THE POLITICAL (MIS)REPRESENTATION OF IMMIGRANTS IN THE CENSUS

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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.\(^1\) 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.\(^2\) To other theorists, citizenship consists of membership in a political community and includes both rights and participation.\(^3\) 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.\(^4\) Political participation occurs through individual voting and representation by elected representatives.

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\(^1\) See generally *Ming Hsu Chen, Pursuing Citizenship in the Enforcement Era* (2020).

\(^2\) 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 Faghfouri 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” includes national citizenship to “protect” those rights).


officials. 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. 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. 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.

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. The “immigrants” and “noncitizens” in this Essay are foreign-born persons who have not attained naturalized citizenship. In the

6 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).
7 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).
8 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).
10 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. 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. 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. This is particularly disturbing given that the evolution of citizenship reveals a history of exclusion. Federal laws initially qualified citizenship by racial prerequisites. African Americans did not gain citizenship until the Reconstruction Amendments implemented between 1865 and 1870. Chinese Americans did not gain citizenship until the repeal of the Chinese Exclusion Act in 1943. Latinos have been reclassified as citizens or noncitizens throughout history, and they are still considered an ethnicity rather than a race on official forms.


12 See infra Part I.

13 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)).


These exclusions violate the principle that, within a community, persons owe each other associative obligations. 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. 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. 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. 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. Studies demonstrate citizenship questions lead to underparticipation from immigrants and their families, resulting in inaccurate population counts.

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

18 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).

19 U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend. XIV, § 2.


21 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).


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).

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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.25 The Supreme Court has interpreted this command to require equal representation of all persons under the Fourteenth Amendment.26 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.27 Specifically, notwithstanding their persistent disenfranchisement until the passage of the Fifteenth Amendment, freed slaves were counted as persons in the Fourteenth Amendment.28 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.”29 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.”30

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

25 U.S. CONST. amend. XIV, § 2; id. art. I, § 2, cl. 3.
27 See id. at 1127–28.
28 Id. at 1127.
29 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).
30 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.
31 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. 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. 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. The lesser diversity in older census counts explains why policymakers, while tasked to focus on “persons,” occasionally used the terms persons and voters interchangeably. 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.


35 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.
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.36 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.”37 Instead, after extensive immigration from Latin America and Asia, by 2015 the population was 62% white, 12% Black, 18% Hispanic (Latino) and 6% Asian.38 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 2055.39 The 2020 census shows the continued trend of the U.S. population becoming more racially and ethnically diverse.40

38 Id. at 9 fig.4.
39 Id. at 10; see also Budiman & Ruiz, supra note 36.
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. 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. 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. 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. 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.

Asian American voters are becoming an increasingly significant electoral block as well. The political heterogeneity of Asian American voters is becoming more apparent, with different communities having different preferences. For example, Vietnamese-American voters have traditionally supported the Democratic Party, while Korean-American voters have been more inclined to support the Republican Party. Additionally, Asian American voters in key swing states have played a crucial role in determining the outcome of recent elections.


43 Krogstad, supra note 41.


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

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 2020.50 The majority of this cohort of naturalized voters are either Latino (34%) or Asian (31%).51

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,52 and Latinos and

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51 BUdIMAN ET AL., supra note 50, at 7.

Asian Americans sometimes confront language barriers. These racial groups overwhelmingly vote Democratic. Additionally, Latinos skew younger than the average population and consequently tend to be more progressive. 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. Whereas the divergence of individuals classified as “persons” or “inhabitants” of a particular state versus citizens used to be relatively small, the population disparities are now enough to change the allocation of seats in Congress and state legislatures and to influence redistricting. 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. The increased presence of noncitizen and younger people amplifies the importance of using total

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

53 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).

54 See supra notes 36-48 and accompanying text.


56 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”).

57 See supra notes 32–34 and accompanying text.

58 Id.

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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. 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. 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. Some immigrants are undocumented because they enter the country without inspection, others overstay their visas,


61 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. For a rebuttal, see the prior discussion of affected interests and the coercion principle, supra note 8 and accompanying text.

and others are removable because they either failed to comply with other terms of their visa or are removable on other grounds.\textsuperscript{63} 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.\textsuperscript{64} 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.\textsuperscript{65}

\textbf{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,\textsuperscript{66} exclude noncitizens from voting in local ele-


\textsuperscript{64} 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).

\textsuperscript{65} See infra notes 165–71 and accompanying text.

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Tions, narrow the definition of constituents on the citizenship test, 67 and strip naturalized citizenship without due process. 68 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

internet access” hinder participation.\textsuperscript{70} 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.\textsuperscript{71}

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

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.\textsuperscript{74} 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,”\textsuperscript{75} because “the group being counted perceive[s] [the] possibility of the information being used against them.”\textsuperscript{76} The effect was likely magnified in the political climate created by the Trump administration.\textsuperscript{77}


\textsuperscript{73} Id. at 25; see also Memo from Ctr. for Surv. Measurement, \textit{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, \textit{N.Y. Times} (June 27, 2019), https://www.nytimes.com/2019/06/27/us/supreme-court-citizenship-census-immigrants.html.

\textsuperscript{74} 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 Dept’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.


\textsuperscript{76} Id.

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.” Before the completion of this study, however, Commerce Secretary Wilbur Ross decided to announce reinstatement of the citizenship question in a March 2018 memorandum. 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. 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.

**Figure 4. Hispanics with No Citizenship Answer on the 2017 American Community Survey**

Source: Washington Post

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80 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).


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. 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.

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, 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. The Supreme Court agreed with lower courts that this explanation was pretextual. 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. 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.

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86 Id. at 660.
87 Id. at 679.
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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), 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.” The information would be used for a variety of purposes. 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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90 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.

91 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; Yurij Rudensky & Gabriella Limon, Missouri Amendment 3 Passed, What Does that Mean for Redistricting?, BRENNA NCTR. (Nov. 5, 2020), https://www.brennancenter.org/our-work/research-reports/mo-3-passed-what-does-mean-redistrict. 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.”

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.

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. President Trump’s effort in 2020 can be understood as the

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92 2019 Order, supra note 90, at 33822–23.
93 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.
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continuation of a “long-simmering battle over the reallocation of political representation.”

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. 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. 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.

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.”

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.”¹⁰¹ 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.”¹⁰² 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.”¹⁰³

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.¹⁰⁴ In their view, the Constitution pronounces nothing about allocating seats within state legislatures.¹⁰⁵

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

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)).

¹⁰¹ Id. (citing CONG. GLOBE, 39th Cong., 1st Sess. 2766–67 (1866)).

¹⁰² Id. at 1132.

¹⁰³ Wesberry v. Sanders, 376 U.S. 1, 13 (1964); id. at 1128.

¹⁰⁴ 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).

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

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.107 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.108 Fundamentally, using CVAP “would be advantageous to Republicans and Non-Hispanic Whites.”109 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.”110

Hofeller correctly predicted that the Supreme Court and congressional Democrats would not allow the citizenship question to be added to the census.111 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.112

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107 HOFELLER, supra note 106, at 4.
108 Id. at 6, 8.
109 Id. at 9.
110 Id. at 4.
111 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.”).
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.\textsuperscript{113} A 2020 executive order named Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (“Apportionment Memo”) redoubled the effort.\textsuperscript{114} 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.”\textsuperscript{115} He then directed the Secretary of Commerce “to provide information permitting the President . . . to carry out the policy.”\textsuperscript{116}

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.\textsuperscript{117} The New York litigation in New York v. Trump enjoined the Apportionment Memo in September 2020.\textsuperscript{118} 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.\textsuperscript{119} 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

\textsuperscript{113} See supra Section II.A.3 for a discussion on the 2019 Order on Collecting Information.

\textsuperscript{114} Apportionment Memo, supra note 60, at 44,679.

\textsuperscript{115} Id. at 44,680.

\textsuperscript{116} Id.


indicated hesitation about deferring to the Census Bureau’s chosen method of counting total population.120

The Supreme Court in December 2020 announced that it would not review these rulings until the Census Bureau submitted its report to Congress.121 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 2021.122 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.123 The Apportionment Memo was rescinded by President Joe Biden on his first day in office.124

Before it was rescinded, the Apportionment Memo also became the subject of a congressional hearing.125 Conservative legal scholars testified in support of President Trump that undocumented people should not be counted in the census.126 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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123 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.


126 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. 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. 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.” After the congressional hearing, federal legislation was introduced to prevent implementation of the Apportionment Memo.

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. Consequently, there have been analogous challenges to the use of total population in favor of CVAP in states.

127 Id. at 9–10, 12.
128 Id. at 11–12.
129 Id. at 12. See also We the People Podcast, supra note 21.
130 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.”).
Most significantly, Alabama sought to restrict eligibility for political representation to CVAP.\textsuperscript{132} In \textit{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.\textsuperscript{133} 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.\textsuperscript{134} 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.\textsuperscript{135} So far there is no litigation, but policy developments since \textit{Evenwel} make a change from total population to

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


\textsuperscript{134} Complaint at 2, Alabama v. U.S. Dep’t of Com., No. 2:18-cv-00772.

\textsuperscript{135} Hansi Lo Wang, \textit{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. 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; 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. 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. 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.

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. 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).

136 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/votingrights/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).

137 TYE RUSH, SUZANNE ALMEIDA & KESHIA M ORRIS, COMMON CAUSE, WHITENING REPRESENTATION: HOW USING CITIZENSHIP DATA TO GERRYMANDER WILL UNDERMINE OUR DEMOCRACY 17 (2019).


140 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”).

141 See Lucas Gutten tagged, 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.\textsuperscript{142} 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.\textsuperscript{143} Some offices closed.\textsuperscript{144} Hiring of census workers was delayed.\textsuperscript{145} The Census Bureau issued a press release indicating that a “delay or discontinu[ance]” may be necessary.\textsuperscript{146} 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.\textsuperscript{147}

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


\textsuperscript{144} Id.


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.\(^{148}\) 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.”\(^{149}\) 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.”\(^{150}\) The plans were thwarted by Judge Lucy Koh’s temporary restraining order against the wind-down plan.\(^{151}\)

Setting aside the Trump administration’s explicit attempt to exclude undocumented people from the apportionment count, numerous flaws in the scheduling,\(^{152}\) the execution,\(^{153}\) and the questions regarding citizenship\(^{154}\) 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.\(^{155}\)


\(^{149}\) Id.


\(^{151}\) Id.


\(^{153}\) 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”).

\(^{154}\) 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.).

\(^{155}\) 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.156 Arizona, Florida, Georgia, New York, or Illinois may also lose some congressional representation.157 Effective gains in seats would be expected in Alabama, Minnesota, Ohio, and Montana.158

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


158 Mellnik & Rabinowitz, supra note 156.
boosts their share as compared to younger, more racially diverse, more urban, and more Democratic voters. 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.

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

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160 Hofeller, *supra* note 107, at 8.
B. Public Benefits

Economic consequences follow from the use of CVAP as well. Census data is used to distribute public benefits to states.\footnote{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. 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. 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. 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.” 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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163 Reamer, supra note 162, at 144.


165 Id. §§ 401, 403, 431.
public benefits.\textsuperscript{166} 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.\textsuperscript{167} The immigration statute excluding public charges from entry does not define the term “public charge.”\textsuperscript{168} 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.”\textsuperscript{169} 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.\textsuperscript{170} 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.\textsuperscript{171} 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.\textsuperscript{172}

\textsuperscript{167} 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.”).
\textsuperscript{168} 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.
\textsuperscript{169} Id. § 1601(2).
\textsuperscript{170} Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,296.
\textsuperscript{172} 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. 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. 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. In November 2020, 65% of Americans expected the census to be somewhat accurate, down from 68% in June 2020 and 75% in March 2020.

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.

173 See supra Part I for an overview of political community; see also Chen & Knapp, supra note 9, at 721.
176 Id.
because the definition of unlawful presence is very complicated and sometimes indeterminate. 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.

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. 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.

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. Civil rights advocates usually advocate for data disaggregation and official recognition as a means of protecting—rather than harming—racial minority groups. However, collecting citizenship data from noncitizens during a period of perceived or actual immigration enforcement...
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. 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. 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 or using administrative records that are already kept by other agencies within certain parameters.

**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’
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.\textsuperscript{187} 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.\textsuperscript{188}

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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\textsuperscript{187} Elizabeth F. Cohen describes this public interest notion as “trusteeship.” Cohen, supra note 6, at 1058.

\textsuperscript{188} 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. 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 or violations of privacy that have brought harm to immigrants in the past.

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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189 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 muddied by political incentives to align their views with the projected benefits to their parties.
