question on the census, President Trump issued an executive order that would provide an alternative means of obtaining information about citizenship status. Executive Order 13880, Collecting Information About Citizenship Status in Connection with the Decennial Census (2019 Order),<sup>89</sup> ordered that "all executive departments and agencies . . . provide the Department [of Commerce] the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country, including any access that the Department may request to administrative records that may be useful in accomplishing that objective."<sup>90</sup> The information would be used for a variety of purposes.<sup>91</sup> The officially stated justifications were to: (1) further the understanding of the effects of immigration, (2) evaluate proposals to change public benefit eligibility rules, (3) help achieve a more reliable

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<sup>89</sup> Exec. Order No. 13880, Collecting Information About Citizenship Status in Connection with the Decennial Census, 84 Fed. Reg. 33821 (July 11, 2019) [hereinafter 2019 Order].

<sup>90</sup> *Id.* The 2019 Order directs particular agencies to make specific efforts to maximize data sharing including: (i) Department of Homeland Security, United States Citizenship and Immigration Services—National-level file of Lawful Permanent Residents, Naturalizations; (ii) Department of Homeland Security, Immigration and Customs Enforcement—F1 & M1 Nonimmigrant Visas; (iii) Department of Homeland Security—National-level file of Customs and Border Arrival/Departure transaction data; (iv) Department of Homeland Security and Department of State, Worldwide Refugee and Asylum Processing System—Refugee and Asylum visas; (v) Department of State—National-level passport application data; (vi) Social Security Administration—Master Beneficiary Records; and (vii) Department of Health and Human Services—CMS Medicaid and CHIP Information System. *Id.* at 33824.

<sup>91</sup> In *Evenwel v. Abbott*, the Supreme Court left open the question whether "States may draw districts to equalize voter-eligible population rather than total population." 136 S. Ct. 1120, 1133 (2016). Some states, such as Texas, have argued that "jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline—including total population and voter-eligible population—so long as the choice is rational and not invidiously discriminatory." *Id.* at 1126. Missouri passed a ballot measure permitting use of eligible voters rather than total population in November 2020. See SHRUTI BANERJEE & NAILA AWAN, HOW STATES AND THE TRUMP ADMINISTRATION ARE WORKING TO EXCLUDE MILLIONS FROM POLITICAL REPRESENTATION AND REDUCE BLACK AND BROWN POLITICAL POWER (2020), <https://www.demos.org/sites/default/files/2020-10/How%20States%20and%20the%20Trump%20Administration%20Are%20Working%20to%20Exclude%20Millions%20from%20Political%20Representation%20and%20Reduce%20Black%20and%20Brown%20Political%20Power.pdf>; Yuri Rudensky & Gabriella Limon, *Missouri Amendment 3 Passed, What Does that Mean for Redistricting?*, BRENNAN CTR. (Nov. 5, 2020), <https://www.brennancenter.org/our-work/research-reports/missouri-amendment-3-passed-what-does-mean-redistricting>. Whether that approach is permissible will be resolved when more states propose districting plans based on voter-eligible population and litigation similar to *United States v. Alabama* ensues. See also *infra* notes 136–41.

count of undocumented immigrants, and (4) allow “States to design State and local legislative districts based on the population of voter-eligible citizens.”<sup>92</sup>

The *New York v. Department of Commerce* litigation left open the possibility that citizenship status could be determined by the inclusion of a citizenship question, contingent on sufficient reasoning, or by data collection through administrative records. Yet, despite the qualifier that information collection must be “consistent with law,” many of the rationales for the 2019 Order depart from approved uses of census data under existing law. For example, rationales two and three that would use information collected to restrict public benefits or facilitate immigration enforcement actions would go beyond the mission of the Census Bureau. Rationale four refers to redistricting and demonstrates a clear link between the government’s prior attempts to collect information about citizenship with reapportionment or redistricting goals that had been hidden under subterfuge in the *New York v. Department of Commerce* litigation. Although the 2019 Order did not explicitly say that citizenship data would be used to change the formula for reapportionment by excluding noncitizens who are ineligible to vote, a regulatory notice filed with the 2019 Order intimates that it would be used in this way.<sup>93</sup>

### B. Legal Barriers to Representation

The aspiration to shrink the eligibility of noncitizens for census enumeration through a contraction of the total counted population would pose a formal means of achieving what the functional barriers aimed to accomplish. If successful, it would eliminate political representation for noncitizens. Excluding immigrants through the adoption of CVAP has been an ambition of conservative legal activists for many years.<sup>94</sup> President Trump’s effort in 2020 can be understood as the

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<sup>92</sup> 2019 Order, *supra* note 90, at 33822–23.

<sup>93</sup> Tierney Sneed, *Feds Producing Data for States to Do Anti-Immigrant Redistricting Overhaul*, TALKING POINTS MEMO (July 15, 2019), <https://talkingpointsmemo.com/news/citizenship-data-states-redistricting-bureau-directed-data> (linking to a regulatory notice stating that, in the absence of a citizenship question on the census, the Census Bureau was directed to produce Citizenship Voting Age Population information prior to April 1, 2021 that states may use in redistricting). Sneed argues that “[i]f the Census Bureau does give the states data on citizenship for redistricting, the next step would be for a state or a local jurisdiction to then draw its districts using CVAP rather than total population.” *Id.* See *infra* text accompanying notes 115–17 for a discussion of the Trump memorandum to exclude aliens in 2020.

<sup>94</sup> See Hansi Lo Wang, *Immigration Hard-Liner Files Reveal 40-Year Bid Behind Trump’s Census Obsession*, NPR (Feb. 15, 2021), <https://www.npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession>.

*continuation* of a “long-simmering battle over the reallocation of political representation.”<sup>95</sup>

### 1. *Limiting Total Population to CVAP: Evenwel v. Abbott*

Federal and state legislatures have on occasion sought to change the formula for reapportionment from total population to CVAP. The legal terrain for these efforts is laid out in the 2016 Supreme Court case *Evenwel v. Abbott*.<sup>96</sup> In *Evenwel*, citizen voters in a Texas district challenged Texas election officials’ use of total population in apportionment as diluting their votes in relation to voters in other Senate districts, in violation of Article I, Section 2 and the Fourteenth Amendment, Section 2.<sup>97</sup> Appellants sought an injunction barring use of the existing Senate map in favor of a map that would equalize the voter population in each district. Amicus briefs in opposition were filed on behalf of immigrants, prisoners, and children who would be excluded from the total population count by a shift to eligible voters.<sup>98</sup> While its ruling upheld the principle of “one person, one vote,” the Court explicitly left open the question of whether CVAP could be used since the Constitution neither compels nor forbids it.

However, the Supreme Court’s opinion explains that constitutional text, history, and precedent show that this issue was considered by the drafters and other courts, who reached the conclusion that total population was deemed to better achieve representational equality. The Fourteenth Amendment commands: “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>99</sup> The *Evenwel* decision highlights the statements of Representative James Blaine at the time of the amendment’s enactment, that “no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot.”<sup>100</sup> The *Evenwel* decision also

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<sup>95</sup> Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1356 (2019).

<sup>96</sup> 136 S. Ct. 1120 (2016).

<sup>97</sup> *Id.* at 1125.

<sup>98</sup> See, e.g., Brief for Amici Curiae Hispanic Bar Association, et al. as Amici Curiae Supporting Appellees, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5731667; Brief of Direct Action for Rights and Equality (DARE), et al. as Amici Curiae Supporting Appellees, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719754; Brief of the Children’s Defense Fund et al. as Amici Curiae Supporting Appellees, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719751.

<sup>99</sup> U.S. CONST. amend. XIV, § 2.

<sup>100</sup> *Evenwel*, 136 S. Ct. at 1128 (citing CONG. GLOBE, 39th Cong., 1st Sess. 141 (1866)). Other members of the House including Representative Conkling and Representative Ward

quotes Senator Jacob Howard from the opposite chamber: “[The] basis of representation is numbers . . . . The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers . . . . Numbers, not voters; numbers, not property.”<sup>101</sup> Moving from text to history, the Court further explains that basing legislative apportionment on voting age population, and by implication CVAP, “would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries.”<sup>102</sup> The opinion also takes note of *Wesberry v. Sanders*, an earlier Supreme Court case which held that the method used to allocate House seats applies to state legislative seats as well: “The debates at the [Constitutional] Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent ‘people’ they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State’s inhabitants.”<sup>103</sup>

Although *Evenwel*’s endorsement of total population counting was unanimous in the Supreme Court, litigants disputed this interpretation of the Constitutional requirements for representational equality. They instead argued that the Framers selected total population for allocating House seats to states because of federalism concerns such as a state expanding its franchise in an attempt to increase its tax base or gain regional advantage in the newly formed nation.<sup>104</sup> In their view, the Constitution pronounces nothing about allocating seats within state legislatures.<sup>105</sup>

Notwithstanding *Evenwel* and other precedent, the federal government during the Trump administration persisted in trying to shrink the population count. One of the more dramatic revelations of the *New York v. Department of Commerce* litigation was that the Republican Party worked with Thomas Hofeller, a political strategist

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agreed and noted that restricting the population count to voters would exclude four-fifths of the total population. *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 358, 434 (1866)).

<sup>101</sup> *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 2766–67 (1866)).

<sup>102</sup> *Id.* at 1132.

<sup>103</sup> *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964); *id.* at 1128.

<sup>104</sup> See *Wesberry*, 376 U.S. at 11; see also *Evenwel*, 136 S. Ct. at 1147–49 (Alito, J., concurring) (arguing in favor of the regional advantage incentive).

<sup>105</sup> See *Wesberry*, 376 U.S. at 6; see also *Reynolds v. Sims*, 377 U.S. 533, 573–74 (1964) (noting the absence of Founders’ intent to establish an apportionment system for state legislatures); *Gray v. Sanders*, 372 U.S. 368, 378 (1963) (same).

who had previously commented on the use of the CVAP to comply with the federal “one person, one vote” standard.<sup>106</sup>

In a study conducted for the purpose of analyzing the prospects of using citizenship data to achieve favorable electoral districts, Hofeller noted that the Supreme Court’s then-pending adoption of the use of total voting age population in *Evenwel* might limit the ability to use citizenship data to their advantage, though he considered use of CVAP still an open question.<sup>107</sup> After acknowledging the fundamental importance of party control to skew redistricting, Hofeller stated that the use of CVAP as the basis for legislative redistricting would result in a different measure of the geographic distributions of people that could be exploited through gerrymandering.<sup>108</sup> Fundamentally, using CVAP “would be advantageous to Republicans and Non-Hispanic Whites.”<sup>109</sup> However, Hofeller concluded “without a congressional mandate for the United States Census Bureau to add a citizenship question to the 2020 Decennial Census form, or such a mandate from the Supreme Court,” changing the method of legislative apportionment would be “functionally unworkable.”<sup>110</sup>

Hofeller correctly predicted that the Supreme Court and congressional Democrats would not allow the citizenship question to be added to the census.<sup>111</sup> Still, the judicial records and regulatory notices associated with the *New York v. Department of Commerce* litigation show that the DOJ nevertheless tried, and the Census Bureau listened.<sup>112</sup>

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<sup>106</sup> THOMAS HOFELLER, THE USE OF CITIZEN VOTING AGE POPULATION IN REDISTRICTING, COMMON CAUSE 1 (2015), <https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf>. For an overview of Hofeller’s background, see Hansi Lo Wang, *Deceased GOP Strategist’s Daughter Makes Files Public that Republicans Wanted Sealed*, NPR (Jan. 5, 2020), <https://www.npr.org/2020/01/05/785672201/deceased-gop-strategists-daughter-makes-files-public-that-republicans-wanted-sea>.

<sup>107</sup> HOFELLER, *supra* note 106, at 4.

<sup>108</sup> *Id.* at 6, 8.

<sup>109</sup> *Id.* at 9.

<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 9 (“A proposal to use CVAP can be expected to provoke a high degree of resistance from Democrats and the major minority groups in the nation.”).

<sup>112</sup> See Census Bureau, *Paperwork Reduction Act Program: Information Collection Request 2020 Census – Enumeration Operations OMB Control Number 0607-1006*, at 16, 47–50, available at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201812-0607-003](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201812-0607-003) (chronicling the Census Bureau’s deliberation of and response to the proposed addition of a citizenship question).

## 2. *Executive Order Excluding Immigrants from Apportionment Base (2020)*

Following the loss in *Department of Commerce v. New York*, President Trump sought to obtain his desired outcome through two executive orders. The 2019 Order collecting information through administrative records has already been described.<sup>113</sup> A 2020 executive order named Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (“Apportionment Memo”) redoubled the effort.<sup>114</sup> The Apportionment Memo sought to use the Census Bureau to differentiate and exclude the undocumented population in the official census count delivered to Congress. In this memo, President Trump proclaimed that “it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act.”<sup>115</sup> He then directed the Secretary of Commerce “to provide information permitting the President . . . to carry out the policy.”<sup>116</sup>

The Apportionment Memo was immediately challenged by a coalition of civil rights groups and state attorneys general, amounting to at least seven lawsuits in five federal districts.<sup>117</sup> The New York litigation in *New York v. Trump* enjoined the Apportionment Memo in September 2020.<sup>118</sup> In addition, a coalition of fifteen states led by New York filed a lawsuit to defend the Census Bureau’s longstanding method of counting noncitizens and citizens alike for apportionment purposes.<sup>119</sup> Attorneys for the coalition, headed by the New York State Attorney General’s office, were prompted in part to intervene due to comments from U.S. Attorney General William Barr which

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<sup>113</sup> See *supra* Section II.A.3 for a discussion on the 2019 Order on Collecting Information.

<sup>114</sup> Apportionment Memo, *supra* note 60, at 44,679.

<sup>115</sup> *Id.* at 44,680.

<sup>116</sup> *Id.*

<sup>117</sup> Complaint, *New York v. Trump*, No. 1:20-cv-05770 (S.D.N.Y. July 24, 2020). The six other cases challenging the Presidential Memorandum include Complaint, *Common Cause v. Trump*, No. 1:20-cv-02023 (D.D.C. July 23, 2020); Complaint, *Haitian-Ams. United, Inc. v. Trump*, No. 1:20-cv-11421-DPW (D. Mass. July 27, 2020); Complaint, *City of San Jose v. Trump*, No. 5:20-cv-05167 (N.D. Cal. July 27, 2020); Complaint, *California v. Trump*, No. 3:20-cv-05169-JSC (N.D. Cal. July 28, 2020); Complaint, *Useche v. Trump*, No. 8:20-cv-02225-PX (D. Md. July 31, 2020); and Second Amended Complaint, *La Unión Del Pueblo Entero v. Trump*, No. 8:19-cv-02710-PX (D. Md. Aug. 13, 2020).

<sup>118</sup> *New York v. Trump*, No. 1:20-cv-05770, at \*5 (S.D.N.Y. Sept. 10, 2020).

<sup>119</sup> Hansi Lo Wang, *15 States Say Unauthorized Immigrants Should Continue to Count for Seats in Congress*, NPR (Sept. 6, 2019), <https://www.npr.org/2019/09/06/754685703/15-states-say-unauthorized-immigrants-should-continue-to-count-for-seats-in-cong>.

indicated hesitation about deferring to the Census Bureau's chosen method of counting total population.<sup>120</sup>

The Supreme Court in December 2020 announced that it would not review these rulings until the Census Bureau submitted its report to Congress.<sup>121</sup> In the course of related litigation, in January 2021 a Justice Department attorney stated data irregularities meant the state population counts needed for reapportioning were not expected until March 2021.<sup>122</sup> The Census Bureau simultaneously announced that it would no longer seek to follow President Trump's Apportionment Memo and would not differentiate the undocumented population in its eventual report.<sup>123</sup> The Apportionment Memo was rescinded by President Joe Biden on his first day in office.<sup>124</sup>

Before it was rescinded, the Apportionment Memo also became the subject of a congressional hearing.<sup>125</sup> Conservative legal scholars testified in support of President Trump that undocumented people should not be counted in the census.<sup>126</sup> In his testimony, Professor John Eastman claimed that under an originalist reading of the founders' theories of representation, immigrants were not "residents" of the states where they reside, "people" and "citizens" were used inter-

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<sup>120</sup> Hansi Lo Wang, *Do Trump Officials Plan to Break Centuries of Precedent in Divvying Up Congress?*, NPR (Aug. 14, 2019), <https://www.npr.org/2019/08/14/749930756/do-trump-officials-plan-to-break-centuries-of-precedent-in-divvying-up-congress>.

<sup>121</sup> *Trump v. New York*, 592 U.S. 530, 537 (2020). Early in 2021, the Census Bureau announced new deadlines for the delivery of apportionment data (April 30, 2021) and redistricting data (September 30, 2021). Hansi Lo Wang, *Census Numbers for Dividing Up House Seats Delayed Until April 30, Bureau Says*, NPR (Jan. 27, 2021), <https://www.npr.org/2021/01/27/961247853/census-numbers-for-dividing-up-house-seats-delayed-until-april-30-bureau-says>; *Census Bureau Statement on Redistricting Data Timeline*, U.S. CENSUS BUREAU (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>.

<sup>122</sup> Hansi Lo Wang, *Census Bureau Stops Work on Trump's Request for Unauthorized Immigration Count*, NPR (Jan. 13, 2021), <https://www.npr.org/2021/01/13/956352495/census-bureau-stops-work-on-trumps-request-for-unauthorized-immigrant-count>.

<sup>123</sup> *Id.* Days before the Census Bureau announced it would not follow Trump's Apportionment Memo, Inspector General Peggy Gustafson revealed that Census Director Steven Dillingham had improperly pressured staff to rush the completion of the report on the undocumented population. Memorandum from Peggy E. Gustafson, Inspector Gen., to Dr. Steven Dillingham, Census Bureau Dir., Regarding Request for Information Pursuant to the Inspector General Act of 1978, as Amended (Jan. 12, 2021), <https://www.oig.doc.gov/OIGPublications/OIG-21-019-M.pdf>.

<sup>124</sup> Exec. Order No. 13986, 86 Fed. Reg. 7015 (Jan. 20, 2021) [hereinafter Biden Executive Order].

<sup>125</sup> *Counting Every Person: Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks: Hearing Before the H. Comm. on Oversight and Reform*, HOUSE COMM. ON OVERSIGHT & REFORM (July 29, 2020), <https://oversight.house.gov/legislation/hearings/counting-every-person-safeguarding-the-2020-census-against-the-trump>.

<sup>126</sup> See, e.g., Eastman Testimony, *supra* note 30.

changeably, and “we the people” only extended to those who had expressed “consent” and “allegiance” to the United States as opposed to immigrants.<sup>127</sup> These observations demonstrate, argues Eastman, that representation in national government was apportioned “only on that part of the population which comprises or becomes part of the body politic,” as opposed to on the total number of inhabitants.<sup>128</sup> Eastman concludes his testimony by saying that the President’s directive is “long overdue” and the directive should be expanded to include “non-citizens more broadly, not just non-citizens who are unlawfully present in the United States.”<sup>129</sup> After the congressional hearing, federal legislation was introduced to prevent implementation of the Apportionment Memo.<sup>130</sup>

The history behind the Apportionment Memo reveals an attempt by the federal government to exclude immigrants from political membership. Adopting CVAP would omit legal noncitizens—whom Trump also sought to exclude in several of his immigration policies—and young people whose votes generally disfavor older, white majorities. A system which excludes undocumented immigrants from the census count would have been more narrowly tailored than leaving out all noncitizens and nonvoting age persons. But its theoretical foundation is harder to defend: Whereas business visitors and tourists may not qualify under regulations as “inhabitants” eligible to be counted on the basis of their temporariness or their foreign political affiliations, green card holders and undocumented immigrants living permanently in the United States arguably have a greater claim to political membership.

### 3. *State Challenges to Using Total Population for Local Districts*

*Evenwel* remains good law and sets forth a strong defense for using total population rather than CVAP for the census. The scope of *Evenwel*, though, is less settled. The population data provided to states can be used for both apportionment of congressional representation and for state redistricting.<sup>131</sup> Consequently, there have been analogous challenges to the use of total population in favor of CVAP in states.

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<sup>127</sup> *Id.* at 9–10, 12.

<sup>128</sup> *Id.* at 11–12.

<sup>129</sup> *Id.* at 12. See also We the People Podcast, *supra* note 21.

<sup>130</sup> H.R. 7724, 116th Cong. (2020) (“To prohibit the use of Federal funds to implement, administer, or enforce the Presidential Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census.”).

<sup>131</sup> See *About Congressional Apportionment*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/public-sector/congressional-apportionment/about.html> (last updated Feb. 10, 2021).

Most significantly, Alabama sought to restrict eligibility for political representation to CVAP.<sup>132</sup> In *Alabama v. United States Department of Commerce*, the state of Alabama and Representative Mo Brooks (R-Ala.) argue that the current system of apportioning congressional seats gives an unfair electoral advantage to states with more undocumented immigrants and will (1) deprive Alabama of its “rightful share of political representation” and (2) cause the state to lose a congressional seat and an electoral vote to a state with a higher number of undocumented individuals.<sup>133</sup> The State contends that counting undocumented immigrants violates the Constitution’s provisions governing congressional apportionment and the electoral college, as well as the federal government’s constitutional duty to conduct an “actual Enumeration” of the population.<sup>134</sup> Alabama seeks to bar the Census Bureau from pursuing a total population count for apportioning congressional seats and electoral votes and to declare unconstitutional any apportionment of seats and votes based on total population. The case is still pending at the time of this writing.

In the 2020 election, Missouri voters approved an amendment to their state constitution that stated legislative districts shall “be drawn on the basis of one person, one vote,” which Missouri officials interpreted as using CVAP.<sup>135</sup> So far there is no litigation, but policy developments since *Evenwel* make a change from total population to

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<sup>132</sup> For a general overview of recent litigation filed by Alabama against the Department of Commerce and the Census Bureau over apportionment policies, see *Alabama v. United States Department of Commerce Court Case Tracker*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/alabama-v-united-states-department-commerce> (last updated May 4, 2021).

<sup>133</sup> Complaint for Declaratory Relief at 2, *Alabama v. U.S. Dep’t of Com.*, No. 2:18-cv-00772 (N.D. Ala. May 23, 2018); see also Tara Bahrapour, *The Census Citizenship Question Failed. But Alabama Is Seeking to Exclude Undocumented Immigrants in Apportioning Congressional Seats*, WASH. POST (Aug. 15, 2019), [https://www.washingtonpost.com/local/social-issues/the-census-citizenship-question-failed-but-an-alabama-lawsuit-seeks-to-exclude-undocumented-immigrants-in-apportioning-congressional-seats-opponents-decry-the-effort-as-unconstitutional-and-an-attempt-by-republicans-to-normalize-the-concept-with-the-public/2019/08/14/1887f190-b777-11e9-b3b4-2bb69e8c4e39\\_story.html](https://www.washingtonpost.com/local/social-issues/the-census-citizenship-question-failed-but-an-alabama-lawsuit-seeks-to-exclude-undocumented-immigrants-in-apportioning-congressional-seats-opponents-decry-the-effort-as-unconstitutional-and-an-attempt-by-republicans-to-normalize-the-concept-with-the-public/2019/08/14/1887f190-b777-11e9-b3b4-2bb69e8c4e39_story.html) (describing Alabama’s argument as grounded in a “concept [that] is a radical shift from anything the country has done in the past”).

<sup>134</sup> Complaint at 2, *Alabama v. U.S. Dep’t of Com.*, No. 2:18-cv-00772.

<sup>135</sup> Hansi Lo Wang, *A National Fight Over Who Is Counted in Voting Districts May Arise from Missouri*, NPR (Nov. 8, 2020), <https://www.npr.org/2020/11/06/931908064/a-national-fight-over-who-is-counted-in-voting-districts-may-arise-from-missouri> (describing the political debate around Missouri’s “one person, one vote” legislative action); see also *supra* note 90. There is no litigation as of this writing, in part because it is unlikely Missouri could compile the necessary data to redistrict without U.S. Census Bureau or ACS population estimates.

CVAP unlikely.<sup>136</sup> Notwithstanding the data challenges, Texas, Arizona, and Nebraska have indicated that they would use citizenship data to pursue CVAP as the basis for redistricting if this data was provided to them;<sup>137</sup> of these states, Texas in 2013 published a report related to the 2010 reapportionment that estimated the CVAP in response to the Census Bureau's decision to remove citizenship information from the long-form questionnaire.<sup>138</sup> Each of these states have increasingly diverse populations under the age of eighteen and stand to retain existing power by limiting their population count to the CVAP.<sup>139</sup> While 2020 demographic data for CVAP is not available, demographic disparities in CVAP and total population mean that if CVAP is used in redistricting by these states, Republican legislatures would be able to slow official recognition of demographic change.<sup>140</sup>

#### 4. *Other Causes for Undercounting: Immigration Enforcement and COVID-19 Delays*

Against the backdrop of mistrust spilling over from the effort to include a citizenship question on the census and to restrict the population count, other confounding factors may undermine counting of immigrants. The federal government's harsh enforcement efforts against immigrants starting at the very beginning of the Trump administration deterred census participation.<sup>141</sup> Worries about contracting

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<sup>136</sup> Notably, the Census Bureau declined to ask about citizenship in 2020, the American Community Survey was not conducted in 2020, and the Census Bureau has suspended work on the post-2020 CVAP special tabulation and likely will not resume. *Post-2020 Census CVAP Special Tabulation*, U.S. CENSUS BUREAU (Oct. 30, 2020), <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap/Post-2020-CVAP.html> (last updated Sept. 1, 2021); *Citizen Voting Age Population by Race and Ethnicity* (Feb. 19, 2021), U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html> (last updated Feb. 19, 2021).

<sup>137</sup> TYE RUSH, SUZANNE ALMEIDA & KESHIA MORRIS, COMMON CAUSE, *WHITEWASHING REPRESENTATION: HOW USING CITIZENSHIP DATA TO GERRYMANDER WILL UNDERMINE OUR DEMOCRACY* 17 (2019).

<sup>138</sup> See TEX. LEGIS. COUNCIL, *ESTIMATING CITIZENSHIP VOTING AGE POPULATION DATA (CVAP): ADDENDUM TO DATA FOR 2011 REDISTRICTING IN TEXAS 1* (2013).

<sup>139</sup> See generally William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted>.

<sup>140</sup> See William H. Frey, *Trump Puts the Census Citizenship Question Back in Play*, BROOKINGS (July 9, 2019), <https://www.brookings.edu/blog/the-avenue/2019/07/09/trump-puts-the-census-citizenship-question-back-in-play> (concluding that redistricting through a “one voting age citizen/ one vote” framework” would “dilute the representation of younger, diverse, and denser populations that comprise larger parts of the nation’s total population than its voting aged population”).

<sup>141</sup> See Lucas Guttentag, *Trump Tracker*, IMMIG. POL’Y TRACKING PROJECT, <https://immpolicytracking.org/home> (last updated June 6, 2021) (cataloguing the over one thousand immigration policies enacted by the Trump administration); see, e.g., Memorandum from Ctr. for Surv. Measurement on Respondent Confidentiality Concerns

COVID-19 from nonhousehold members, going door-to-door, or getting sick and being unable to procure medical care further exacerbated the mistrust and chilled participation in the 2020 census.<sup>142</sup>

The Trump administration's attempts to interfere with the census count in the midst of the pandemic aggravated the perennial problems of undercounting. In an average year, census workers engage in outreach to nonresponsive homes. The early stages of the pandemic presented significant operational obstacles to census administration.<sup>143</sup> Some offices closed.<sup>144</sup> Hiring of census workers was delayed.<sup>145</sup> The Census Bureau issued a press release indicating that a "delay or discontinu[ance]" may be necessary.<sup>146</sup> Once operations recommenced, census workers faced additional obstacles. Regardless of citizenship, social distancing guidelines and the need to quarantine made individuals more reluctant to open their doors to strangers during the pandemic and the government needed to recalibrate its efforts and rely more heavily on online data collection that routinely leaves out poor and minority communities. Immigrant communities were especially worried about sickness because of their fears that testing for the virus or pursuing health care would negatively impact them in the public charge rule.<sup>147</sup>

The federal government also attempted to wind down the census count early, which if successful would have exacerbated an

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(Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf> (reporting increased concerns about misuse of census data in the context of the Muslim ban, the attempted rescission of the Deferred Action for Childhood Arrivals ("DACA") program, and escalated ICE enforcement).

<sup>142</sup> See Nick Brown, *First Online U.S. Census Kicks Off Amid Coronavirus Fears*, REUTERS (Mar. 12, 2020), <https://www.reuters.com/article/us-usa-census-kickoff/first-online-u-s-census-kicks-off-amid-coronavirus-fears-idUSKBN20Z1JH>.

<sup>143</sup> Trevor Bach, *COVID-19 Has Stopped Virtually Everything — Except the U.S. Census*, U.S. NEWS (Mar. 21, 2020), <https://www.usnews.com/news/national-news/articles/2020-03-21/the-coronavirus-outbreak-has-stopped-virtually-everything-except-the-us-census>.

<sup>144</sup> *Id.*

<sup>145</sup> See *id.* (noting that the pandemic created inordinate challenges and unforeseen consequences that led to delay at every stage of the census); Jory Heckman, *2020 Census Hiring Suspended Until at Least April 1 Amid Coronavirus Pandemic*, FED. NEWS NETWORK (Mar. 20, 2020), <https://federalnewsnetwork.com/hiring-retention/2020/03/2020-census-hiring-suspended-until-at-least-april-1-amid-coronavirus-pandemic>.

<sup>146</sup> See *Census Bureau Statement on Coronavirus and the 2020 Census*, U.S. CENSUS BUREAU (Mar. 11, 2020), [https://2020census.gov/en/news-events/press-releases/statement-coronavirus.html?cid=20412:%2Bcensus%20%2Bcoronavirus:sem.ga:p:dm:en:&utm\\_source=sem.ga&utm\\_medium=utm\\_campaign=DM:en&utm\\_content=20412&utm\\_term=%2Bcensus%20%2Bcoronavirus](https://2020census.gov/en/news-events/press-releases/statement-coronavirus.html?cid=20412:%2Bcensus%20%2Bcoronavirus:sem.ga:p:dm:en:&utm_source=sem.ga&utm_medium=utm_campaign=DM:en&utm_content=20412&utm_term=%2Bcensus%20%2Bcoronavirus).

<sup>147</sup> Jeffrey Miron & Erin Partin, *Unintended (COVID) Consequences of Tough Immigration Policies*, CATO INST. (Mar. 27, 2020), <https://www.cato.org/blog/unintended-covid-consequences-tough-immigration-policies>.

undercount. A lawsuit filed by the National Urban League and other civil rights groups alleged that the administration's decision to abandon COVID-19 plans that extend the timeline for counting would rush the data collection and data processing.<sup>148</sup> The "Rush Plan," as they called it, would have resulted in a "massive undercount of the country's communities of color and the municipalities, cities, counties, and states where they live."<sup>149</sup> Ultimately, the Department of Commerce was enjoined "from implementing the [Rush Plan] or allowing to be implemented any actions as a result of the shortened timelines in the [Rush Plan], including but not limited to winding down or altering any Census field operations."<sup>150</sup> The plans were thwarted by Judge Lucy Koh's temporary restraining order against the wind-down plan.<sup>151</sup>

Setting aside the Trump administration's explicit attempt to exclude undocumented people from the apportionment count, numerous flaws in the scheduling,<sup>152</sup> the execution,<sup>153</sup> and the questions regarding citizenship<sup>154</sup> exacerbated the challenging task of obtaining a complete and accurate count of the total population. Data scientists inside and outside of the Census Bureau have expressed concerns that the resulting data may be unreliable due to these anomalies and irregularities.<sup>155</sup>

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<sup>148</sup> Complaint at 2, *Nat'l Urb. League v. Ross*, 2020 WL 4805007 (N.D. Cal. Aug. 18, 2020) (No. 20-cv-5799).

<sup>149</sup> *Id.*

<sup>150</sup> *Nat'l Urb. League v. Ross*, 484 F. Supp. 3d 802, 808 (N.D. Cal. Sept. 5, 2020).

<sup>151</sup> *Id.*

<sup>152</sup> During oral arguments before the Supreme Court in *Trump v. New York*, acting Solicitor General Jeffrey Wall attributed the delays to an earlier injunction issued by a California court, "and some subsequent issues in processing the data." Transcript of Oral Argument at 6, *Trump v. New York*, 141 S. Ct. 530 (2020) (No. 20-336), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/20-366\\_k537.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-366_k537.pdf) [hereinafter *Trump v. New York Oral Arguments*].

<sup>153</sup> In a letter sent to Secretary of Commerce Wilbur Ross on December 2, 2020, the House Committee on Oversight and Reform described thirteen additional anomalies that impacted more than 900,000 census records. Letter from Carolyn B. Maloney, Chairwoman, Comm. on Oversight & Reform, U.S. House of Representatives, to Wilbur L. Ross, Jr., Sec'y of U.S. Dep't of Com. 3-5 (Dec. 2, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-12-02.CBM%20to%20Ross-Commerce%20re%202020%20Census%20Count.pdf> (arguing that "the Trump Administration is preventing Congress from verifying the scope of these anomalies, their impact on the accuracy of the Census, and the time professionals at the Census Bureau need to fix them," a "dangerous pattern of obstruction with the Census").

<sup>154</sup> See *Trump v. New York Oral Arguments*, *supra* note 152, at 86-87 ("[T]he memo expresses the intent to exclude non-citizens who are here unlawfully . . . . [T]he argument has revealed . . . [that] it's going to be very difficult—it's not going to be particularly feasible to exclude all of the non-citizens.") (Kavanaugh, J.).

<sup>155</sup> See, e.g., AM. STATISTICAL ASS'N, 2020 CENSUS QUALITY INDICATORS 1-2 (2020); Hansi Lo Wang, *Millions of Census Records May Be Flawed, Jeopardizing Trump's Bid to*

### III

#### HARMS TO POLITICAL REPRESENTATION OF ASIAN, LATINO, AND IMMIGRANT COMMUNITIES

This Essay has shown that decisions about who is counted in the census determine whose voices are heard in government. These decisions determine whether immigrants count in the political community. This Part describes several harms that flow from excluding immigrants from the political community: altering electoral outcomes, skewing public benefit distribution, and compromising representational equality.

##### *A. Electoral Outcomes*

Undercounting the immigrant population would result in lost U.S. congressional seats for some states and gained seats for others. A shift from counting the total population to counting only CVAP would also shift congressional seats. A Pew Research data analysis suggests that excluding the undocumented population from the census would lead to lost seats in places where immigrants are concentrated, such as California, Florida, and Texas.<sup>156</sup> Arizona, Florida, Georgia, New York, or Illinois may also lose some congressional representation.<sup>157</sup> Effective gains in seats would be expected in Alabama, Minnesota, Ohio, and Montana.<sup>158</sup>

Moreover, since census data is provided at the block level and includes attributes like age, sex, race, and citizenship, the data could be used by states for targeted redistricting according to political aims. Changing districting based on CVAP instead of total population would tend to benefit older, white, rural, Republican voters because it

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*Alter Count*, NPR (Dec. 5, 2020), <https://www.npr.org/2020/12/05/943416487/millions-of-census-records-may-be-flawed-jeopardizing-trumps-bid-to-alter-count> (reporting on leaked documents to the House Oversight and Reform Committee).

<sup>156</sup> See Jeffrey S. Passel & D’Vera Cohn, *How Removing Unauthorized Immigrants from Census Statistics Could Affect House Reapportionment*, PEW RSCH. CTR. (July 24, 2020), <https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment>; see also Ted Mellnik & Kate Rabinowitz, *Where a Citizenship Question Could Cause the Census to Miss Millions of Hispanics*, WASH. POST (July 4, 2019), <https://www.washingtonpost.com/politics/2019/06/06/where-citizenship-question-could-cause-census-miss-millions-hispanics-why-thats-big-deal/>; *New York v. Trump*, 485 F. Supp. 3d 422, 447 (S.D.N.Y. 2020) (“[E]xcluding illegal aliens from the apportionment count could reduce the number of representatives in States with large immigrant populations . . . .”); Complaint at 11, *Common Cause v. Trump*, No. 1:20-cv-02023, 2020 WL 4280023 (D.D.C. July 23, 2020) (noting large apportionment consequences resulting from the exclusion of undocumented immigrants in California, New York, and Georgia).

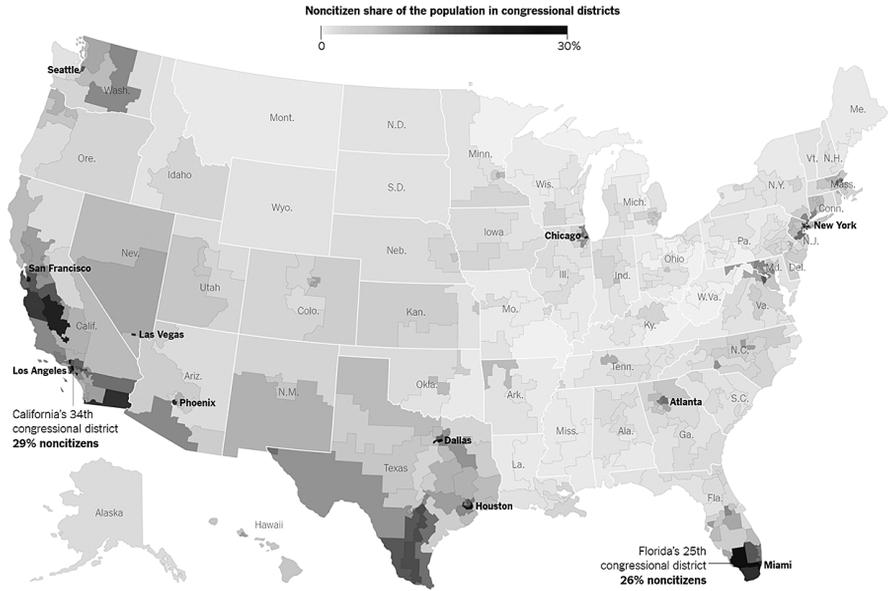
<sup>157</sup> *New York v. Trump*, 485 F. Supp. 3d at 447.

<sup>158</sup> Mellnik & Rabinowitz, *supra* note 156.

boosts their share as compared to younger, more racially diverse, more urban, and more Democratic voters.<sup>159</sup> If the CVAP were used to redraw district lines in Texas, populations in El Paso and the Rio Grande valley would suffer the greatest representational loss, while the greatest gains in representation would be in rural and semirural counties in Central and West Texas.<sup>160</sup>

This manner of exclusion literally seeks to remove noncitizens from the body politic, and it does so in violation of the Constitution, Supreme Court precedent, and settled practice.

FIGURE 5. ELECTORAL CONSEQUENCES OF EXCLUDING CVAP



Sources: Social Explorer, Census Bureau | By Weiyi Cai

<sup>159</sup> See Jowei Chen & Nicholas O. Stephanopoulos, *Democracy's Denominator*, 109 CALIF. L. REV. 1019 (2021).

<sup>160</sup> HOFELLER, *supra* note 107, at 8.

FIGURE 6. ELECTORAL CONSEQUENCES OF EXCLUDING CVAP

**Projected change in congressional seats after 2020 census**

	Current # of House seats	Gain/loss due to census count based on ...		Projected total based on ...	
		Population change	Minus unauthorized immigrants	Population change alone	Pop. change minus unauthorized immigrants
Texas	36	3	-1	39	38
Florida	27	2	-1	29	28
Arizona	9	1	-	10	10
Colorado	7	1	-	8	8
Montana	1	1	-	2	2
North Carolina	13	1	-	14	14
Oregon	5	1	-	6	6
Alabama	7	-1	1	6	7
Minnesota	8	-1	1	7	8
Ohio	16	-1	1	15	16
Illinois	18	-1	-	17	17
Michigan	14	-1	-	13	13
New York	27	-1	-	26	26
Pennsylvania	18	-1	-	17	17
Rhode Island	2	-1	-	1	1
West Virginia	3	-1	-	2	2
California	53	-1	-1	52	51

Note: Current number of House seats based on 2010 census counts.

Source: Method of equal proportions applied to Pew Research Center projections based on Census Bureau population estimates and Pew Research Center estimates of unauthorized immigrants.

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*B. Public Benefits*

Economic consequences follow from the use of CVAP as well. Census data is used to distribute public benefits to states.<sup>161</sup> These

<sup>161</sup> In 2020, the Census Bureau prepared to analyze federal programs “to define either the characteristics of populations served by the program or the characteristics of governments and organizations eligible to receive funds to provide those services,” to determine the amount of funds awarded or allocated to recipients, and to monitor and assess program performance. MARISA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION: A NEW

benefits impact 316 federal programs, including programs targeted at low-income individuals such as Medicaid (except for emergency care), the Children's Health Insurance Program, Temporary Assistance for Needy Families, Supplemental Nutrition Assistance Program, and Supplemental Security Income.<sup>162</sup> They impact an additional \$1.5 trillion of funds that flow through and to states and local governments in the form of grants, loans, and loan guarantees.<sup>163</sup> Further hindering equitable distribution of public benefits, federal laws have distinguished between "qualified" and "not qualified" immigrants to determine benefit eligibility, and this distinction would become more difficult to make if CVAP were introduced.<sup>164</sup> The "qualified" immigrant category includes lawful permanent residents, refugees, and people granted parole by the U.S. Department of Homeland Security (DHS) such as Cuban and Haitian entrants. Certain abused immigrants, their children, their parents, and survivors of trafficking may also be qualified to receive public benefits. All other noncitizens, including undocumented immigrants and others who may be lawfully present in the United States, are considered "not qualified."<sup>165</sup> Since removing noncitizens from the census count corresponds to reduced public benefits for qualified immigrants and for their communities, it effectively renders those immigrants beyond the reach and responsibility of the government.

The dilution of public resources for immigrants is amplified by the chilling effects of a regulation under President Trump that restricted the green card eligibility of some immigrants upon accepting

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DESIGN FOR THE 21ST CENTURY 3 (2017), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>. Scholarship on the distribution of federal spending focuses on Congress and the President. See, e.g., Christopher R. Berry, Barry C. Burden & William G. Howell, *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 783 (2010).

<sup>162</sup> See ANDREW REAMER, GEO. WASH. INST. PUB. POL'Y, COUNTING FOR DOLLARS 2020: THE ROLE OF THE DECENNIAL CENSUS IN THE GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS 1 (Feb. 2020), [https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%202020%20-%20Comprehensive%20Accounting\\_Report%207B%20Feb%202020%20rev.pdf](https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%202020%20-%20Comprehensive%20Accounting_Report%207B%20Feb%202020%20rev.pdf); HOTCHKISS & PHELAN, *supra* note 161, at 3 (finding that 132 federal programs relied on the Census Bureau data to distribute \$675 billion in funds during the 2015 fiscal year); TANYA BRODER, AVIDEH MOUSSAVIAN & JONATHAN BLAZER, NAT'L IMMIGR. L. CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 1, 3 (2015), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms> (focusing on the eligibility of immigrants accessing federal public benefit programs).

<sup>163</sup> REAMER, *supra* note 162, at 144.

<sup>164</sup> See Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (enacting "Welfare reform").

<sup>165</sup> *Id.* §§ 401, 403, 431.

public benefits.<sup>166</sup> The rule, enacted at the end of the Trump administration, rationalized this exclusion as consistent with longstanding rules that disfavor immigrants who were public charges or reliant on the state for their daily needs.<sup>167</sup> The immigration statute excluding public charges from entry does not define the term “public charge.”<sup>168</sup> But in a related statute Congress articulated a national policy that (1) “aliens” within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (2) “the availability of public benefits do not constitute an incentive for immigration to the United States.”<sup>169</sup> In its revision of the public charge rule under the Trump administration in 2019, the DHS reinterpreted the statute to include programs like SNAP, Medicaid, and housing subsidies which were previously excluded from the public charge designation.<sup>170</sup> The result is to exclude people from claiming public benefits if they hope to become citizens one day. In other words, the rule restricts the boundaries of the political community by wealth and burdens the ability of poor noncitizens from someday becoming citizens.

Moreover, a feedback loop exists between the economic and political dimensions of the census: the allocation of public resources spills over into the realm of political representation. In *New York v. Trump*, in which litigants challenged the dilution of immigrants’ political power through their exclusion from a census count, a coalition of states intervening on behalf of the plaintiffs alleged that excluding the undocumented population from the census would reduce federal funds to their entire jurisdiction, and not only for immigrants.<sup>171</sup> They also claimed that immigrants and their communities would suffer from less effective advocacy for future benefits with reduced representation in Congress and the state legislature, setting in motion a cycle of diluted public benefits for the people in districts with many noncitizens.<sup>172</sup>

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<sup>166</sup> Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

<sup>167</sup> *Id.* (“This final rule amends DHS regulations by prescribing how DHS will determine whether an alien applying for admission or adjustment of status is inadmissible to the United States . . . because he or she is likely at any time to become a public charge.”).

<sup>168</sup> Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4). The statute does require the consideration of the following factors: age; health; family status; assets, resources, and financial status; education and skills.

<sup>169</sup> *Id.* § 1601(2).

<sup>170</sup> Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,296.

<sup>171</sup> Complaint at ¶¶ 113, 121–22, *New York v. Trump*, 20-CV-5770-RCW-PWH-JMF, 2020 WL 4253046 (S.D.N.Y. July 24, 2020).

<sup>172</sup> *Id.* at ¶ 123.

Similar to lost electoral seats, the loss of public benefits is a material harm of excluding noncitizens in the census. The significance of this spillover from political to economic belonging is that restricting noncitizen participation in the census extends beyond the sphere of politics—where some are willing to accept inequalities between citizens and noncitizens—into a sphere where citizenship distinctions should be less relevant.

### C. *Representational Harms*

Beyond the material harms of lost electoral seats and public benefits, the exclusion of noncitizens from the census creates symbolic harms. As I stated in this Essay and in a related Essay on representation in voting, immigrants are entitled to be part of the political community, even if they lack other rights reserved for U.S. citizens.<sup>173</sup> Naturalized citizens have an even greater claim to political community as full rights bearers and yet are excluded from society because they bear other markers of disadvantage: being foreign-born, and frequently, being non-native English speakers, racial minorities, and less acclimated to U.S. politics. Overlooking these claims to representation undermines democratic legitimacy and disrespects the associative obligations of Americans to noncitizens because noncitizens have not expressed consent to the persons or positions adopted by elected officials. Studies of procedural justice consistently show that a lack of trust in decisionmakers can lead to noncompliance or a lack of social cooperation, which undermines the very goals of a policy.<sup>174</sup> In the specific instance of the census, a Pew Report shows that the percentage of Americans who believed the 2020 census would be accurate declined over the course of the year and differed by race and ethnicity.<sup>175</sup> In November 2020, 65% of Americans expected the census to be somewhat accurate, down from 68% in June 2020 and 75% in March 2020.<sup>176</sup>

The exclusion of immigrants from the polity is exacerbated by the failure to distinguish noncitizens as a broad category of persons from the narrower category of undocumented immigrants. As a legal matter, counting the undocumented population is notoriously tricky

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<sup>173</sup> See *supra* Part I for an overview of political community; see also Chen & Knapp, *supra* note 9, at 721.

<sup>174</sup> See generally Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. PUB. INT. 75 (2015).

<sup>175</sup> D'Vera Cohn, *How Accurate Will the 2020 U.S. Census Be? We'll Know More Soon*, PEW RSCH. CTR. (Dec. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/12/14/how-accurate-will-the-2020-u-s-census-be-well-know-more-soon>.

<sup>176</sup> *Id.*

because the definition of unlawful presence is very complicated and sometimes indeterminate.<sup>177</sup> Additionally, undocumented immigrants may refrain from participation out of fear that their neighborhoods could experience targeted immigration enforcement or harassment if the census count reveals their status.<sup>178</sup>

Moreover, as a theoretical matter, by eliminating undocumented immigrants from the total population count, the government uses a consent-based theory to say Americans do not consent to the presence of undocumented immigrants and neither the government nor American citizens accept responsibility to represent them or hold reciprocal obligations.<sup>179</sup> Resorting to CVAP takes this argument a step further by implying that Americans do not consent to *any* noncitizens being part of their political community: not even documented immigrants such as lawful permanent residents or temporary visa holders. This faulty implication results from unexamined assumptions. It also shows the reach of exclusionary immigration enforcement policies into the everyday affairs of immigrants seeking to integrate into their political communities. The corollary is also true: noncitizens whose input or consent is not sought by their representatives are coerced into supporting policies and positions that may not align with their own interests.<sup>180</sup>

It would be fair to ask whether the collection of citizenship data from the census *necessarily* excludes noncitizens from the polity. After all, in other contexts more data is better. Demographers generally prefer more detailed data collection about population groups.<sup>181</sup> Civil rights advocates usually advocate for data disaggregation and official recognition as a means of protecting—rather than harming—racial minority groups.<sup>182</sup> However, collecting citizenship data from noncitizens during a period of perceived or actual immigration enforcement

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<sup>177</sup> See *supra* text accompanying notes 61–63 (discussing the indeterminacy of undocumented status).

<sup>178</sup> See Brown et al., *supra* note 78, at 2, 6, 19–20, 39 (concluding that “adding a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens” and explaining incentives to provide an incorrect answer due to concerns about data being used for enforcement).

<sup>179</sup> See *supra* note 8.

<sup>180</sup> *Id.*

<sup>181</sup> For one of many contemporary efforts for data disaggregation, see, for example, *FAQ: Data Disaggregation and Asian Americans*, ASIAN AM. ADVANCING JUST., <https://censuscounts.org/wp-content/uploads/2019/03/FAQs-on-Data-Disaggregation-and-Asian-Americans.pdf> (last visited June 3, 2021).

<sup>182</sup> See *infra* notes 190–92 and accompanying text. For historical accounts of the politics of recognition and multiracialism on the census, see, for example, VICTORIA HATTAM, *IN THE SHADOW OF RACE: JEWS, LATINOS, AND IMMIGRANT POLITICS IN THE UNITED STATES* (2007); *THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS* (Joel Perlmann & Mary C. Waters eds., 2002); *COLOR LINES: AFFIRMATIVE*

is risky, so the costs and benefits need to be weighed. The historical and contemporary examples of federal and state governments seeking to collect citizenship information has indeed worked to the detriment of immigrants. Even if the fears of government abuse can be mitigated—for example, by assuring immigrant communities that the collection of citizenship data is motivated by a desire to help, or at least not harm, or by improving legal safeguards against data sharing with immigration enforcement—the data is vulnerable to misuse. For example, some of the risks described in government privacy impact statements include the possibility that disclosure of sensitive information could lead to an inaccurate immigration status being assigned to an individual or the data could be used for unauthorized purposes.<sup>183</sup> As a matter of accuracy, the census data could be inaccurately linked with data from DHS and other sources and the individual would not be able to correct or amend information about them in official records.<sup>184</sup> Ultimately, it is not clear that these risks are justified when social scientists and statisticians contend there are less risky ways to produce accurate data about citizenship, such as administering surveys to smaller groups and relying on statistical sampling to extrapolate the total population<sup>185</sup> or using administrative records that are already kept by other agencies within certain parameters.<sup>186</sup>

## CONCLUSION

The conclusion suggests several solutions to the problems of representational inequality for noncitizens. Generally, census reports need to reflect changing demographics to keep up with the Founders'

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ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA (John David Skrentny ed., 2001).

<sup>183</sup> See DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE DEPARTMENT OF HOMELAND SECURITY (DHS) IMMIGRATION-RELATED INFORMATION SHARING WITH U.S. CENSUS BUREAU 10–11 (2019) (offering mitigation mechanisms, but recognizing that full mitigation is not possible).

<sup>184</sup> See *id.* at 11.

<sup>185</sup> See, e.g., Jennifer Van Hook & James D. Bachmeier, *How Well Does the American Community Survey Count Naturalized Citizens?*, 29 DEMOGRAPHIC RSCH. 1, 5–15 (2013). The DHS, the Pew Hispanic Center, and the Center for Migration Studies regularly produce estimates of the unauthorized foreign population using similar statistical methods.

<sup>186</sup> Administrative records from the DHS or other agencies specified in the 2019 Order could be useful for limited purposes, but they have their own risks of inaccuracy if used to estimate precise numbers of undocumented immigrants at detailed levels of geography. See Jennifer Van Hook, *Analysis: Why the 2020 Census Doesn't Need a Citizenship Question to Count the Undocumented*, PBS NEWS HOUR (July 17, 2019), <https://www.pbs.org/newshour/science/analysis-why-the-2020-census-doesnt-need-a-citizenship-question-to-count-the-undocumented> (acknowledging that while administrative records “could help answer some narrowly defined questions about immigrants and improve national estimates,” they would likely be insufficient to resolve many other inquiries).

aspiration of representational equality in a democracy. The need for the Census Bureau to counter inequality for Black and lower-income voters is a recognized challenge. Extending the scope of attention to include countering inequality for the growing immigrant, Asian, and Latino foreign-born population is also necessary. Indeed, representational equality is more consequential than ever given the rift between the white majority citizen population and newer communities that tend to be younger, more racially diverse, and more Democratic.

Beneath the technical details of formulas for enumeration, political leaders and theorists need to expand overly narrow conceptions of who is considered a member of the political community. They need to make the case that immigrants and foreign-born citizens are part of the political community, similar to U.S.-born citizens. This conceptual shift requires recognizing that representation in a democracy is not conditioned on a one-to-one translation of voter wishes into policies; it is based on a broader conception of the public interest and a commitment to representational equality in a democracy.<sup>187</sup> Policymakers who recognize that the total population within their districts includes immigrants in a variety of legal statuses—ranging from permanent to temporary, legal to undocumented—will more faithfully embody the wishes of “we the people.” The restoration by President Biden’s Census Bureau of the longstanding practice of including noncitizens in the total population count is a promising step in this direction, but other challenges persist.<sup>188</sup>

Congress can prevent the erosion of representational equality by continuing to use total population when counting the American people. This metric ensures that immigrants and the noncitizen and nonvoting population are not excluded from electoral politics. Courts should stringently review the rationales set forward to justify narrower schemes of counting, including President Trump’s executive order to eliminate undocumented immigrants from the count and state-led efforts to institute citizenship qualifications for political representation. While redistricting is inextricably political, its important implications for equality protections found in the Equal Protection Clause and Voting Rights Act necessitate rigorous scrutiny.

Another way to bolster noncitizen representation is to mobilize immigrants and communities with many foreign-born citizens to participate in the decennial enumeration. Maintaining census questionnaires that are fair and do not intimidate participants is a prerequisite

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<sup>187</sup> Elizabeth F. Cohen describes this public interest notion as “trusteeship.” Cohen, *supra* note 6, at 1058.

<sup>188</sup> See Biden Executive Order, *supra* note 124.

to attaining a comprehensive and accurate count. Survey data can be used to mitigate risks to vulnerable communities.<sup>189</sup> Information requests about aggregated data can be limited to avoid creation of citizen designations at the block level that can then be used improperly for redistricting in Congress and state legislatures. If information about immigration status is needed for other government purposes, especially immigration enforcement, it should come from data sources other than the census. Safeguards should avoid the misuse of data<sup>190</sup> or violations of privacy that have brought harm to immigrants in the past.<sup>191</sup>

Immigrants are not the same as American citizens, and they do not have all of the same rights. But representational equality requires that immigrants be seen as members of the same political community as other Americans in the United States.

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<sup>189</sup> Although the modern Census Bureau and civil rights groups have favored a method of reserving citizenship and other sensitive questions for statistical sampling only, courts and conservatives have resisted sampling (as recently as 1999). See MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* ix (2000) (“In January 1999, the U.S. Supreme Court ruled that the Bureau of the Census may not use sampling techniques in determining representational apportionment.”). The Supreme Court expressed a view that sampling techniques violate the strict text of the Constitution’s command to count every person. See *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 334–35 (1999). A related view is the idea that counting every person is a civic act and that using a method that skips over that act amounts to a shortcut that denies sampled groups the ability to directly participate, though support for this civic-act theory fades when confronted with the empirical reality that a more accurate account derives from sampling rather than counting hard-to-reach groups, particularly amidst the availability of improved administrative records relating to naturalization data. Politicians in Congress have weighed in on sampling, though their views are muddled by political incentives to align their views with the projected benefits to their parties.

<sup>190</sup> See, e.g., Comment on the 2020 Census Information Collection Request, ACLU (Oct. 9, 2019), <https://www.aclu.org/letter/aclu-2020-census-icr-comment> (commenting on a federal register notice with “serious concerns” regarding block-level CVAP data production).

<sup>191</sup> Historical examples of privacy transgressions include the use of citizenship data during World War II to intern Japanese Americans and the 2004 sharing of aggregated totals from the 2000 census to identify Arabs for purposes of DHS enforcement. See Lori Aratani, *Secret Use of Census Info Helped Send Japanese Americans to Internment Camps in WWII*, WASH. POST (Apr. 6, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/03/secret-use-of-census-info-helped-send-japanese-americans-to-internment-camps-in-wwii/?variant=116ae929826d1fd3>; Lynette Clementson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES (July 30, 2004), <https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>. Requests for special tabulations on sensitive populations made by federal, state, or local law enforcement and intelligence agencies using protected data now require prior approval from the appropriate associate director of the government agency.