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Immigration Law
*The Political (Mis)Representation
of Immigrants in the Census*

Ming Hsu Chen¹

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 face when considered outsiders to this political community?

Some theorists say political rights are the *sine qua non* of citizenship and that political rights ought to be reserved for citizens.² Others say citizenship consists of membership in a political community and includes both rights and participation.³ Political participation occurs through individual voting and representation by elected officials.⁴ The focus of this chapter 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.⁵ Elected representatives are obligated to look out for all the

¹ Excerpted and adapted from Ming Hsu Chen, *The Political (Mis)Representation of Immigrants in the Census*, 96 N.Y.U. L. REV. 901 (2021).

² E.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298–300 (1968 ed.).

³ E.g., Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 452 (2000).

⁴ SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 8–9 (1995).

⁵ See generally Elizabeth F. Cohen, *Dilemmas of Representation, Citizenship, and Semi-Citizenship*, 58 ST. LOUIS U. L. REV. 1047 (2014)

people in their district, regardless of citizenship status, because legislators represent the public interest, not merely the interests of voting constituents.⁶

The census count, or enumeration, shapes representation because the size of the population determines apportionment (how many seats are available) and redistricting (how those seats will be distributed). Representation is intertwined with voting because individual voters select the officials who fill those seats. Yet representation is distinct from voting because it is not restricted to citizens.

Who gets counted in the census reveals political inequality because immigrants lack the political rights to vote, serve jury duty, and hold public office even though they are supposed to be counted in the census. 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.⁷ This is particularly disturbing given that the evolution of citizenship reveals a history of exclusion.⁸

These exclusions violate the principle that, within a community, persons owe each other associative obligations.⁹ The

(arguing that representatives should include in their decisionmaking considerations important to those who cannot vote).

⁶ *See id.*

⁷ Michael Walzer argues that principles of distributive equality are violated when rights in one sphere of life do not carry over to other spheres. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 63 (1983).

⁸ *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).

⁹ 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

Framers specified in the Constitution that the total population of the nation should be based on the number of persons residing in a state.¹⁰ 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.¹¹ But the Census Bureau avoided asking about citizenship on the decennial count of the total population for the next seventy years until 2020.¹² 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.¹³ Studies demonstrate that citizenship questions lead to underparticipation from immigrants and their families, resulting in inaccurate population counts.¹⁴

Contemporary efforts to exclude immigrants from the census should be understood in the context of this history of political contestation.

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), see SARAH SONG, *IMMIGRATION AND DEMOCRACY* (2018).

¹⁰ U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

¹¹ 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) (listing the wording of census citizenship questions from 1820 through 1950).

¹² See Wolf & Cea, *supra* note 11, at 16, 26–28.

¹³ Tamara Keith, *Fact Check: Has Citizenship Been a Standard Census Question?*, NPR (Mar. 27, 2018).

¹⁴ 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); see also Mem. from Ctr. for Surv. Measurement for Assoc. Directorate for Rsch. & Methodology, *Respondent Confidentiality Concerns* (Sept. 20, 2017), <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).

*Challenges of Representational Equality
Among Growing Demographic Diversity*

The Constitution mandates the counting of “persons” in each State every ten years.¹⁵ The Supreme Court has interpreted this command to require equal representation of voters and nonvoters alike.¹⁶ Further, the Supreme Court has consistently used total-population figures to evaluate whether districting maps violate the Equal Protection Clause.¹⁷ 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.”¹⁸

Congress tasked the Secretary of Commerce, aided by the Census Bureau, with conducting the census count,¹⁹ and the Census Bureau has exercised its mission “to count everyone once, only once, and in the right place” using a formula of counting persons in the total population.²⁰ The Census Bureau counts “persons” as “inhabitants of the state where they reside,” and its regulations define inhabitants to include noncitizens living in the United States, “[c]ounted at the U.S. residence where they live and sleep most of the time.”²¹ Counting everyone is an immense task

¹⁵ U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

¹⁶ See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

¹⁷ *Id.* at 1124; see also *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) (declaring that the Framers of the Equal Protection Clause agreed that the House of Representatives should represent “people” based on the number of inhabitants).

¹⁸ *Evenwel*, 136 S. Ct. at 1132.

¹⁹ 13 U.S.C. §§ 21, 141(a).

²⁰ *2020 Census: Our Mission to Count Everyone*, U.S. CENSUS BUREAU (June 22, 2020), <https://www.census.gov/content/dam/Census/library/factsheets/2020/de/c/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).

²¹ Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018). This definition includes legal

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.²²

Those challenges have only grown with increasing demographic diversity concentrated in certain states. 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, a much greater divergence between voters and persons is driven by increased immigration from Latin America and Asia.²³ 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.”²⁴ Instead, after extensive immigration from Latin America and Asia, by 2015 the population was 60% white, 13% Black, 18% Hispanic (Latino) and 6% Asian.²⁵ 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 2055.²⁶ The 2020 census shows the continued trend of the U.S. population becoming more racially and ethnically diverse.²⁷

permanent residents, certain temporary-visa holders, and undocumented immigrants.

²² See *2020 Census: Our Mission to Count Everyone*, *supra* note 20; 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>.

²³ See Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021).

²⁴ PEW RSCH. CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065, at 9 (2015).

²⁵ CENSUS DEP’T, QUICK FACTS (2021), <https://www.census.gov/quickfacts/fact/table/US/PST045221>.

²⁶ PEW RSCH. CTR., *supra* note 24, at 10; *see also* Budiman & Ruiz, *supra* note 23.

²⁷ *2020 U.S. Population More Racially and Ethnically Diverse Than Measures in 2010*, U.S. CENSUS BUREAU (Aug. 12, 2021),

The growth of immigrant populations is electorally significant. Historically, the percentage of the nonvoting population was geographically uniform, but immigration since the 1960s has more rapidly increased nonvoting populations in certain states.²⁸ Pew Hispanic data show that the nation's largest Latino populations are in California, Texas, Florida, and New York.²⁹ The two states with the greatest number, California (15.6 million) and Texas (11.5 million), are among the most populous and delegate-rich states in the country.³⁰ This changing profile and geographic distribution of the political community challenges representational equality.³¹ Immigrant-population increases, if properly counted, now would change the allocation of seats in Congress and state legislatures and influence redistricting.³²

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 population as the counting method for purposes of furthering representational equality. Yet this principle counting noncitizens for purposes of allocating political representation is under challenge on multiple fronts.

<https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html>.

²⁸ See Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020) (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).

²⁹ Jens Manuel Krogstad, *Hispanics Have Accounted for More than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020); *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> (last updated Mar. 6, 2020).

³⁰ Krogstad, *supra* note 29; *Distribution of Electoral Votes*, *supra* note 29.

³¹ See, e.g., Janai Nelson, *Counting Change: Ensuring an Inclusive Census for Communities of Color*, 119 COLUM. L. REV. 1399, 1405 (2019).

³² *Id.*

Social and Political Barriers to Representation

The census routinely undercounts immigrants and racial minorities, especially those who live in households with both noncitizens and citizens, because immigrants and racial minorities, like other vulnerable populations, are hard to enumerate and are dissuaded from participation.³³ In August 2018, a Census Bureau study 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.”³⁴ In part for that reason, the Census Bureau avoided putting a question about citizenship status on the decennial form for many years.³⁵

In March 2018, however, Commerce Secretary Wilbur Ross sought to include a citizenship question in the 2020 census.³⁶ The courts held Ross’s attempt to do so to be procedurally unlawful,³⁷ but President Trump issued an executive order that would provide an alternative means of obtaining information about citizenship status³⁸ by ordering “all executive departments and agencies” to

³³ See, e.g., Hansi Lo Wang, *The 2020 Census had Big Undercounts of Black People, Latinos and Native Americans*, NPR (Mar. 11, 2022) (reporting a 3.3% undercount of Black people and a 5% undercount of Latinos).

³⁴ 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 2018). A 2019 independent 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. 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).

³⁵ See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2561–62 (2019).

³⁶ Letter from Wilbur Ross, Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs, 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.

³⁷ 351 F. Supp. 3d 502, 600 (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).

³⁸ Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (Jul. 11, 2019).

“provide the Department [of Commerce] the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country.”³⁹ An official justification was to allow “States to design State and local legislative districts based on the population of voter-eligible citizens.”⁴⁰

In his last year in office, President Trump ordered a count of every unauthorized immigrant in the nation and asked the Census Bureau to subtract this number from the official census count delivered to Congress.⁴¹ President Trump proclaimed it “the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status.”⁴² That Apportionment Memo was immediately challenged in court⁴³ and was temporarily enjoined in September 2020.⁴⁴ Under intense time pressure and pandemic-related delays, the Census Bureau concluded it would not follow the Apportionment Memo and would not differentiate the undocumented population in the census report.⁴⁵ President Joe Biden rescinded the Apportionment Memo on his first day in office.⁴⁶

The history behind the Apportionment Memo relates to a “long-simmering battle over the reallocation of political representation”⁴⁷ by changing the formula for reapportionment from total population to CVAP.

The 2016 Supreme Court case *Evenwel v. Abbott*⁴⁸ laid out the legal terrain for these efforts. In *Evenwel*, citizen voters in a Texas

³⁹ *Id.*

⁴⁰ *Id.* at 33,822–23.

⁴¹ Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census (“Apportionment Memo”), 85 Fed. Reg. 44,679 (July 21, 2020).

⁴² *Id.* at 44,680.

⁴³ *E.g.*, *New York v. Trump*, No. 1:20-cv-05770 (S.D.N.Y. July 24, 2020).

⁴⁴ *Id.* at *5.

⁴⁵ Hansi Lo Wang, *Census Bureau Stops Work on Trump’s Request for Unauthorized Immigration Count*, NPR (Jan. 13, 2021).

⁴⁶ Joseph R. Biden, THE WHITE HOUSE, *Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census* (Jan. 20, 2021).

⁴⁷ Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1356 (2019).

⁴⁸ 136 S. Ct. 1120 (2016).

district challenged Texas election officials' use of total population in apportionment as diluting their votes in relation to voters in other districts, in violation of the Equal Protection Clause.⁴⁹ The Court rejected that challenge, holding that the use of total population was constitutionally permitted and represented "a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries."⁵⁰ The Court highlighted Representative James Blaine's statement, at the time of the Fourteenth 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."⁵¹ The Court also quoted 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.⁵²

Finally, the Court cited *Wesberry v. Sanders*, which stated that "when the delegates agreed that the House should represent 'people' they intended that in allocating Congressman the number assigned to each State should be determined solely by the number of the State's inhabitants."⁵³ However, the Court left open the question of whether states could use CVAP instead of total-population counts for state elections.⁵⁴

⁴⁹ *Id.* at 1125.

⁵⁰ *Id.* at 1132.

⁵¹ *Id.* at 1128.

⁵² *Id.*

⁵³ *Id.* at 1128; *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

⁵⁴ *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 establishing an apportionment system for state legislatures); *Gray v. Sanders*, 372 U.S. 368, 378 (1963) (same).

Harms to Political Representation of Immigrant Communities

This chapter has shown that decisions about who is counted in the census determine whose voices are heard in government. Failure to include these voices has material consequences. In terms of electoral outcomes, undercounting the immigrant population would result in lost 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 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.⁵⁵ Arizona, Florida, Georgia, New York, or Illinois may also lose some congressional representation.⁵⁶ Effective gains in seats would be expected in Alabama, Minnesota, Ohio, and Montana.⁵⁷

Beyond the material harms of lost electoral seats, the exclusion of noncitizens from the census causes symbolic harms. Immigrants are entitled to be part of the political community, even if they lack other rights reserved for U.S. citizens.⁵⁸ 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.

⁵⁵ See Jeffrey S. Passel & D’Vera Cohn, *How Removing Unauthorized Immigrants from Census Statistics Could Affect House Reapportionment*, PEW RSCH. CTR. (July 24, 2020). See also Ted Mellnik & Kate Rabinowitz, *Where a Citizenship Question Could Cause the Census to Miss Millions of Hispanics*, WASH. POST (July 4, 2019); *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”); Compl. ¶ 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).

⁵⁶ *New York*, 485 F. Supp. 3d at 447.

⁵⁷ Mellnik & Rabinowitz, *supra* note 55.

⁵⁸ See Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715, 721 (2021).

Conclusion

Census reports need to reflect changing demographics to keep up with the Founders' aspiration of representational equality in a democracy. The Census Bureau can help achieve that aspiration by counting the growing immigrant population, giving them both voice in Congress and approval in their communities.

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