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## The Importance of Counting All Immigrants for Apportionment and Redistricting

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# The Importance of Counting All Immigrants for Apportionment and Redistricting

TYE RUSH,<sup>†</sup> SAMUEL HALL<sup>††</sup> AND MATT A. BARRETO<sup>†††</sup>

*How are non-citizens counted and accounted for in representation? Section 2 of the Fourteenth Amendment requires that all whole persons residing in a state are to be counted for apportionment and districting. Courts have interpreted Section 2's requirement to include women (before the Nineteenth Amendment), non-citizens, and people under 18 years old. Yet today, some states are attempting to exclude non-citizens from apportionment and representation by using a citizen population calculus. This stands in contrast to more than 225 years of practice and to nearly all modern legal interpretations of representation. In landmark 1960s cases such as Wesberry v. Sanders and Reynolds v. Sims, the Supreme Court clarified the ideals of equal representation, writing that every district should have the same total population following the decennial apportionment, so that each of the 435 U.S. House districts had almost the exact same total population. As the nation's immigrant population has increased in the last sixty years, some have argued that only eligible voters should be counted for apportionment, to the exclusion of non-citizens and even children. In 2016, the Supreme Court addressed this question in Evenwel v. Abbott, in which Evenwel challenged Texas' use of total population and argued instead for the exclusion of non-citizens. The Court upheld Texas' use of total population. However, it did not go so far as to say that total population is the only population that can be used, thus leaving the door open for states to potentially choose whether to count every individual residing within their borders or to count exclusively adult citizens.*

*This Essay examines the potential impact of excluding non-citizens in the redistricting process on the composition of districts. We show that, in moving from total population to citizen population, states with large immigrant populations, such as California, Texas, Florida, and New York, would lose Congressional seats. Further, the communities within these states that have a higher concentration of immigrants, many of which are in Los Angeles, San Jose, Houston, Miami, and New York City, would stand to lose seats in their respective state legislatures. It goes without saying that immigrants contribute greatly to their communities, pay taxes, own homes, and have U.S.-born citizen children in school systems, regardless of their own citizenship statuses. As such, immigrants are entitled to political representation as defined in Section 2 of the Fourteenth Amendment, which directs the counting of all whole persons in states. We conclude that using citizen population instead of total population in redistricting and apportionment is inconsistent with U.S. jurisprudence and would result in immigrant communities losing their constitutionally guaranteed*

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*representation. We believe the law requires counting the total population and focusing on communities of interest (COI), including immigrant communities, to allow all residents of the United States to be incorporated into the redistricting and line-drawing process to ensure fair representation.*

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## INTRODUCTION

The Constitution requires that Congressional districts be drawn to equalize population on the decennial U.S. Census.<sup>1</sup> The U.S. Census requires that all persons in all households are counted, regardless of citizenship status, and includes considerable non-response-follow-up (“NRFU”) efforts to ensure full participation from every household.<sup>2</sup> In 2016, the Supreme Court took up the question of who counts for apportionment and districting. The Court’s decision in *Evenwel v. Abbott* affirmed Texas’ 2011 decision to use total population, all people—citizens and non-citizens—who are living in the United States at the time of the census,<sup>3</sup> but it did not conclude that total population was *required*.<sup>4</sup> Indeed, some argue that *Evenwel* left the door open for states to use alternative population counts, such as citizen population, which would *exclude* non-citizens, to apportion their districts. Indeed, this was the objective of former President Trump, who stated that non-citizens should not be counted for apportionment in his infamous July 2020 executive memorandum.<sup>5</sup>

For centuries, the United States has counted and apportioned political districts to include people not eligible to vote, given our country’s unequal and slow expansion of the franchise. Originally, Article I, Section 2 of the Constitution laid out principles of apportionment stating that representatives “shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”<sup>6</sup> While the explicitly racist three-fifths clause, which counted enslaved Black people as three-fifths of a free person for representation, was later scrapped by the Fourteenth Amendment in 1868, Section 2 of the Fourteenth Amendment still took an open view of total population, stating we must, “[count] the whole number of persons in each State,” for purposes of apportionment. From our perspective, there is no question that the framers of the Constitution were aware of and thinking about citizens and non-citizens.<sup>7</sup> In Article I, Section 2, just one paragraph earlier than the section on apportionment, the Constitution states that in order to be eligible to be a Representative, the person must have “been seven Years a Citizen of the

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1. U.S. CONST. amend. XIV, § 2.

2. *Census Bureau Adapts Operations to Ensure Everyone Is Counted*, U.S. CENSUS BUREAU (Aug. 14, 2020), <https://www.census.gov/newsroom/press-releases/2020/adapts-2020-operations.html>; *About the Foreign-Born Population*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/foreign-born/about.html> (last visited Aug. 10, 2024).

3. See *Frequently Asked Questions (FAQs)*, U.S. CENSUS BUREAU (Nov. 22, 2021), <https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#:~:text=The%20resident%20population%20counts%20include,sleep%20most%20of%20the%20time>.

4. *Evenwel v. Abbott*, 578 U.S. 54, 64 (2016).

5. Memorandum of July 21, 2020: Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679, 44680 (July 23, 2020).

6. U.S. CONST. art. I, § 2.

7. *Id.*

United States.”<sup>8</sup> Thus, citizens and non-citizens were known population categories since the drafting of the Constitution, and if the framers had meant to exclude non-citizens from apportionment population counts, they could have done so. Indeed, since this country’s founding, the Constitution has required that large categories of people not eligible to vote be included in census enumeration and in apportionment, counting women, children, African Americans, and non-citizens in these processes.<sup>9</sup>

Yet today, some states are attempting to exclude non-citizens from apportionment and representation. This stands in contrast to more than 225 years of practice and to nearly all modern legal interpretations of representation. In *Wesberry* and *Reynolds*, the courts clarified the ideals of equal representation, writing in the 1960s that every district should have the same total population.<sup>10</sup> As the nation’s immigrant population has increased in the last sixty years, some have argued that only eligible voters should be counted for apportionment, thereby excluding non-citizens and even children.<sup>11</sup> While the Supreme Court found that Texas was justified in using total population in *Evenwel*, the Court did not create a standard that would require states to use total population.<sup>12</sup> The Court’s focus on states’ rights created a debate over whether states have the authority to choose whether to use total population or only count citizens.<sup>13</sup>

This Essay examines the potential impact on the composition of districts if non-citizens were to be excluded from the redistricting process. We show that, in moving from total population to citizen population, states with large immigrant populations, such as California, Texas, Florida, and New York, would lose Congressional seats. Further, within these states, communities with a higher concentration of immigrant populations in cities such as Los Angeles, San Jose, Houston, Miami, and New York City, would stand to lose seats in their respective state legislatures. Immigrants contribute greatly to their communities, pay taxes, own homes, and have U.S.-born citizen children in school systems, regardless of their own citizenship statuses. As such, they are entitled to political representation as defined in Section 2 of the Fourteenth Amendment, which demands the counting of all whole persons in states for apportionment. We conclude that using citizen population instead of total population in redistricting and apportionment is inconsistent with U.S. jurisprudence and would result in immigrants losing their constitutionally guaranteed representation. We believe the most current interpretation of the law (e.g. *Allen v. Milligan*) requires

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8. *Id.*

9. Census Act of 1790, ch. 2, §§ 1–7 Stat. 101, 101–103 (current version at 13 U.S.C. §§ 1–402).

10. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Reynolds v. Sims*, 377 U.S. 533, 563–65(1964).

11. Ariana Figueroa, *U.S. House Republicans Pass Bill to Stop Census from Counting Noncitizens*, MO. INDEP. (May 9, 2024), <https://missouriindependent.com/briefs/u-s-house-republicans-pass-bill-to-stop-census-from-counting-noncitizens>.

12. *Evenwel v. Abbott*, 578 U.S. 54, 75 (2016).

13. J. Colin Bradley, *The Petition Clause and the Constitutional Mandate of Total-Population Apportionment*, 75 STAN. L. REV. 335, 361 (2023).

counting the total population and focusing on communities of interest (COI),<sup>14</sup> including immigrant communities, to allow all residents of the United States to be incorporated into the redistricting and line-drawing process to ensure fair representation.

### I. THE U.S. CENSUS COUNTS ALL PERSONS REGARDLESS OF CITIZENSHIP

The United States has carried out an enumeration of its total population by state, every ten years, since 1790. Indeed, this obligation is outlined in Article I, Section 2 of the Constitution and was thought of as a mechanism to instill popular influence into our nation's democracy. According to the Census Bureau, "the plan was to count *every person* living in the new[ly] created United States of America, and to use that count to determine representation in the Congress."<sup>15</sup> (emphasis added). In 2000, when a group of plaintiffs in Texas tried to block Census 2000 from moving forward due to alleged violations of privacy, a district court in Texas,<sup>16</sup> affirmed by the Fifth Circuit, explained the importance of the census to count all persons and keep all information confidential for legitimate government interests. The district court wrote, "[a] census of the type of Census 2000 has been taken every ten years since the first census in 1790. Such a census has been thought to be necessary for over two hundred years. There is no basis for holding that it is not necessary in the year 2000."

The procedure of determining who is counted during the Census and its subsequent apportionment had remained largely unchanged until a significant development in May 2017. At that time, Commerce Secretary Wilbur Ross emailed his staff directing them to add a required question on the Census about each person's citizenship status. Attorneys General for the states of New York and California led a lawsuit, and in 2019, the issue reached the Supreme Court after a nearly sixty-year hiatus. The Court stated, "[t]he Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage non-citizens from responding to the census and lead to a less accurate count of the total population."<sup>17</sup> The Court's apparent concern for asking about citizenship status and consequently getting an inaccurate total population number reaffirmed the concept that all persons, regardless of citizenship status,

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14. In *Allen v. Milligan*, the Court wrote that "plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt." 599 U.S. 1, 13 (2023). The Court went on to explain that recognizing communities of interest and population equality are indeed two of the important considerations: "Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, *communities of interest*, and *population equality*." *Id.* at 27 (emphasis added).

15. *Census in the Constitution*, U.S. CENSUS BUREAU (Nov. 23, 2021), <https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html>.

16. *Morales v. Daley*, 116 F. Supp. 2d 801, 820 (S.D. Tex. 2000).

17. *Dep't of Com. v. New York*, 558 U.S. 752, 761 (2019).

should be counted and considered for apportionment.<sup>18</sup> The effect of the Court striking down the citizenship question was that certain state legislatures did not have decennial Census data on citizenship and had to use total population for the 2021 round of redistricting. The Supreme Court’s decision to reject the inclusion of a citizenship question on the Census clearly shows that the Court did not believe there is a legitimate government interest in drawing a distinction when counting citizens and non-citizens.

Despite this outcome, President Trump attempted to circumvent the Court ruling in July of 2020. On July 21, 2020, Trump issued a memorandum titled, “Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census,” in which he ordered Commerce Secretary Wilbur Ross to obtain alternative data on the number of non-citizens in the country.<sup>19</sup> In the memorandum, Trump stated, “it is the policy of the United States to exclude from the apportionment base aliens who are now in the lawful immigration status.”<sup>20</sup> Indeed, we do not have to theorize about why this directive was set forth. President Trump was clear that his express purpose was to diminish the Congressional representation in states with large immigrant populations, writing:

Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State’s entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.<sup>21</sup>

Eventually, a three-judge panel for the U.S. District Court for the Southern District of New York wrote a unanimous decision striking down Trump’s executive memorandum, stating that it would violate the “constitutional responsibility to count the whole number of persons in each State and to apportion members . . . according to their respective numbers.”<sup>22</sup>

Our review highlights two important conclusions. First, the Census is tasked with counting the total population of the country with the exact purpose of informing apportionment of political representation. Second, there is a significant effort to enumerate and exclude non-citizens from political representation today, which the published scholarship and case law suggest is inconsistent with constitutional practices.

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18. *Id.*

19. Memorandum of July 21, 2020: Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679, 44680 (July 23, 2020).

20. *Id.*

21. *Id.*

22. *State of New York v. Donald J. Trump*, No. 1:20-cv-05770-JMF, op. & ord. at 85, (S.D.N.Y. Sept. 10, 2020).



## II. HISTORICAL APPROACH TO APPORTIONMENT IN THE UNITED STATES

Since the founding of the United States, there has been an assumption that representation must include all persons, not just citizens. The Constitution states that representation should “be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”<sup>23</sup> In Federalist Paper No. 54, the authors emphasized that it was “not contended that the number of people in each State ought not to be the standard for regulating the proportion of those who are to represent the people of each State.”<sup>24</sup> This was noted to be as important for representation as it was for tax purposes. Regrettably, with respect to Black people, the authors wrote that “slaves [were] considered as property, not as persons.”<sup>25</sup> The authors then raised the question of how enslaved people, who could “neither vote themselves nor increase the votes of their masters,” should be accounted for in federal estimates of representation. The Founders ultimately settled on a racist compromise between the Southern states, which wished to maximize their representation in Congress, and the Northern states, which wished to limit the political power that enslaved people provided to slaveowners. Specifically, the compromise regarded enslaved people as “inhabitants” who were “debased by servitude below the equal level of free inhabitants, which regards the SLAVE as divested of two fifths of the MAN.”<sup>26</sup> The Founders wrote in the very text of our Constitution that those who were denied the right to vote still deserved representation in the federal legislative branch.<sup>27</sup> The only obstacle preventing the Founders from granting Black people the same apportionment as white women was the racist compromise the Founders deemed necessary to maintain slavery.

For almost a century, Black individuals were counted as three-fifths of a person for purposes of apportionment when drawing district boundaries, and yet still they were denied the right to vote. During this period, white non-citizens were fully counted as whole persons. It was not until the Reconstruction era that Black men and women would be counted as full persons and Black men would obtain the right to vote.

The Reconstruction Amendments made several important democratic improvements to our Constitution. First, the Thirteenth Amendment ended the three-fifths compromise and its ensuing apportionment scheme.<sup>28</sup> Second, the Fifteenth Amendment barred voting discrimination on account of race, color, or previous servitude.<sup>29</sup> It was the Fourteenth Amendment that provided guidance

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23. U.S. CONST. art. I, § 2, cl. 3.

24. THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison).

25. *Id.*

26. *Id.*

27. U.S. CONST. art. I, § 2, cl. 3.

28. U.S. CONST. amend. XIII.

29. U.S. CONST. amend. XV.

on who shall count for apportionment, by first requiring the guarantee of citizenship to all those born in the United States and second by creating the guarantee of due process and equal protection of the laws to all persons.<sup>30</sup> Importantly, Section 2 of the Fourteenth Amendment states that “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”<sup>31</sup> Not only did the Fourteenth Amendment specifically outline that the whole number of persons should be counted and apportioned to determine representation, but the authors specifically excluded Native Americans who did not pay taxes due to treaty obligations.<sup>32</sup> The only reason for the Founders to include this clause, was because they meant for everyone else to be counted. Embedded into the very fabric of our Constitution is, therefore, a guarantee that all persons residing in the United States will be counted for apportionment purposes.

The Founders never even debated whether white women, white non-citizens, and children should be counted for apportionment. Ultimately, women would be counted as full persons for apportionment, although they were denied the right to vote until 1920.<sup>33</sup> This is important when viewed next to the text of the Fourteenth Amendment, passed more than a half a century earlier, which specifically mandated that “the whole number of persons” be included for apportionment purposes.<sup>34</sup> Yet again, this underscores that the Constitution unambiguously requires representation to be allocated according to total population.

### III. APPORTIONMENT IN THE EYES OF THE COURTS

Almost a century after the Reconstruction Amendments and nearly a half century after the passage of the Nineteenth Amendment, the Supreme Court established the critical doctrine of one-person, one-vote in *Wesberry v. Sanders*.<sup>35</sup> The Court found that Congressional districts with different populations were unfair and invalid, because they violated the requirement of Article I, Section 2 that Congressmen be elected “by the People of the several States.”<sup>36</sup> This requires that, as “nearly as is practicable[,] one man’s vote in a congressional election is to be worth as much as another’s.”<sup>37</sup> The Court went on to say that “[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.”<sup>38</sup> Through the *Wesberry* decision,

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30. U.S. CONST. amend. XIV.

31. U.S. CONST. amend. XIV, § 2.

32. *Id.*

33. *Id.* amend. XIX.

34. *Id.* amend. XIV, § 2.

35. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

36. *Id.* at 7–8.

37. *Id.* at 8.

38. *Id.* at 17–18.

the Court established the importance of appropriate apportionment for congressional districts and emphasized that two people who can vote must have the same say.<sup>39</sup> The Court then seemed to limit this right to only those who had the right to vote already; however, the Court went on to say in the last paragraph of *Wesberry*, that “[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.”<sup>40</sup> Today, we now have the technology to draw districts with mathematical precision to accomplish the Court’s explicitly stated goal of ensuring “equal representation for equal numbers of people.”<sup>41</sup> This principle applies not only for citizens, or citizens of voting age, but for all people.

A few months after *Wesberry*, the Supreme Court got into the details of apportionment in a bicameral state legislature in *Reynolds v. Sims*.<sup>42</sup> Here, the Court held that “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis” so that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted.”<sup>43</sup> Importantly, the Court acknowledged that some deviations could be necessary, but in this case, the “deviations from a strict population basis [were] too egregious to permit.”<sup>44</sup> The Court went through a lengthy process of evaluating the Alabama legislature’s plans and the validity of their claims, but concluded, “[s]ince neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be justified in proceeding no further.”<sup>45</sup> This was a clear statement from the Court that state legislative districts must be apportioned according to their population rather than some other denominator.

Shortly after *Reynolds*, the Court heard a case claiming that the selection of the commissioner’s court from single-member districts of unequal population violated the Fourteenth Amendment.<sup>46</sup> The Court held that in Midland County, Texas, the petitioner had “a right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident.”<sup>47</sup> The Court further clarified by saying that the Equal Protection Clause did not “require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.”<sup>48</sup> Reminding us of *Reynolds*, the

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39. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

40. *Id.* at 18.

41. *Id.*

42. *Reynolds v. Sims*, 377 U.S. 533, 534, 568, 576 (1964).

43. *Id.* at 568.

44. *Id.* at 569.

45. *Id.* at 571.

46. *Avery v. Midland Cnty.*, 390 U.S. 474, 474–76 (1968).

47. *Id.* at 476.

48. *Id.* at 484.

majority said that “bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures.”<sup>49</sup> Here, the Court used the language of *citizens* to mean the residents of Midland County, as it required Midland to create single-member districts drawn in equal size based on total population. Indeed, in *Avery*, the Court held that the Constitution permits “no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.”<sup>50</sup> This was a nearly explicit statement that *Avery* expanded upon the doctrine expounded in *Reynolds* to all but require total population be used as it had been, and continues to be, for legislative apportionment. Thus, at every level of political representation—Congress, the State Legislature, or local county commission—districts must be equalized in population.

Three decades later, in 1996, the Court heard *Wisconsin v. City of New York*; it held:

The Constitution provides that the results of the census shall be used to apportion the Members of the House of Representatives among the States. . . . Because the Constitution provides that the number of Representatives apportioned to each State determines in part the allocation to each State of votes for the election of the President, the decennial census also affects the allocation of members of the electoral college . . . and the States use the results in drawing intrastate political districts.<sup>51</sup>

Knowing that the Census did not ask about citizenship in the 1990s, the Court emphasized the importance of the decennial Census as the critical data used in drawing districts. This not only underscores that total population is the denominator envisioned by the States and the Court, but that the Members of House of Representatives itself are apportioned based on the results of the decennial Census. Using an entirely different set of data to then distribute those representatives throughout the state would make as little sense now as it did then.

#### IV. RECENT DEBATE ON WHO COUNTS IN REDISTRICTING: *EVENWEL*

Closer to the modern day, the Supreme Court in *Evenwel v. Abbott* addressed the issue of which denominator to use when determining how to apportion legislative districts. The plaintiffs in *Evenwel* claimed that Texas had to use citizens of voting age (referred to as Citizen Voting Age Population, or CVAP) to apportion legislative districts, while Texas claimed it could choose to use either CVAP or Total Population.<sup>52</sup> The federal government joined the suit, claiming only that using Total Population when determining legislative

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49. *Id.*

50. *Id.* at 485.

51. *Wisconsin v. City of New York*, 517 U.S. 1, 5–6 (1996) (citation omitted).

52. *Evenwel v. Abbott*, 578 U.S. 54, 63–64 (2016).

apportionment was permissible.<sup>53</sup> The Court acknowledged the concerns of the Founders that prompted the use of total population rather than voting population, namely the “perceived risk that a voter-population base might encourage States to expand the franchise unwisely and the hope that a total-population base might counter States’ incentive to undercount their populations, thereby reducing their share of direct taxes.”<sup>54</sup> The Court further acknowledged “that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.”<sup>55</sup> The Court then affirmed the District Court’s decision to “permit jurisdictions to use any neutral, nondiscriminatory population baseline, including total population, when drawing state and local legislative districts.”<sup>56</sup> The inclusion of the word “nondiscriminatory” is crucial in this opinion and underlines the fact that total population is the only nondiscriminatory population baseline to draw districts. However, some have interpreted the Court’s use of the terms “any” population baseline and “including” total population as suggestions that other population counts might be permissible, with total population being only one such available baseline. Indeed, as noted above, former President Trump pushed explicitly to exclude non-citizens from apportionment counts, and during the 2021 redistricting process, many states and localities proposed or debated the idea of using alternative population counts, such as those that exclude non-citizens.

#### V. CONSEQUENCES OF USING CITIZEN POPULATION FOR APPORTIONMENT

Having reviewed the historical and legal framework for counting all persons for apportionment, we now turn to an empirical analysis to determine the implications of such a shift on political representation in the United States. Over the past couple of decades, the foreign-born population of the United States has grown. Figure one shows the magnitude of this change over time with U.S. Census data compiled by the Migration Policy Institute.<sup>57</sup> In 1970, less than five percent of the people in the United States were foreign-born, but by 2022, that number grew to 13.9 percent.<sup>58</sup> Similarly, the total foreign-born population grew from 9.6 million in 1970 to 46.2 million in 2022.<sup>59</sup> About half of all foreign-born residents naturalize and become citizens, but more than half of the remaining non-citizen population reside in the four most populous states: California, Florida, New York, and Texas.<sup>60</sup> Moreover, almost half of the

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53. *Id.* at 64.

54. *Id.* at 69.

55. *Id.*

56. *Id.* at 63.

57. *U.S. Immigrant Population and Share Over Time, 1850-Present*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time> (last visited June 24, 2024).

58. *Id.*

59. *Id.*

60. *Id.*

country's undocumented residents call these states home.<sup>61</sup> As such, any change in apportionment that leaves out non-citizens erodes the representation of the four most populous states in the House of Representatives, disproportionately benefitting smaller states where the immigrant population is often less than two percent.<sup>62</sup> Within these states, this change also erodes representation in the state legislatures for the regions where immigrant populations are most concentrated.

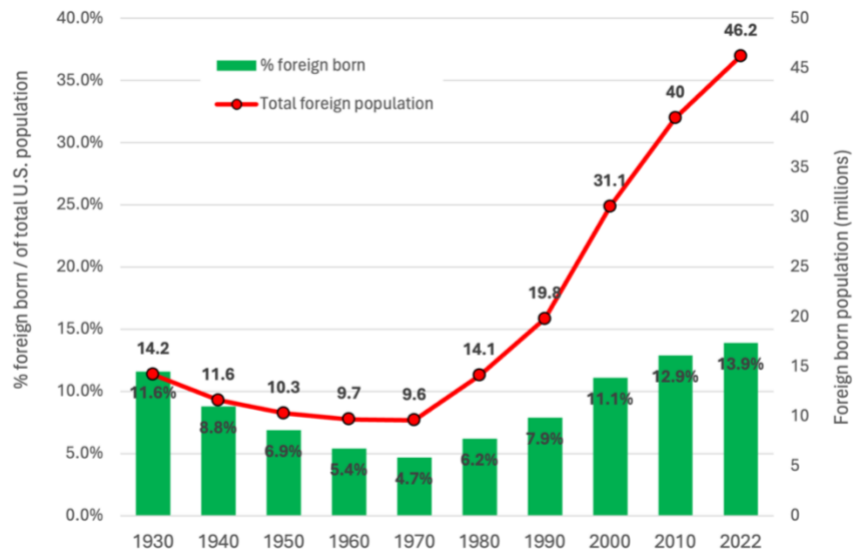


Figure 1: Change in U.S. Foreign Born Population 1930–2022

#### A. IMPACT OF EXCLUDING NON-CITIZENS ON CONGRESSIONAL APPORTIONMENT

According to the Census Bureau's 2022 American Community Survey (ACS) there are 21.6 million non-citizens living in the United States.<sup>63</sup> At 21.6 million, this figure surpasses the entire population of New York State.<sup>64</sup> Indeed, only three states had a larger total population: California, Texas and Florida.<sup>65</sup> In 2022, the average population per congressional district was just

61. *U.S. Unauthorized Immigrant Population Estimates by State, 2016*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state>.

62. *Id.*

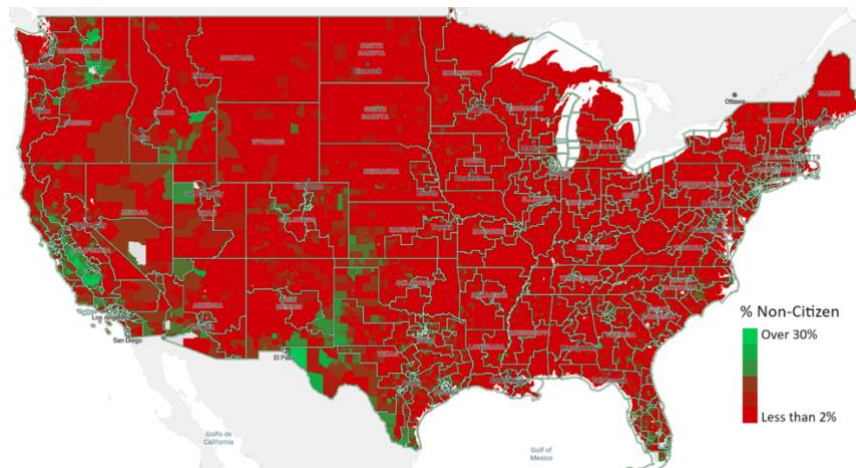
63. *2018–2022 ACS 5-Year Estimates*, U.S. CENSUS BUREAU (Nov. 29, 2023), <https://www.census.gov/programs-surveys/acs/technical-documentation/table-and-geography-changes/2022/5-year.html> [hereinafter *ACS 2022*].

64. *Id.*

65. *Id.*

over 761,000,<sup>66</sup> meaning that the total non-citizen population alone could account for twenty-eight congressional districts. But as stated above, this population is not evenly distributed across the fifty states. A hypothetical change from apportioning seats in the House of Representatives by total population to apportioning by citizen population erodes representation in states with large immigrant populations.

Using the mapping visualization application Social Explorer, we created an interactive map that readers can access to understand the geographic distribution of the non-citizen population by state, county, and congressional district.<sup>67</sup>



*Figure 2: County Percent Non-Citizen with 118th Congressional District Boundaries*

It is clear from the map that large segments of California, Texas, and Florida have congressional districts with large non-citizen populations. So too does the Yakima farm valley of Eastern Washington, as well as the agricultural region of Southwest Kansas. On the east coast, due to high population density, the overall U.S. map obscures the large non-citizen population in New York and New Jersey. Readers can access this map<sup>68</sup> and zoom in to the city or even neighborhood level to observe patterns of non-citizen populations that are very likely to lose congressional or state legislative representation if cases such as *Evenwel* were successful. According to the 2022 American Community Survey,

66. CONG. RSCH. SERV., 2020 CENSUS DELAYS, APPORTIONMENT, AND CONGRESSIONAL REDISTRICTING 2 (Oct. 5, 2022), <https://crsreports.congress.gov/product/pdf/IN/IN12027>.

67. *Total Population: Not A Citizen*, SOC. EXPLORER, <https://www.socialexplorer.com/4e9c7c44e1/view> (last visited Aug. 10, 2024).

68. *Id.*

there are forty-eight congressional districts that have more than 100,000 non-citizens who contribute towards their total population.<sup>69</sup> While many of these forty-eight districts are in California, Texas, Florida, and New York, they are also found in Arizona (AZ-3), Maryland (MD-4), Massachusetts (MA-7), New Jersey (NJ-8, NJ-9), Illinois (IL-4), Washington (WA-1), and Georgia (GA-7).<sup>70</sup>

To demonstrate the magnitude of this potential loss in congressional representation, we used the same statistical method by which the 435 seats in the House of Representatives are apportioned to fifty states but use the citizen population instead of total population to determine apportionment.

The goal of apportionment is to equitably assign 435 seats in the House of Representatives to the fifty states. The Constitution requires that every state has at least one representative; the method by which the remaining 51st through 435th seats are apportioned is the Method of Equal Proportions.<sup>71</sup> First, each of the 435 seats must represent the same number of people, so the total population of the country is divided by 435 seats to get the target population of each seat.<sup>72</sup> According to the 2020 Decennial Census, there were 331,108,434 people in the United States, so the target population for each of the 435 seats was about 761,168 people per seat in the House of Representatives. The Method of Equal Proportions computes a priority value for each state based on this proportion (761,168 people per seat).<sup>73</sup> Then it assigns a second, third, fourth, and nth seat to states, until all 435 are apportioned, with the most populous states receiving more seats than smaller states.

Using the Method of Equal Proportions, we apportioned the 435 House of Representatives seats among fifty states but did so with citizen population instead of total population. To get the citizen population of each state, we used data from the 2022 American Community Survey five-year estimates on nativity and citizenship status in each state.<sup>74</sup> We used the R package “apportion” to apportion 435 seats based on the citizen population of each state. After comparing the results from apportionment based on citizen population to the results of apportionment based on total population,<sup>75</sup> it is clear that the four most populous states<sup>76</sup>—California, Texas, New York, and Florida—all stand to lose seats in the House of Representatives. Figure three reports how many seats each of these states would lose and which states would gain an additional seat in switching from apportionment by total population to apportionment by citizen population. California, the most populous state and the state with the largest

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69. ACS 2022, *supra* note 63.

70. *Id.*

71. SARAH J. ECKMAN, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 6 (2021).

72. *Id.*

73. *Id.* at 2, 6.

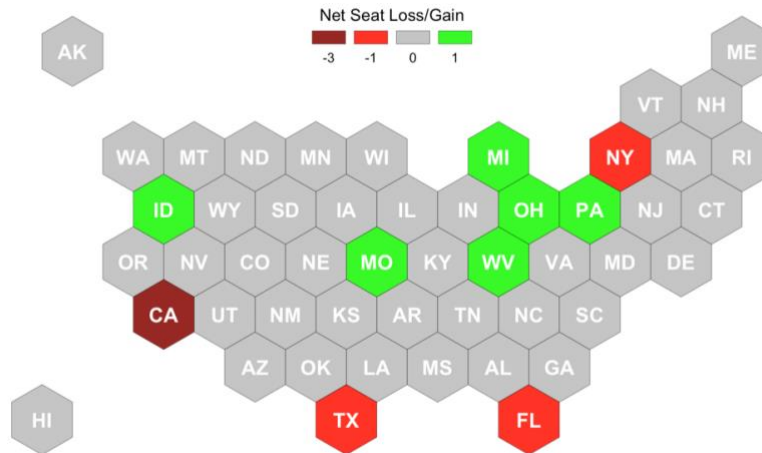
74. See ACS 2022, *supra* note 63.

75. 2020 *Census Apportionment Results*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html>.

76. ACS 2022, *supra* note 63



number of non-citizen residents, stands to lose the most representation in the House—three seats total. Idaho, Michigan, Missouri, Ohio, Pennsylvania, and West Virginia would each gain an additional seat, shifting representation away from larger states.



*Figure 3: Congressional Seat Change Using Citizen Population Instead of Total Population*

#### B. CHANGES IN REPRESENTATION IN THE STATE LEGISLATURE

If states shift toward redistricting their state legislatures by citizen population, regions with a larger share of the state's immigrant population will lose representation in those legislative bodies. To illustrate which regions within California, Texas, New York, and Florida would lose the most seats in the legislature, we used demographics to analyze differences in total population and citizen population, and we report those results below. To do so, we constructed a dataset of the 2020 Decennial Census total population tabulations and the 2022 American Community Survey five-year estimates on nativity and citizenship status.<sup>77</sup> State senates are larger than their state house counterpart, and each state senate district represents roughly the same number of people. Thus, for ease of illustration, we construct this dataset at the state senate-level, using new state senate boundaries from the recent cycle of redistricting (2021–2022).

To estimate which regions lose representation in the statehouse and which gain representation, we calculated the percent of the state's citizen population and the percent of the state's total population that reside in each state senate district. We then subtracted the citizen population ratio from the total population ratio to get our variable of interest: whether each state senate district has a smaller, larger, or unchanged citizen-to-total population ratio. State senate

77. The Census Bureau components of this dataset can be downloaded through <https://data.gov>.

districts with large non-citizen populations would be at risk of contracting and being combined with adjacent districts. At the same time, state senate districts with relatively few non-citizens would now be overpopulated, and new districts would likely need to be drawn in these regions (shaded green). Thus, those state senate districts that would lose representation have a negative value, those that would gain representation have a positive value, and those that see no change have a value of zero.<sup>78</sup> We depict results below for California, Texas, New York, and Florida graphically using heat maps; state senate districts that would lose representation are shaded red, those that would gain representation are shaded green, and those that neither gain nor lose representation are shaded white. Darker shading indicates a greater loss or gain in representation than lighter shading.

More than 23 percent of the nation's foreign-born, non-citizen population lives in California, but the population is not distributed evenly across the state.<sup>79</sup> In California, parts of the Bay Area, Central Valley, Orange County, and Los Angeles County stand to lose representation in any change to redistricting that counts only the citizen population. Figure 4 is a heat map of California that shows change in representation by state senate district. Los Angeles County was among the first to elect Latinos to the state legislature,<sup>80</sup> but most of the Latino members of the legislature today represent those regions of California that would lose out on representation.<sup>81</sup> Much of this progress follows on the heels of a wave of anti-immigrant backlash aimed at Latinos and their access to public institutions across the state in the 1990s, forever changing the partisan landscape of the state.<sup>82</sup> Although most of California's immigrant population are Latino and primarily come from Mexico, a majority of recent immigrants come from Asian countries.<sup>83</sup> As the fastest growing racial or ethnic group in the United States,<sup>84</sup> Asian Americans in California have experienced major descriptive representational milestones, with fourteen Asian Americans currently serving in

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78. For example, a state senate district that has 2 percent of the state's citizen population but that has 3 percent of the state's total population, one that has more non-citizen residents than other districts, would have a negative 1, indicating that it would lose representation if states redistrict by citizen population.

79. *ACS 2022*, *supra* note 63.

80. *Our Story: Historical Overview of the California Legislative Caucus*, LATINO CAUCUS, <https://latinocaucus.legislature.ca.gov/our-story#:~:text=Aware%20of%20their%20unified%20strength,empowerment%20of%20the%20Latino%20community> (last visited Aug. 10, 2024).

81. John Osborn D'Agostino, Sameea Kamal, & Ariel Gans, *How Much Does the Legislature Look Like California?*, CALMATTERS (Jan. 4, 2023), <https://calmatters.org/politics/capitol/2023/01/california-legislature-legislators-like-you/> (data accessed by selecting "Race/Ethnicity" under "Legislators Like You").

82. Shaun Bowler, Stephan P. Nicholson, & Gary M. Segura, *Earthquakes and Aftershocks: Race, Direct Democracy, and Partisan Change*, 50 AM. J. POL. SCI. 146, 156 (2006).

83. Marisol Cuellar Mejia, Cesar Alesi Perez, & Hans Johnson, *Immigrants in California*, PUB. POL'Y INST. OF CAL. (Jan. 2024), <https://www.ppic.org/publication/immigrants-in-california>.

84. Abby Budiman & Neil G. Ruiz, *Asian Americans Are the Fastest Growing Racial or Ethnic Group in the U.S.*, PEW RSCH. CTR. (Apr. 9, 2021), <https://www.pewresearch.org/short-read/2021/04/09/asian-americans-are-the-fastest-growing-racial-or-ethnic-group-in-the-u-s>.

the California State Legislature.<sup>85</sup> All of the Asian Americans serving in the state legislature represent regions of the state that would lose representation, in particular, large concentrations in Santa Clara County and the Bay Area.<sup>86</sup> Since the bulk of California's non-citizen population comes from either Asia or Latin America,<sup>87</sup> counting only citizens for redistricting reduces the number of Asian or Latino majority districts that can be drawn. Given that Asian American voters in California largely prefer co-ethnic candidates in elections, and that Latino voters across a variety of geographic contexts typically prefer Latino candidates,<sup>88</sup> we expect that fewer majority Asian American and Latino districts would result in fewer Asian American and Latino representatives elected to office. Consequently, counting only citizens for redistricting threatens both the longstanding Latino representation in the state and the more recent representational gains that Asian American communities enjoy.

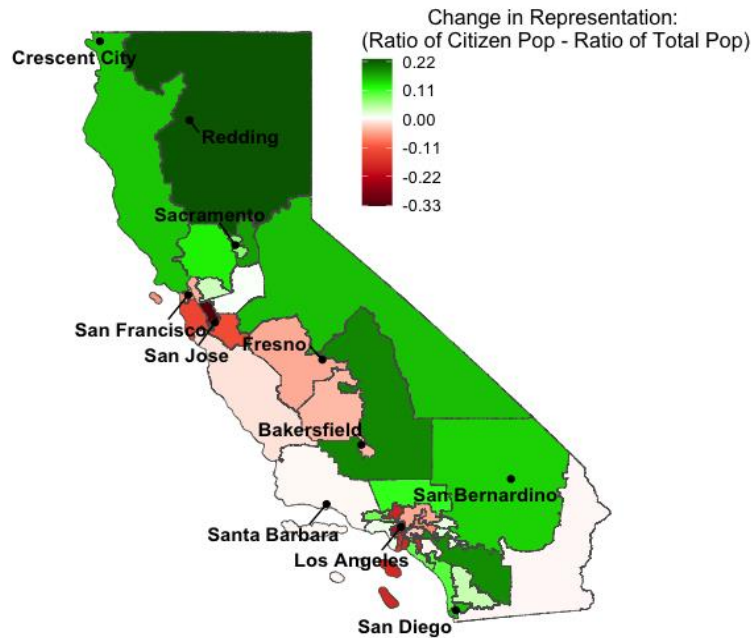


Figure 4: Net Change in Representation by California State Senate District

85. D'Agostino et al., *supra* note 81.

86. *See id.*

87. Mejia et al., *supra* note 83.

88. Matt A. Barreto, *¡Sí Se Puede! Latino Candidates and the Mobilization of Latino Voters*, 101 AM. POL. SCI. REV. 425, 435 (2007); Ivelisse Cuevas-Molina, & Tatishe M. Nteta, *Finding the Missing Link? The Impact of Co-ethnicity, Pan-ethnicity, and Cross-ethnicity on Latino Vote Choice*, 76 POL. RSCH. Q. 337, 337 (2023).

Florida, Central Florida, Tampa, and Miami-Dade are all regions that lose representation in switching from redistricting by total population to redistricting by citizen population. Figure five is a heat map of Florida, showing changes in representation by state senate district. This primarily impacts Black Caribbean, Latino, and Afro-Latino immigrant communities.<sup>89</sup> About ten percent of the nation's foreign-born population lives in Florida, a figure which has been on the rise since 1990.<sup>90</sup> Additionally, immigrants make up a large portion of the population within Florida; one out of every five residents is foreign-born.<sup>91</sup> Immigrant communities across Florida primarily come from Cuba, Haiti, Colombia, Mexico, and Jamaica,<sup>92</sup> fostering communities that look very different from immigrant communities in other states, where immigrants largely come from Mexico and other Latin American countries.<sup>93</sup> Today, South Florida has the second largest Black immigrant population in the entire country, outside of New York and New Jersey.<sup>94</sup> These diverse immigrant communities lose representation in redistricting by citizen population.

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89. Christine Tamir & Monica Anderson, *One-in-Ten Black People Living in the U.S. are Immigrants*, PEW RSCH CTR. 23, 25 (Jan. 20, 2022), [https://www.pewresearch.org/race-ethnicity/wp-content/uploads/sites/18/2022/01/RE\\_2022.01.20\\_Black-Immigrants\\_FINAL.pdf](https://www.pewresearch.org/race-ethnicity/wp-content/uploads/sites/18/2022/01/RE_2022.01.20_Black-Immigrants_FINAL.pdf).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

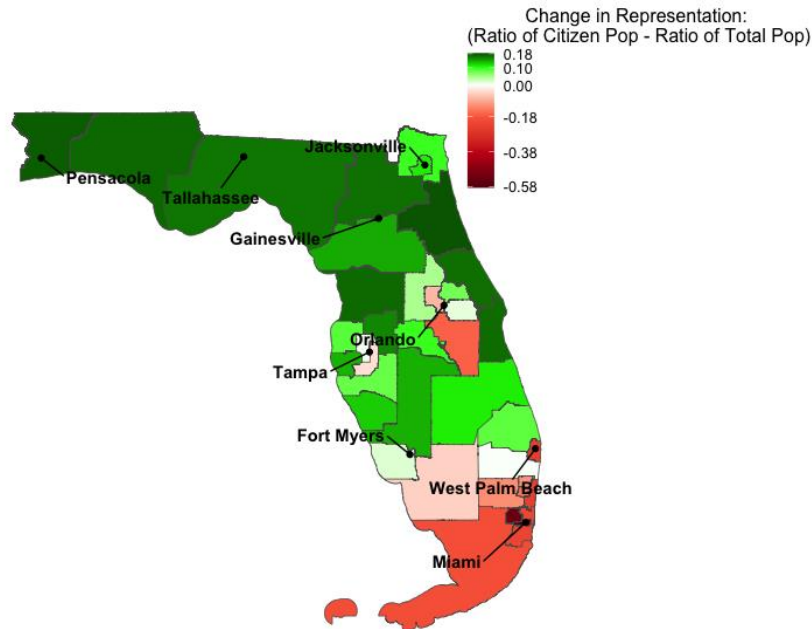


Figure 5: Net Change in Representation by Florida State Senate District

In New York, several of Long Island's communities and New York City itself lose representation in switching from redistricting by total population to redistricting by citizen population. Home of Ellis Island, New York boasts a diverse immigrant community, concentrated primarily in New York City and Long Island. Figure 6A is a heat map of New York, showing change in representation by state senate district. Figure 6B is the same heat map, zoomed in on New York City and Long Island, which are segments of the state where this loss in representation is primarily confined. In Long Island, where immigrants account for 19 percent of the population,<sup>95</sup> communities stand to lose representation in the legislature. But in New York City, that loss is greater. Immigrants comprise a staggering 37.2 percent of the population of New York City.<sup>96</sup> The plurality of foreign-born residents come from Latin American countries, such as the Dominican Republic, Mexico, Ecuador, Colombia, and Guatemala.<sup>97</sup> Many of the city's foreign-born population emigrated from Asia

95. *Immigrants in the Long Island Economy: Overcoming Hurdles, Yet Still Facing Barriers*, IMMIGR. RSCH. INITIATIVE (June 6, 2023), <https://immresearch.org/publications/longisland>.

96. N.Y.C. MAYOR'S OFF. FOR ECON. OPPORTUNITY, AN ECONOMIC PROFILE OF IMMIGRANTS IN NEW YORK CITY 2017, at 5 (2020), <https://www.nyc.gov/assets/opportunity/pdf/immigrant-poverty-report-2017.pdf>.

97. *Id.*

and the Caribbean.<sup>98</sup> In fact, the state has been home to the largest share of the country’s Black immigrant population since 2000, with almost the entirety of these Black foreign-born immigrants concentrated in New York City.<sup>99</sup>

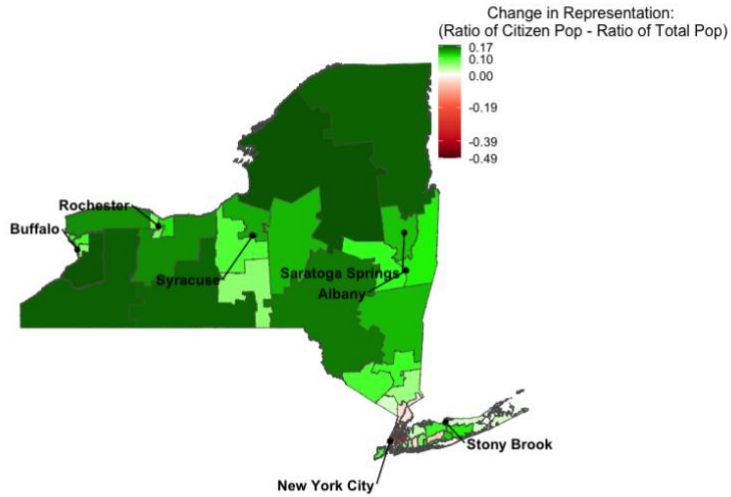


Figure 6A: Net Change in Representation by New York State Senate District

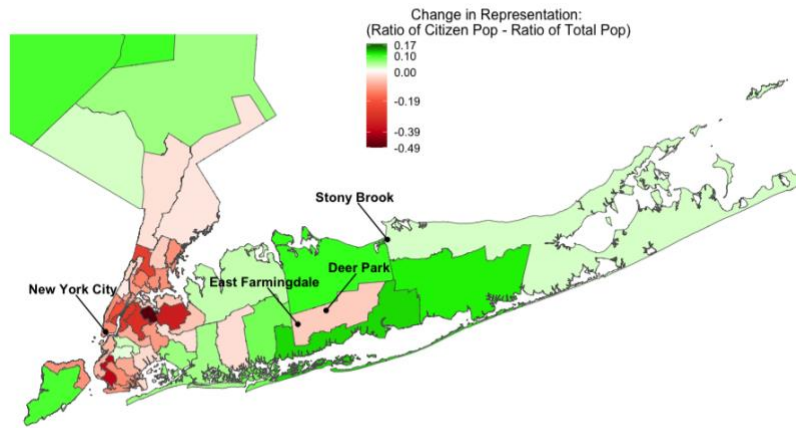


Figure 6B: Net Change in Representation by New York State Senate District, Zoomed-In to New York City

98. *Id.*

99. Tamir & Anderson, *supra* note 89.

In Texas, regions around Austin, Dallas, the Houston metropolitan area, the South Texas Plains, and West Texas lose representation in switching from redistricting by total population to redistricting by citizen population. Figure 7 is a heat map of Texas, showing change in representation by state senate district. With eleven percent of all foreign-born immigrants nationwide living in Texas, it has the second-largest share of the nation's foreign-born population, and this share has increased consistently from 1990 to 2020.<sup>100</sup> More than half of the state's foreign-born population comes from Mexico, and many others come from India, El Salvador, Vietnam, and Honduras.<sup>101</sup> While the majority of Texas' immigrant population lives in larger metropolitan areas around Austin, Dallas, and Houston, the countries of origin for recent arrivals in these cities are split between Latin America and Asia.<sup>102</sup> San Antonio, El Paso, and several counties in the southernmost region of the state continue to have immigrant populations that are more heavily Latino.<sup>103</sup> Redistricting based on citizen population threatens longstanding Latino immigrant representation and more recent Asian immigrant representation in Texas.

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100. *Redistricting Data Datasets*, U.S. CENSUS BUREAU (Oct. 8, 2021), <https://www.census.gov/programs-surveys/decennial-census/data/datasets/rdo.html>.

101. AM. IMMIGR. COUNCIL, *IMMIGRANTS IN TEXAS 1* (Aug. 6, 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_texas.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_texas.pdf).

102. *Id.*

103. *Id.*

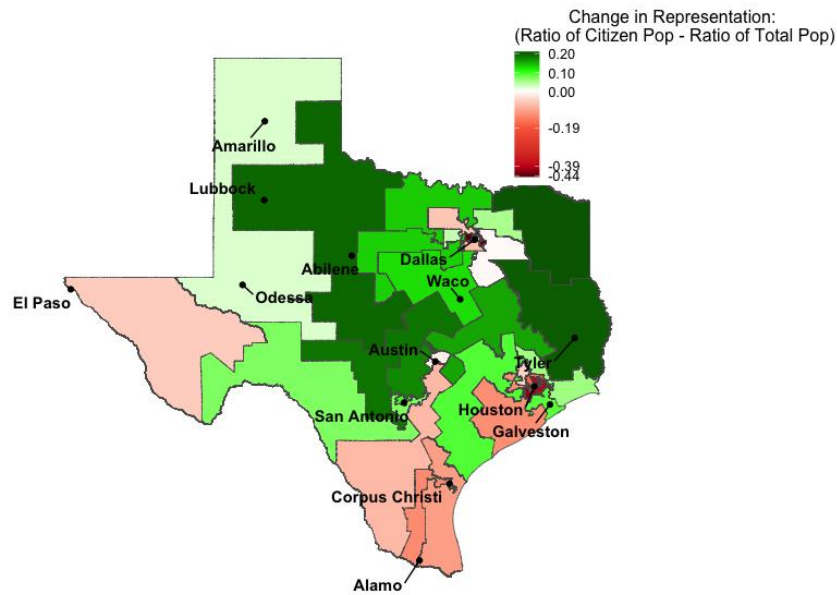


Figure 7: Net Change in Representation by Texas State Senate District

#### CONCLUSION

Since the founding of American democracy, immigrants and non-citizens have played important roles in shaping representation and the nation's economy. The adage that "America is a nation of immigrants" rings true today more than ever. With more than 46 million immigrants, and over 21 million non-citizens living in the United States, the foreign-born population is more central to the total American population than ever before.<sup>104</sup> As the Constitution clearly outlines, and as courts have agreed over the years, all persons, including those not eligible to vote, shall be counted by the U.S. Census and entitled to political representation. For immigrants, the future of fair representation in the United States House of Representatives and in state legislatures across the country hinges on apportionment and redistricting that relies on total population.

Throughout our nation's history, there has been slow and steady progress towards increasing representation and access to democracy. This is evident in achievements from the Reconstruction Amendments, to the franchise of women, to lowering the voting age to eighteen, to expanding voting materials to non-English speaking populations through the Voting Rights Act. To remove segments of the population from apportionment or redistricting would be

104. ACS 2022, *supra* note 63.



unprecedented and would move our democracy backwards. Additionally, our analysis shows that removing non-citizens from consideration would reduce the number of seats in the House of Representatives that are apportioned to the largest states, while smaller states with fewer immigrants would stand to gain seats. Our analysis also shows that in the states with the largest shares of the nation's immigrant population, redistricting by citizen population would erode representation for immigrant communities in those state legislatures.

Recently, some states added the requirement that map plans preserve Communities of interest (“COIs”) during the redistricting process,<sup>105</sup> which has preserved immigrant representation in state legislatures across the country. COIs are generally defined as a “group of people with a common interest (usually, a common interest that legislation might benefit).”<sup>106</sup> During the 2021-2022 redistricting cycle, fifteen states required state legislative district maps to preserve COIs, and eleven states required similar preservation in Congressional district maps.<sup>107</sup> These efforts notably improve immigrant representation in state legislatures. For example, in California, a state with a redistricting process that explicitly preserves COIs, the proportion of Latino and Asian American state legislators elected to the new map plans matches more closely the proportion of the total population that are Latino or Asian American.<sup>108</sup> Moving slowly towards parity in descriptive representation is one benefit of preserving COIs, but this criterion also protects immigrant communities from being split up across multiple districts, which would dilute their political power as a voting bloc. Efforts to apportion districts based only on the citizen population effectively renders invisible the 21.6 million non-citizens who call America home. Encouraging districting bodies to preserve COIs is a potential solution to safeguarding their representation in Congress and state legislatures. Indeed, extensive research in Political Science finds a strong connection between having minority representatives and direct service and policy to benefit the community. First established by analyzing Black members of Congress and State Legislatures who were more likely to listen to, and respond to Black constituents,<sup>109</sup> this research was later extended to studying immigrant and Latino populations and finding descriptive representation played a key role in

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105. *Redistricting Criteria*, NAT'L CONF. OF ST. LEGIS. (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria>.

106. *Where Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/redistricting-101/where-are-the-lines-drawn> (last visited June 26, 2024).

107. *Id.*

108. D'Agostino et al., *supra* note 81.

109. Christian Grose, *Disentangling Constituency and Legislator Effects in Legislative Representation: Black Legislators or Black Districts?*, 86 SOC. SCI. Q. 427, 428 (2005); Andy Baker & Corey Cook, *Representing Black Interests and Promoting Black Culture: The Importance of African American Descriptive Representation in the U.S. House*, 2 DU BOIS REV. 227, 229 (2005); Robert Preus, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 J. POL. SCI. 585, 597-98 (2006).

blocking anti-immigrant policy, and promoting more inclusive and welcoming immigrant policies.<sup>110</sup>

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110. Alexandra Filindra & Shanna Pearson-Merkowitz, *Research Note: Stopping the Enforcement “Tide”: Descriptive Representation, Latino Institutional Empowerment, and State-Level Immigration Policy*, 41 *POL. & POL’Y* 814, 816 (2013); Gabriel Sanchez & Jason Morin, *The Effect of Descriptive Representation on Latinos’ Views of Government and of Themselves*, 92 *SOC. SCI. Q.* 483, 503–04 (2011); Walter Wilson, *Descriptive Representation and Latino Interest Bill Sponsorship in Congress*, 91 *SOC. SCI. Q.* 1043, 1059 (2010); Robert Preuhs, *Descriptive Representation as a Mechanism to Mitigate Policy Backlash: Latino Incorporation and Welfare Policy in the American States*, 60 *POL. RSCH. Q.* 277, 287 (2007).

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