# CITIZENSHIP, PERSONHOOD, AND THE CONSTITUTION IN 2020

By Rachel F. Moran*

When I arrived at Yale Law School in 2005 for a conversation about a vision for the Constitution in 2020, it became clear that some of the assembled scholars saw citizenship as the key to a reinvigorated progressive agenda.[1] The hope was that appeals to citizenship would revitalize the democratic process and mitigate the class divide through a redistribution of resources. On the political front, constitutional scholar Bruce Ackerman proposed "patriot dollars" that citizens could donate to candidates or political organizations as well as a new national holiday called "Deliberation Day" expressly dedicated to fostering civic dialogue.[2] As for addressing the growing gap in income and wealth, Ackerman called for a guaranteed stake of $80,000 to every American "[a]s a birthright of citizenship."[3] In addition, law professor (and now judge) Goodwin Liu argued that the Citizenship Clause should be resurrected to counter interstate disparities in school finance by treating educational adequacy as a right of national citizenship.[4] Finally, constitutional historian William E. Forbath sought to restructure the low-wage job market and restore dignity to work through decent wages and benefits by instantiating "social citizenship."[5]

Although I had originally planned to address an entirely different topic, I revised my remarks to resist a narrow focus on citizenship and insist on claims of personhood as at least equally vital to any prospects for redemptive constitutionalism.[6] I certainly understand the impulse behind the progressive turn toward citizenship. The concept has been largely emptied of

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[1] *See, e.g.*, Bruce Ackerman, *The Citizenship Agenda*, *in* THE CONSTITUTION IN 2020 109, 111 (Jack M. Balkin & Reva B. Siegel eds., 2009) (urging America's lawyers to "reclaim the lost promise of national citizenship for the twenty-first century"); Goodwin Liu, *National Citizenship and the Promise of Equal Educational Opportunity*, *in* THE CONSTITUTION IN 2020, *supra*, at 119, 120 (proposing that interstate educational inequality should be addressed through "*legislative enforcement of the affirmative guarantee of national citizenship*") (emphasis in original); William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, *in* THE CONSTITUTION IN 2020, *supra*, at 55, 56 (calling for renewed constitutional attention to "the material bases of citizenship").

[2] Ackerman, *supra* note 1, at 112–15.

[3] *Id*. at 115–17.

[4] Liu, *supra* note 1, at 130.

[5] Forbath, *supra* note 1, at 64–66.

[6] *See generally* Rachel F. Moran, *Terms of Belonging*, *in* THE CONSTITUTION IN 2020, *supra* note 1, at 133.

its protective force, but it is worth noting that citizenship was destabilized and undermined precisely when it might have advanced the work of promoting equality.[7] That history alone should alert progressives to the treacherous possibilities as well as the hoped-for promise of citizenship. At the 2005 conference, I worried that citizenship can be a sword wielded against immigrant communities, particularly disadvantaged communities of color, as well as a shield for those who fear that the nation-state's bonds are fraying under the political and economic pressures of globalization.[8] As I noted then, citizenship is an especially fraught concept for a progressive agenda because the United States has been experiencing high levels of immigration, including from Latin America.[9] Ultimately, I concluded that citizenship has been deployed in such deeply exclusionary and dehumanizing ways that it would be hard to imagine it as the core organizing principle for an inclusive, egalitarian reform agenda.[10]

Now that 2020 has arrived, I believe that my concerns about a citizenship agenda have been vindicated. Today, I am even more convinced that citizenship is just as likely—if not more likely—to be a destructive wedge issue in partisan politics as it is a tool for promoting equality and community. As I will explain, a progressive agenda for citizenship has failed to deliver much in the way of its promised benefits. At the same time, progressive calls to invigorate citizenship can legitimate the distinction between citizens and non-citizens and eclipse the claims to personhood that immigrants make. In fact, conservatives have readily appropriated the concept of citizenship to advance their own highly exclusionary agenda, one targeted at immigrants and the communities of color in which they live. The critical question for these communities is whether personhood can be a robust source of protection against government abuse and overreaching.

## I. The Unrealized Progressive Vision for a Citizenship Agenda

Intervening events since the 2005 conference have repeatedly revealed the limited prospects for a progressive citizenship agenda to succeed. So far, there have been few efforts to experiment with "patriot dollars." One notable example took place in 2015, when voters in

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[7] During Reconstruction, for example, the United States Supreme Court interpreted the meaning of federal citizenship very narrowly, eviscerating its power to protect newly emancipated African Americans. *See* The Slaughter-House Cases, 83 U.S. 36, 79–80 (1873); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1194, 1259 (1992) (describing how *The Slaughter-House Cases* "strangl[ed] the privileges or immunities clause in its crib" and led to "the impoverishment of Fourteenth Amendment discourse in the Supreme Court over the next several generations" following Reconstruction). In a similar vein, contemporary efforts to destabilize citizenship as a way to weaken immigrant rights are evident in increased rates of denaturalization as well as ongoing demands to do away with birthright citizenship. *See* LEO R. CHAVEZ, ANCHOR BABIES AND THE CHALLENGE OF BIRTHRIGHT CITIZENSHIP 40 (2017); Katie Benner, *Justice Department Establishes Office to Denaturalize Immigrants*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html.

[8] Moran, *supra* note 6, at 140.

[9] *Id*. at 136 (according to the 2000 Census, "over one in ten Americans was born outside the United States, and of these, over half come from Latin America.").

[10] *Id*. (discussing how citizenship has been deployed throughout American history to exclude Latinos from the American Dream, "whether through expulsion from our borders or relegation to second-class status within them").

Seattle, Washington approved a ballot initiative that provides all residents eligible to donate to political campaigns with a "democracy voucher" worth $100 to support candidates of their choice in city-specific elections.[11] Interestingly, the vouchers are sent not only to citizens but also to legal immigrants eligible to make campaign contributions.[12] The experiment so far has had mixed results: Only 3.3% of Seattle residents used their vouchers, but of those who did, 84% had never donated to a candidate before.[13] Some other municipalities have expressed interest in Seattle's program, but the costs can be daunting. The city spent $1 million to operate a program that yielded $1.1 million in contributions.[14] As for Deliberation Day, it does not appear to have had much traction in the United States, although an Australian politician recently suggested the idea as "an exercise in realistic utopianism."[15]

The track record on the redistribution of resources is also far from reassuring. The idea of a birthright stake for citizens has yet to be fully tested in the United States, and an experiment with "baby bonds" in the United Kingdom was abandoned about a decade ago during the Great Recession.[16] Despite continued calls for reform, there has yet to be any meaningful movement toward recognizing a national right to educational adequacy.[17] As for social citizenship, the two most noteworthy recent advances relate to health care and the minimum wage. President Barack Obama's Administration succeeded in enacting health care reform, but the program continues to be attacked.[18] In order to get the measure passed, the Administration excluded undocumented immigrants from coverage, even though health care was framed as a human right.[19] With respect to employment conditions, grassroots activism has led some states and municipalities to pass minimum wage legislation that guarantees workers at least $15 an hour.[20] Far from being couched in terms of citizenship, the Fight for $15 has enlisted the participation of immigrants,

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[11] Sara Kliff, *Seattle's Radical Plan to Fight Big Money in Politics*, VOX (Nov. 5, 2018, 7:00 AM), http://www.vox.com/2018/11/5/17058970/seattle-democracy-vouchers.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Australian MP Floats 'Deliberation Day' Idea to Energize Voters*, BBC (Apr. 21, 2017), http://www.bbc.com/news/world-australia-39650324.

[16] Elise Viebeck, *Booker Wants a 'Baby Bond' for Every U.S. Child, Would It Work?*, WASH. POST (Aug. 19, 2019), http://www.washingtonpost.com/politics/cory-booker-wants-a-baby-bond-for-every-us-child-would-it-work/2019/08/15/35003f16-b88b-11e9-bad6-609f75bfd_story.html.

[17] Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 15–16, 18–20 (Kimberly Jenkins Robinson ed., 2019).

[18] *See, e.g.*, Adam Liptak & Abby Goodnough, *Supreme Court to Hear Obamacare Appeal*, N.Y. TIMES (Mar. 2, 2020), http://www.nytimes.com/2020/03/02/us/supreme-court-obamacare-appeal.html; Richard Wolf, *Supreme Court Refuses for Now to Hear Appeal of Decision Threatening Affordable Care Act*, USA TODAY (Jan. 21, 2020, 9:52 AM), http://www.usatoday.com/story/news/politics/2020/01/21/affordable-care-act-supreme-court-decide-obamacare/2831787001/.

[19] Sarah Wheaton, *Undocumented Immigrants Won't Get Obamacare*, POLITICO (Nov. 20, 2014, 8:39 PM), http://www.politico.com/story/2014/11/obamacare-undocumented-immigrants-113076.

[20] Graham Vyse, *After Federal Minimum Wage Bill Advances, What's the Future of the Fight for $15?*, GOVERNING (July 29, 2019), http://www.governing.com/topics/mgmt/gov-minimum-wage-house-bill.html (reporting that seven states and thirty localities, mostly in California, have adopted $15 minimum wage laws).

who have played a pivotal role in revitalizing the labor movement in urban areas with diverse workforces.[21]

These experiences reveal that citizenship has not served as a strong animating principle for progressive reforms. Very often, successful change depends on mobilizations around shared interests—to fight big money in politics, to get basic medical care, and to earn a living wage. The awareness of a common cause will not necessarily rest on the rather diffuse and encompassing notion of citizenship, but on other traits that are part of the human condition like vulnerability to illness and want.[22] It should come as no surprise, then, that some recent efforts to stimulate political engagement and mitigate socioeconomic inequality have included citizens and non-citizens alike.

## II. The Conservative Agenda for Citizenship

If a citizenship agenda to date has had limited value for progressive purposes, it has been a potentially more impactful tool when wielded by conservatives to push a very different agenda for the Constitution in 2020. These efforts have been most salient on the political front, beginning with litigation that culminated in the United States Supreme Court's decision in *Evenwel v. Abbott*[23] in 2016. There, the plaintiffs alleged that Texas had diluted the value of their votes by using total population to apportion representation in the state senate.[24] Because the plaintiffs lived in areas with a high proportion of citizens eligible to vote, their districts received fewer state senators per voter than districts that included large numbers of minors and non-citizens who were ineligible to vote.[25] In fact, the maximum deviation from the average number of representatives per person was just 8.04% across districts, but the maximum deviation per eligible voter was at least five times greater, exceeding 40%.[26] Because of this gross disparity, the plaintiffs argued, Texas was constitutionally obligated to abandon a districting plan based on total population and to substitute one that used a measure of the voting-eligible population.[27]

Although the plaintiffs highlighted the unfairness between rural and urban districts that resulted from using total rather than voting-eligible population,[28] the shift also implicated the

[21] JONATHAN ROSENBLUM, BEYOND $15: IMMIGRANT WORKERS, FAITH ACTIVISTS, AND THE REVIVAL OF THE LABOR MOVEMENT 171–72, 180–84, 190 (2017).

[22] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–12 (2008) (describing the universalism of vulnerability, even as we experience different forms of dependency over time).

[23] 136 S. Ct. 1120 (2016).

[24] *Id*. at 1121.

[25] *Id*. at 1125; Brief for Appellants at 10–12, Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (No. 14-940).

[26] 136 S. Ct. at 1125; Brief for Appellants, *supra* note 25, at 9.

[27] 136 S. Ct. at 1125; Brief for Appellants, *supra* note 25, at 14–15.

[28] *See, e.g.*, Warren Richey, *Supreme Court to Examine if Texas Districts Violate One Person, One Vote*, CHRISTIAN SCI. MONITOR (May 26, 2015), http://www.csmonitor.com/USA/Justice/2015/0526/Supreme-Court-to-examine-if-Texas-districts-violate-one-person-one-vote (emphasizing differential effects on rural and urban communities); Richard Wolf, *Supreme Court to Consider Redefining 'One-Person, One-Vote' Principle*, USA TODAY (May 26, 2015), http://www.usatoday.com/story/news/nation/2015/05/26/supreme-court-voting-rights/27800607/ (same).

balance of power among racial and ethnic groups.[29] As the Leadership Conference on Civil and Human Rights pointed out in its amicus brief, there are significant differences in the proportions of racial and ethnic groups eligible to vote: While 79.1% of non-Hispanic whites and 70.2% of blacks are voting-age citizens, only 45.2% of Latinos and 54.5% of Asian Americans are.[30] These differences largely result from the comparative youth of the Latino and Asian American populations and their higher percentages of foreign-born immigrants.[31] Equalizing apportionment based on voting-eligible population rather than total population therefore would eliminate some representatives from areas serving predominantly Latino, Asian American, and immigrant constituencies, making it harder for these groups to gain access to elected officials.[32]

The United States Supreme Court unanimously concluded that states need not privilege voter equality over access to representation by all members of the population.[33] However, the decision left open whether states retain the discretion to adopt apportionment plans that weigh voting equality for citizens.[34] For that to be a meaningful option, states would have to draw on reliable estimates of the voting-eligible population. Yet, as the State of Texas, the United States, and amici in *Evenwel* pointed out, there is no comprehensive count of eligible voters. The short-form version of the Census, which goes to all American households, asks about age but not citizenship.[35] Consequently, a state would have to rely on the results of the American Community Survey, which includes a citizenship question but goes to only a tiny fraction of American households.[36] Based on that sampling, states would need to extrapolate the size of the voting-eligible population, a process that would grow increasingly difficult in smaller districts with fewer sampled households.[37]

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[29] Brief of the Cato Institute and Reason Foundation as Amici Curiae Supporting Appellants at 13, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (arguing that "a relatively small constituency of eligible Hispanic voters . . . have their votes 'over-weighted' and 'over-valuated,' effectively diluting the votes of eligible voters" in districts with fewer Latinos); Brief of Amicus Curiae Immigration Reform Law Institute in Support of Appellants at 11–17, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (describing interstate inequities in voter equality due to immigrants); Brief of the City of Yakima, Washington as Amicus Curiae Supporting Appellants at 10, *Evenwel*, 136 S. Ct. 1120 (No. 14-940) (arguing that a shift from at-large to multi-member districts exacerbates voter inequality when total population is used to draw the boundaries). *See generally* Garrett Epps, *One Person, One Vote?*, THE ATLANTIC (May 31, 2015), http://www.theatlantic.com/politics/archive/2015/05/one-person-one-vote/394502/ (noting racial and ethnic as well partisan implications of shifting from total population to voter population).

[30] Brief of the Leadership Conference on Civil and Human Rights et al. as Amici Curiae in Support of Appellees at 2c–4c (Appendix C), *Evenwel*, 136 S. Ct. 1120 (No. 14-940).

[31] *Id*. at 25–27.

[32] *See, e.g.*, Brief of the Texas Senate Hispanic Caucus and the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees at 11–19, *Evenwel*, 136 S. Ct. 1120 (No. 14-940); Brief for Amici Curiae Texas Senators in Support of the Appellees at 16–19, *Evenwel*, 136 S. Ct. 1120 (No. 14-940); Brief of Amicus Curiae Carl E. Heastie in his Official Capacity as Speaker of the New York State Assembly in Support of Appellees at 6, 9, *Evenwel*, 136 S. Ct. 1120 (No. 14-940).

[33] *Evenwel*, 136 S. Ct. at 1126–33.

[34] *Id*. at 1133.

[35] Brief for Appellees at 50–53, *Evenwel*, 136 S. Ct. 1120 (No. 14-940); Brief of Nathaniel Persily et al. as Amici Curiae in Support of Appellees at 11, *Evenwel*, 136 S. Ct. 1120 (No. 14-940).

[36] Brief of Nathaniel Persily et al. as Amici Curiae in Support of Appellees, *supra* note 35, at 12.

[37] *Id*. at 14–15, 19–20. Interestingly, the Project on Fair Representation eventually filed an amicus brief in the United States Supreme Court that linked the need for the citizenship question directly to the *Evenwel* decision and

For states to take up the invitation to experiment with measures of eligible voters when redistricting, officials would have to surmount these technical obstacles. It should come as no surprise, then, that shortly after *Evenwel* was decided, a new controversy erupted over the Trump Administration's decision to add a citizenship question to the 2020 Census. This controversy also had its roots in Texas. At the time that *Evenwel* was being litigated, Thomas A. Hofeller, a Republican consultant on redistricting, conducted a 2015 study of the state's legislative districts and found that omitting non-citizens from the count "would be advantageous to Republicans and non-Hispanic whites" because it would erode the influence of Latino voters who tend to support Democrats.[38] Meanwhile, Kris Kobach, a Kansas politician who once was considered for an appointment as the Trump Administration's "immigration czar," had longstanding objections to counting undocumented immigrants for purposes of apportionment.[39] Adding a citizenship question was a priority for Kobach, one that he discussed with both Donald Trump and his top adviser Steve Bannon during the presidential campaign and shortly after Trump's inauguration.[40] Bannon and Kobach also urged Secretary of Commerce Wilbur Ross to take action, and over the objections of career Census Bureau experts, Ross proposed adding a citizenship question in March 2018, purportedly in response to a Justice Department request. According to Ross, the Justice Department had asked for the information on citizenship to improve enforcement of the Voting Rights Act, particularly efforts to protect minority voting strength when redistricting.[41]

Litigation soon followed. The plaintiffs in *New York v. Department of Commerce*,[42] which eventually wended its way to the United States Supreme Court, first contended that adding the citizenship question would violate the Enumeration Clause by seriously undermining the accuracy of the total population count.[43] The plaintiffs also claimed that the Secretary's decision to add the question was an abuse of discretion under the Administrative Procedure Act (APA). To support this argument, they cited procedural irregularities, including a failure to pre-test the question, as well as problems with the substantive decision-making process. In particular, the plaintiffs noted that Ross had ignored confidentiality concerns in using the data for voting rights enforcement and had disregarded expert evidence and recommendations that consistently

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the inadequacy of American Community Survey data. *See* Brief of Project on Fair Representation as Amicus Curiae in Support of Petitioner at 14–17, U.S. Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019) (No. 18-966).

[38] JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 322 (2019).

[39] *See, e.g.*, John Binder, *Kris Kobach: Counting Illegal Aliens in Congressional Apportioning 'Grossly Distorts Representation'*, BREITBART (Apr. 22, 2018), https://www.breitbart.com/radio/2018/04/22/kris-kobach-counting-illegal-aliens-in-congressional-apportioning-grossly-distorts-representation/.

[40] DAVIS & SHEAR, *supra* note 38, at 322; Jill Colvin & Colleen Long, *President Trump Considering Naming an 'Immigration Czar*,*'* CHICAGO TRIB. (Apr. 2, 2019), https://www.chicagotribune.com/nation-world/ct-trump-immigration-czar-20190401-story.html.

[41] DAVIS & SHEAR, *supra* note 38, at 322–23.

[42] 351 F. Supp. 3d 502 (S.D.N.Y. 2019, *aff'd in part and rev'd in part*, 139 S. Ct. 2551 (2019). Several other cases were filed as well. *See* State v. Ross, 358 F. Supp. 3d 965 (N.D. Cal. 2019) (filed Mar. 26, 2018); Kravitz v. U.S. Dep't of Commerce, 336 F. Supp. 3d 545 (D. Md. 2018) (filed Apr. 11, 2018); City of San Jose v. Ross, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); La Union del Pueblo Entero v. Ross, 353 F. Supp. 3d 381 (D. Md. 2018) (filed May 31, 2018).

[43] New York v. U.S. Dep't of Commerce, 315 F. Supp. 3d 766, 799 (S.D.N.Y. 2018).

counseled against adding the question.[44] Finally, the plaintiffs asserted that Trump Administration officials acted with discriminatory animus in violation of the Equal Protection Clause.[45]

The district court dismissed the Enumeration Clause claim because the Secretary had a broad charge to administer the Census, and adding questions would nearly always affect response rates. If some alleged impact on the total population count were enough to trigger judicial review of a question, the courts would find themselves regularly second-guessing the Secretary's decisions.[46] The court also found insufficient evidence of discriminatory intent in adopting the question.[47] The lower court enjoined the Secretary from adding the question, however, because the decision was arbitrary and capricious and based on a pretextual rationale. The judge remanded the matter to the agency for further action to cure defects in the process.[48]

In reviewing the lower court's decision, the United States Supreme Court concerned itself with the Enumeration Clause and APA violations. In a majority opinion written by Chief Justice John Roberts, the Court agreed that the Enumeration Clause allowed Secretary Ross to add the citizenship question for information-gathering purposes.[49] However, the Court found that the decision-making process could not survive scrutiny under the APA. Although administrators were entitled to considerable deference, the Court ultimately concluded that it could not "ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'"[50] As Chief Justice Roberts explained, Ross initially justified his decision as a response to the Justice Department's request for granular data on citizenship to enforce the Voting Rights Act, but it later became clear that the sequence of events was markedly different. According to the majority opinion:

> The evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ [the Department of Justice] would make the request; and adopted the Voting Rights rationale late in the process.[51]

Because authentic justifications for administrative actions are essential to transparency and accountability, "[a]ccepting contrived reasons would defeat the purpose of the enterprise" and render judicial review "an empty ritual."[52] This litany of misdirection and subterfuge was

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[44] New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d at 647–59.
[45] 315 F. Supp. 3d at 806–11; 351 F. Supp. 3d at 669.
[46] 315 F. Supp. 3d at 804–06.
[47] 351 F. Supp. 3d at 671.
[48] *Id*. at 671–78. The district court also found some violations of the Census Act. *Id*. at 636–47.
[49] U.S. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2566–67 (2019).
[50] *Id*. at 2575 (citing United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).
[51] *Id*. at 2574.
[52] *Id*. at 2576.

necessary to get a majority of the Court to overturn the Secretary's decision. Only a minority of the Justices, in an opinion written by Justice Stephen Breyer, were willing to conclude that the decision was arbitrary and capricious based solely on Ross's consistent disregard of relevant policy considerations as well as the expert findings and recommendations provided by his staff.[53]

When the Court upheld the district court's injunction and the matter was remanded to the agency for further action, the Trump Administration at first seemed inclined to fight to keep the citizenship question on the Census. Eventually, however, Ross abandoned the effort, perhaps because of fresh disclosures that did not figure in the Supreme Court's deliberations. These revelations came to light after Republican political consultant Thomas Hofeller died and relevant evidence was found in his computer files.[54] In *Kravitz v. Department of Commerce*,[55] another lawsuit challenging the citizenship question, the plaintiffs used this newly discovered information to ask that a federal district court in Maryland reopen claims of animus under the Equal Protection Clause.[56] In particular, the plaintiffs cited Hofeller's 2015 study of Texas districts, which found that switching to apportionment based on the voting-eligible population would eliminate five of thirty-five Latino-majority House districts and alienate Latino voters but "would be advantageous to Republicans and Non-Hispanic Whites."[57] Hofeller's computer files also showed that he had played a direct role in preparing the letter that provided the Trump Administration with a rationale for adding the citizenship question.[58] As the plaintiffs explained, "[t]his new evidence . . . provides a direct line from Dr. Hofeller's 2015 study—endorsing the addition of the citizenship question to help non-Hispanic Whites and Republicans at Hispanics' expense—to Ross's 'trusted advisor' . . . and senior Commerce officials around Ross, and ultimately to the DOJ Letter, which Secretary Ross himself solicited and induced DOJ to provide."[59] The district court agreed to reopen the equal protection claim and granted an injunction preventing the citizenship question from being added until that issue was resolved.[60] At about this time, Ross gave up on adding the question, and Trump issued an executive order directing agencies to gather citizenship data already on hand.[61]

Although legal roadblocks have prevented conservatives from fully implementing their version of a citizenship agenda, its power to exclude is palpable and remains an ongoing threat to

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[53] *Id*. at 2595 (Breyer, J., concurring in part and dissenting in part).

[54] DAVIS & SHEAR, *supra* note 38, at 393–94; Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html; Mark Joseph Stern, *There's New Proof that Trump Officials Lied Under Oath about the Census Citizenship Question*, SLATE (Nov. 15, 2019, 6:11 PM), https://www.slate.com/news-and-politics/2019/11/hofeller-document-census-citizenship-question-supreme-court-consequences.html.

[55] Kravitz v. U.S. Dep't of Commerce, 336 F. Supp. 3d 545 (D. Md. 2018).

[56] Memorandum in Support of Plaintiffs' Rule 60(b)(2) Motion for Relief from Final Judgment & Request for Indicative Ruling Under Rule 62.1(a) at 1–2, Kravitz v. U.S. Dep't of Commerce, 382 F. Supp. 3d 393 (D. Md. 2019) (No. 18-cv-01041).

[57] *Id.* at 5.

[58] *Id*. at 6.

[59] *Id*. at 7–8.

[60] *Kravitz*, 382 F. Supp. 3d at 402–03; Order at 1–2, Kravitz v. U.S. Dep't of Commerce, No. 18-cv-01041 (D. Md. July 16, 2019).

[61] DAVIS & SHEAR, *supra* note 38, at 393–94.

immigrants and communities of color. The federal government is still free to add a citizenship question in the future if it abides by a proper process, and states are still free to experiment with the use of the voting-eligible population as one factor in redistricting. These possibilities clearly threaten the political visibility and voice of non-citizens as well as the communities of color in which they reside. Moreover, the potential changes jeopardize the resources these communities receive under formulas that depend on how the population is counted. Ironically, then, the very goals that progressives hoped a citizenship agenda would achieve—that is, increased political participation and more equitable distribution of resources—are being thwarted by conservatives using the same tool for very different ends.

## III. The Diminished Condition of Constitutional Personhood and the Search for Alternatives

If conservatives have mainly used citizenship as a sword, its exclusionary force stems—at least in part—from the ongoing vitiation of personhood as a source of constitutional protection. Personhood has not always been so pusillanimous. In 1982, in *Plyler v. Doe*, the Supreme Court struck down a Texas statute that allowed public schools to charge tuition and even bar undocumented students from enrolling altogether.[62] The law was framed as a necessary antidote to inadequate federal enforcement at the border, a way to deter the undocumented from migrating to the state with their families.[63] The Court struck down the statute as a violation of the Equal Protection Clause because innocent children, who might very well remain in the United States, would be relegated to a permanent underclass of illiterates unable to participate fully in economic or civic life.[64] Such a punitive approach, the Court concluded, posed "most difficult problems for a Nation that prides itself on adherence to principles of equality under law"[65] and ultimately violated "fundamental conceptions of justice."[66]

*Plyler* treated the inevitable stigma and subordination associated with illiteracy as an injury not just to the affected children but to our shared democratic commitments. But truth be told, *Plyler* was a jurisprudential anomaly at the time it was decided and remains so today.[67] The decision gave life to constitutional personhood by recognizing that identity can be highly mutable and that the state can shape it for good or ill. Elsewhere in equal protection jurisprudence, however, the Court has treated protected traits as immutable, ascribed at birth, and presumptively irrelevant to a person's deservingness. As a consequence, government officials need not consider these characteristics to advance human flourishing. On the contrary, the state

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[62] 457 U.S. 202, 228–30 (1982).
[63] *Id*. at 205–06; MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 9–10 (2012).
[64] *Plyler*, 457 U.S. at 202–03, 218–20, 226, 229–30.
[65] *Id*. at 219.
[66] *Id*. at 220.
[67] Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. (forthcoming 2020).

must be colorblind and refrain from discriminatory acts.[68] That narrow approach is evident in the equal protection analysis in the litigation over the citizenship question. The focus is entirely on whether the question was motivated by a desire to disadvantage Latinos and immigrants.[69]

Events surrounding the adoption and rescission of the Deferred Action for Childhood Arrivals (DACA) program shed further light on the limits of arguments based on constitutional personhood. In 2012, the Obama Administration adopted a policy of deferring deportation of undocumented immigrant youth who had entered the country at a young age; had resided continuously in the United States for five years; had a high school diploma, a graduate equivalency degree, or military service; had no serious criminal record; and were under thirty years of age.[70] Under DACA, a beneficiary not only could set aside worries about being removed from the United States but also could apply for work authorization.[71] For many recipients, DACA was transformative. Before the program became available, they had some protections under *Plyler* but only as long as they remained in public elementary and secondary schools. Upon graduating from high school, however, they began what sociologist Roberto G. Gonzales describes as a "transition to illegality."[72] As one undocumented youth, Rodolfo, explains, "I never actually felt like I wasn't born here. Because when I came I was like ten and a half. I went to school. I learned the language. I first felt like I was really out of place when I tried to get a job."[73]

The cumulative experiences of this abrupt transition from belonging to marginalization led to the rise of the Dreamers' movement and demands for a path to legalization. The Dreamers picked up on *Plyler*'s trope of innocence, reminding the public and policy-makers that they were in the United States through "no fault of their own."[74] But the movement's message also drew on the decision's aspirational quality: The opportunity to learn and flourish as capable adults was part of our democratic creed. The Dreamers described their academic accomplishments to demonstrate their deservingness,[75] and they explained how their socialization in the public schools had made them de facto Americans, members of the community except on paper.[76] As another undocumented youth, Lilia, noted:

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[68] *Id*.
[69] *See supra* notes 45, 47, 56–60 and accompanying text.
[70] Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.
[71] *Id*. at 3.
[72] ROBERTO G. GONZALES, LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA 96 (2016) (emphasis omitted).
[73] *Id*. at 97.
[74] WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 53 (2013).
[75] *Id*. at 54.
[76] *See* ALEXIS M. SILVER, SHIFTING BOUNDARIES: IMMIGRANT YOUTH NEGOTIATING NATIONAL, STATE AND SMALL-TOWN POLITICS 128 (2018).

> They say go back to your country, but I don't even know the Mexican national anthem. It's kind of embarrassing around my cousins from Mexico, but I didn't grow up there. I sure do know all of our national songs, 'My Country, 'Tis of Thee,' 'America the Beautiful.' We learned them in school. It's like every American kid knows those songs because we learn them in school. I think that means something. It says something about me, where I'm from. It connects us.[77]

Despite the inherent power of these claims, there has been no space for them in the Court's jurisprudence of constitutional personhood. The question is not whether the transition to illegality dehumanizes Lilia, but whether that transition stems from official actions done with discriminatory intent.[78]

*Plyler*'s acknowledgment of a liberty interest, that is, access to education in order to grow into the fullness of adulthood, is also an outlier in the Court's equal protection doctrine. The decision was remarkable at the time because less than a decade before, the Supreme Court had rejected any right to equal education. In *San Antonio Independent School District v. Rodriguez*,[79] students challenged the State of Texas's reliance on a property tax system that led to significant disparities in per-pupil funding in the public schools. The lawsuit emphasized distinctions between low-wealth and high-wealth districts, rather than those between predominantly white and predominantly minority districts. As a result, the Justices applied a lenient standard of review and concluded that questions of differential funding were best left to the political process.[80] However, the decision did leave open the possibility that there might be a constitutional right to minimum access to education.[81] *Rodriguez* was consistent with earlier cases that had rejected fundamental rights to welfare assistance or basic shelter.[82] These decisions applied to citizens and non-citizens alike, making clear just how remarkable *Plyler*'s protection of undocumented schoolchildren was at the time.

Nothing has happened in the years since to suggest that *Plyler* is something other than "one of a kind, perhaps moral high ground, iconic but limited in its application."[83] Because protections for persons and even citizens are relatively thin, government officials enjoy an increasing amount of power and discretion.[84] Civil rights lawyers, therefore, have been forced to turn to other means to protect the vulnerable. As Thomas Saenz, President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), has observed, he

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[77] GONZALES, *supra* note 72, at 76.
[78] Moran, *supra* note 67.
[79] 411 U.S. 1 (1973).
[80] *Id*. at 28–29, 36–44.
[81] *Id*. at 36–37.
[82] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 480, 485–87 (1970) (holding that the use of statutory caps on welfare assistance did not violate the Equal Protection Clause, even if large families received per-capita grants that did not meet their basic economic needs); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (determining that the right to decent shelter does not qualify as a fundamental interest).
[83] OLIVAS, *supra* note 63, at 97.
[84] *See, e.g.*, Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 717, 729 (2015) (writing that undocumented students are "vulnerable to the discretionary decision-making of public . . . actors" and must seek "inclusion in the form of an administrative act of grace, rather than asking an adjudicator to enforce a right.").

cannot "remember the last case that MALDEF has pursued all the way through to conclusion involving an Equal Protection Clause claim."[85] Instead of relying on a traditional rights-based approach, he believes that Latinos must develop "a new civil rights jurisprudence, which we might call Civil Rights 2.0," one that turns on "a comprehensive theory of the Constitution."[86]

In the search for Civil Rights 2.0, advocates increasingly have drawn on provisions that constrain government power, like those in the Administrative Procedure Act (APA), to contest agency actions as an abuse of discretion. Those arguments featured prominently in litigation over the citizenship question,[87] and they are front and center again in *Department of Homeland Security v. Regents of the University of California*,[88] a pending Supreme Court challenge to the Trump Administration's 2017 rescission of the DACA program. Given the deferential standard of review that courts apply to executive decision-making, claims under the APA will not be easy to win, as the Court's decision on the citizenship question makes clear. Despite a deeply flawed administrative record, the Court did not strike down the question based on Secretary Ross's arbitrary and capricious disregard of expert evidence and recommendations. Instead, the majority relied on the contrived nature of the Commerce Department's proffered justification. That finding rested on an extraordinary showing that the Department lobbied the Justice Department for a voting rights rationale that had nothing to do with the Secretary's real reasons for adding the question.[89] If agency action will be nullified only when an administrative masquerade strains credulity, Civil Rights 2.0 may have to turn to tools other than the APA to fight government overreaching of vulnerable clients.

In the DACA case, the plaintiffs have made much of the Department of Homeland Security's failure to consider beneficiaries' reliance interests when ending the program.[90] The Justices were clearly concerned with this issue during oral argument.[91] Justice Breyer was especially vigorous in pressing the United States on whether reliance interests were limited only to beneficiaries or extended to a wide range of stakeholders, including health care organizations, labor unions, educational associations, businesses, religious organizations, and state and local governments, that had submitted amicus briefs to the Court.[92] And, even as the United States

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[85] Thomas A. Saenz, *One Advocate's Road Map to a Civil Rights Law for the Next Half Century: Lessons From the Latino Civil Rights Experience*, 38 N.Y.U. REV. L. & SOC. CHANGE 607, 617 (2014).

[86] *Id*. at 621–22.

[87] *See supra* notes 44, 48, 50–53 and accompanying text.

[88] 139 S. Ct. 2779 (2019) (mem.) (granting certiorari).

[89] *See supra* notes 50–52 and accompanying text. Although the plaintiffs in the DACA case argue that the justification for the program's rescission was pretextual, the evidence is considerably less dramatic than the proof that emerged in the *Department of Commerce* case. *See* Brief for Respondents at 56–58, U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (No. 18-587).

[90] *Id*. at 40–43. Reliance interests also figured prominently in lower court proceedings on DACA's rescission. *See* Batalla Vidal v. Nielson, 279 F. Supp. 3d. 401, 431–32 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1044–45 (N.D. Cal. 2018), *aff'd*, 908 F. 3d 476 (9th Cir. 2018); NAACP v. Trump, 298 F. Supp. 3d 209, 240 (D.D.C. 2018).

[91] Transcript of Oral Argument at 20–23, 26, 30, 56–63, U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (No. 18-587), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-587_1bn2.pdf.

[92] *Id*. at 23–24.

sought to minimize beneficiaries' reliance interests because DACA was at most "a temporary stop-gap measure,"[93] Justice Sonia Sotomayor reminded the Solicitor General that the rescission was "about our choice to destroy lives."[94]

Administrative law scholar Blake Emerson has called on courts to adopt a less deferential approach to agency decision-making when reliance interests are at stake. In his view, agencies must recognize that they bear a heavier burden of justification when they upend a previous policy and that decision has "vast economic and political significance" as DACA's rescission arguably does.[95] These concerns are especially weighty when policy reversals bear on the social inclusion of disadvantaged constituencies, including what immigration expert Jennifer Chacón calls the "liminal legality" of the undocumented.[96] Under these circumstances, reliance interests provide at least a faint reminder of the normative principles first elucidated in *Plyler*. There, the Court acknowledged the damage to our democracy that public officials inflict when they are wholly indifferent to the harsh and dehumanizing consequences of their actions.[97] While *Plyler* spoke in the register of inviolate constitutional rights, litigation under the APA seeks minimal safeguards against official abuses of discretion. This shift reveals how much the terms of constitutional personhood have changed. If the Dreamers do not have the right to have rights, they at least ask for the right to have expectations.[98]

Sadly, the opinion in *Department of Commerce* does not bode well for efforts to impose meaningful constraints on administrative action that marginalizes disadvantaged populations. There, a majority of the Justices were unwilling to find that it was arbitrary and capricious to add a citizenship question without dramatic proof of a fabricated justification. Evidence of the adverse impact on the Latino population and the disregard of expert input, standing alone, did not suffice to overturn Secretary Ross's decision.[99] The Court will have to accord decisive weight to neglected reliance interests to find that the DACA program's rescission was arbitrary and capricious. For this argument to prevail, a majority will have to be persuaded that, as Justice Sotomayor put it, this is a case "about our choice to destroy lives" and that the Court's obligation to safeguard the integrity of the administrative process, therefore, is notably more exacting than in the ordinary case.

## IV. Personhood Revisited

It seems clear that citizenship has been a far more useful tool for conservatives than for progressives and that personhood remains a fairly pallid source of protection. Needless to say, this is far from a satisfying way to end a reflection on the state of the Constitution in 2020. After

[93] *Id*. at 20.
[94] *Id*. at 31.
[95] Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2205 (2019) (citing Texas v. United States, 809 F.3d 134, 183 (5th Cir. 2015)).
[96] *Id*. at 2208–15; Chacón, *supra* note 84, at 733–34.
[97] *See supra* notes 65–66 and accompanying text.
[98] Moran, *supra* note 67.
[99] *See supra* notes 50–52 and accompanying text.

all, being right about the destructive possibilities of a citizenship agenda is hardly as gratifying as celebrating the renaissance of personhood. For that reason, I want to conclude by exploring two situations in which there might be opportunities to revive the dignity of persons—citizens and non-citizens alike. The first arises when incursions on human dignity are so shocking that they become intolerable. The sense of estrangement from others grows extreme enough that we are in danger of ballasting any notion of our shared humanity. As in *Plyler*, this circumstance often involves the mistreatment of children. A recent example is the "zero tolerance" policy that relied on family separations at the border to deter undocumented immigration. Senior officials in the Obama Administration had previously considered this approach but ultimately rejected it because, as domestic policy advisor Cecilia Muñoz concluded, "The morality of it was clear—that's not who we are."[100] Her statement evokes the norms of personhood in *Plyler*, which held that relegating innocent children to inhumane conditions did grave injury to our democratic sensibilities as a people.

The Trump Administration was not similarly reticent. Between July and November 2017, federal officials operated a secret pilot program in a border sector covering New Mexico and parts of western Texas to test how effective family separations would be in reducing the number of families crossing the border. The Administration concluded that crossings had dropped by sixty-four percent as a result of the separations.[101] With this statistic in hand, high-level officials began to push for a formal policy of family separations across the entire southern border.[102] On May 7, 2018, Attorney General Jeff Sessions announced that "we are not going to let this country be overwhelmed" and "[p]eople are not going to caravan or otherwise stampede our border."[103] He made clear that under the Trump Administration's zero-tolerance policy, "If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."[104] After noting that the number of undocumented immigrants and their citizen-children was large enough to make up "our fifth-most populous state," he concluded that the American people "are right and just and decent" to ask for strict enforcement to create "a safe, secure border."[105]

By June, it was clear that not all of the American people agreed. News outlets were reporting on traumatized children held in substandard conditions as they begged to be reunited with their parents.[106] After a visit to one detention facility, Senator Jeff Merkley, a Democrat from Oregon, likened the spaces to "cages" that "look like the way you would construct a dog kennel."[107] An employee at one of the facilities provided media outlet ProPublica with an audio recording of children weeping for their parents, as a Border Patrol agent joked, "Well, we have

[100] DAVIS & SHEAR, *supra* note 38, at 123.
[101] *Id*. at 253.
[102] *Id*. at 254.
[103] Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, U.S. DEP'T OF JUSTICE (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.
[104] *Id*.
[105] *Id*.
[106] DAVIS & SHEAR, *supra* note 38, at 269.
[107] *Id*.

an orchestra here. What's missing is a conductor."[108] The response was swift and searing. The Pope termed the policy "immoral," former First Lady Laura Bush described it as "cruel" and reminiscent of Japanese internment during World War II, and the CEO of the U.S. Chamber of Commerce announced that "this is not who we are, and it must end now."[109] On June 20, President Trump rescinded the policy, remarking, "I didn't like the sight or the feeling of families being separated."[110] Ultimately, the Administration appeared to concede that "zero tolerance" is "zero humanity."[111]

Personhood can emerge as a significant concept not only when we exceed our own capacity for cruel indifference but also when we recognize our inescapable interdependence.[112] Building on *Plyler*, for example, some public school districts have announced that they are "sanctuary schools" that offer safe spaces for undocumented children.[113] These schools bar Immigration and Customs Enforcement officials from entering to detain students. The sanctuary resolutions highlight the district's "obligation to educate all students" as well as the concern that immigration enforcement would "arguably deprive undocumented students [of] an education out of fear that going to school would lead to arrest and removal from the United States."[114] By taking this action, officials define their community as one that encompasses every child in the school; to fail any of them is to betray a pedagogical mission and a sense of shared purpose.

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[108] Ginger Thompson, *Zero Tolerance: Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy.

[109] *Id.*; DAVIS & SHEAR, *supra* note 38, at 277.

[110] John Wagner et al., *Trump Reverses Course, Signs Order Ending His Policy of Separating Families at the Border*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/powerpost/gop-leaders-voice-hope-that-bill-addressing-family-separations-will-pass-thursday/2018/06/20/cc79db9a-7480-11e8-b4b7-308400242c2e_story.html.

[111] Thompson, *supra* note 108. The fallout from the separations continues. The American Civil Liberties Union filed suit challenging family separations. *See* Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Ms. L v. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-cv-0428), https://www.aclu.org/legal-document/ms-l-v-ice-complaint; Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations, Ms. L v. Immigration and Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-cv-0428), https://www.aclu.org/legal-document/ms-l-v-ice-amended-complaint. That litigation continues as a means to ensure that children are reunified with their parents, despite serious shortcomings in federal recordkeeping. *See, e.g.*, OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf. Fears remain that families continue to be separated at the border even after Trump rescinded the policy. *See* Ginger Thompson, *Families Are Still Being Separated at the Border, Months After "Zero Tolerance" Was Reversed*, PROPUBLICA (Nov. 27, 2018), https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed. These concerns were raised in the *Ms. L.* case, but the district court rejected the claim that the federal government had reverted to a policy of systematic separations. *See* Ms. L. v. U.S. Immigration & Customs Enf't, 415 F. Supp. 3d 980, 997–998 (S.D. Cal. 2020).

[112] This principle applies to a number of problems that are international in scope, ranging from global warming to global pandemics. However, I focus here on examples related to immigration policy.

[113] *See* Mark Keierleber, *'Sanctuary schools' across America defy Trump's immigration crackdown*, THE GUARDIAN (Aug. 21, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/aug/21/american-schools-defy-trump-immigration-crackdown.

[114] *See* Rose Cuizon Villasenor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1245–46 (2019).

Sanctuary cities have been the highest-profile examples of efforts to acknowledge shared fate and shared humanity in a local setting. There are various definitions of a sanctuary city, but most have policies limiting cooperation with federal immigration law enforcement.[115] Sanctuary cities initially emerged in the 1980s in cities like "Los Angeles, [which] had significant numbers of Latinos, refugee organizations, and Latino-dominant religious institutions to merge religious beliefs with social activism."[116] As the sanctuary city movement grew, it remained "deeply embedded in the nation's urban areas," in part because the country's twenty largest cities "are home to 6.8 million unauthorized immigrants, or 61% of the nation's total unauthorized."[117] Metropolitan areas were large enough to "allow those who are unauthorized to blend in with minimal public attention, particularly in communities with high concentrations of Latinos and other people of color, while tapping into social networks that . . . [could] help them obtain employment, find housing and places of worship, and even engage in mass demonstrations."[118]

Through these networks, undocumented immigrants became integral members of their neighborhoods, and as a result, local law enforcement officials often found it awkward and even counterproductive to play a vigorous role in enforcing federal immigration laws.[119] One comprehensive review of sanctuary city policies concluded that they are justified not only as ways to preserve local control over criminal justice, prevent unlawful arrests, and avoid racial profiling but also as ways to strengthen community trust and promote inclusion in highly diverse communities.[120] Taken together, these rationales suggest that sanctuary cities are embracing the role of community-building, as they seek to "reinvigorat[e] the possibility of a political solution to the divisions that now characterize American metropolitan areas."[121] Through those efforts, municipalities can help the nation to re-imagine its community by reminding us that, in a complex world, we are all in this together—regardless of race, class, or national origin.[122] Whether sanctuary cities succeed in healing these divides will likely depend on whether their efforts survive punitive federal efforts to squelch the movement.[123]

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[115] *See* MELVIN DELGADO, SANCTUARY CITIES, COMMUNITIES, AND ORGANIZATIONS: A NATION AT THE CROSSROADS 106 (2018).

[116] *Id*. at 113. Indeed, the sanctuary movement had its origins in churches that rendered assistance to Central American refugees in the 1980s. *See id*. at 113–15; Villasenor & Gulasekaram, *supra* note 114, at 1228–35.

[117] DELGADO, *supra* note 115, at 116–17. Delgado shows that sanctuary cities are strongly bicoastal, uncommon in the South, and typically Democratic. *Id*. at 121, 126–34. See also Jeffrey S. Passel & D'Vera Cohn, *20 metro areas are home to six-in-ten unauthorized immigrants in U.S.*, PEW RESEARCH CTR. (Mar. 11, 2019), https://www.pewresearch.org/fact-tank/2019/03/11/us-metro-areas-unauthorized-immigrants, for an update of their 2017 report on the proportion of undocumented immigrants living in major urban areas.

[118] DELGADO, *supra* note 115, at 116.

[119] *Id*. at 119–20.

[120] Christopher Lasch et al., *Understanding Sanctuary Cities*, 59 B.C. L. REV. 1703, 1736–72 (2018).

[121] GERALD FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 140 (Princeton University Press 2001).

[122] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES 6–7 (Verso 1991) (describing the emergence of an imagined community in which "regardless of the actual inequality and exploitation that may prevail, the nation is always conceived as a deep, horizontal comradeship").

[123] In 2017, the Trump Administration announced that it would withhold from sanctuary cities all federal grants administered by the Justice Department and the Department of Homeland Security. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017); Memorandum from Jefferson Sessions, Att'y Gen., U.S. Dep't of Justice, on

As the cases of sanctuary schools and cities suggest, a sense of shared fate that turns on our common humanity is most likely to emerge at the local level. Acknowledging that our destinies transcend international boundaries requires a greater leap of the imagination than recognizing that our classmates or neighbors can shape our collective future. Even so, a sense of solidarity can emerge at the supranational level when there is widespread recognition that no single nation-state can solve a global problem. Historian Samuel Moyn has argued that the international human rights movement became significant in the 1970s as "the moment that favored pure moral visions passed, not least in American party and electoral politics . . . ."[124] The turn to human rights reflected a growing acknowledgment that other "political utopias [had] died,"[125] but precisely because the international movement's reach was so expansive, its reform agenda often remained vague and ill-defined.

By insisting that the imperatives of a shared humanity transcended politics, activists made it difficult to move from aspirational ideals to practical methods of protecting the most vulnerable against the depredations of state power.[126] The real question, then, is whether there are some policy arenas in which the urgency of a global problem can allow personhood to emerge as a platform for real change. Sanctuary cities themselves offer an illuminating, if not wholly encouraging, case study. At the outset, when cities were responding to the Central American refugee crisis, they expressly invoked the language of human rights.[127] Eventually, however, this language faded away, in part because human rights for migrants were only weakly elaborated in international law.[128] The act of imagining a global community was simply too arduous to sustain, but it did plant the seeds for more pragmatic rationales to emerge at the state and local level.

Even so, global migration can highlight the interdependence of nation-states in upholding basic norms of human dignity, both at home and abroad. Presently, a case is pending before the United States Supreme Court that invokes the Convention Against Torture to contest expedited removal in deportation proceedings without judicial review.[129] Currently, no such review is available for immigrants who are being removed due to the commission of specified criminal

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Implementation of Executive Order 13768, Enhancing Public Safety in the Interior of the United States (May 22, 2017), https://www.justice.gov/opa/press-release/file/968146/download. So far, most federal courts have rejected the efforts to withhold funds as an overreach of the Attorney General's power. *See* City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1234–35 (9th Cir. 2018); City of Chicago v. Sessions, 888 F.3d 272, 283–87 (7th Cir. 2018); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 320–21 (E.D. Pa. 2018). More recently, however, the Second Circuit Court of Appeals upheld the decision as one that is statutorily authorized. New York v. U.S. Dep't of Justice, 951 F.3d 84, 121 (2d Cir. 2020). In addition, the Ninth Circuit upheld the federal government's use of sanctuary city status to assign lower scores to applicants for competitive federal grants. City of Los Angeles v. Barr, 929 F.3d 1163, 1177–81 (9th Cir. 2019).

[124] SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 213 (paperback ed. 2010).

[125] *Id*. at 214.

[126] *Id*. at 227.

[127] Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2747–48 (2019) (describing early reliance on international human rights standards for refugees in resolutions declaring sanctuary cities).

[128] *Id*. at 2744–46.

[129] Nasrallah v. Barr, 140 S. Ct. 428 (2019) (mem.) (granting certiorari).

offenses.[130] In distinguishing his case, Nidal Khalid Nasrallah has argued that the United States made a commitment to presumptive judicial review under the Convention when a deportee asserts that he or she is likely to be tortured upon return to the home country.[131] He points out that these issues are not adjudicated in underlying criminal proceedings that bear on deportability, and so review is essential to protect individuals facing life-or-death consequences.[132] Because the Convention implicates a "core value" of protecting any person against the prospect of torture and death, Nasrallah claims that the federal government's obligation is "absolute" and "always counterbalances laws that, for various policy objectives, restrict judicial review."[133] In response, the Attorney General has argued that the Convention does not constrain Congress's power to limit judicial review under federal immigration policy.[134] Whether Nasrallah's arguments succeed will be one important test of personhood's power to check executive discretion under a treaty that protects international human rights.

Another pending Supreme Court case has relied on procedural protections, rather than international agreements, to challenge expedited removals without judicial review.[135] This litigation also invokes claims of personhood as a shield against state overreaching and incursions on human dignity.[136] Vijayakumar Thuraissigiam is an asylum seeker who has argued that he is entitled to judicial review of a claim of credible fear of persecution upon return to his home country.[137] Thuraissigiam contends that his removal is a restraint of liberty that triggers habeas corpus protections.[138] Though habeas claims are the principal focus of the case, he also asserts that he has a right to procedural due process, including judicial review.[139] In Thuraissigiam's view, he is a person entitled to these protections, even if he recently entered the United States unlawfully.[140] The government has argued that the rights of constitutional personhood do not attach simply by crossing the border; instead, an individual must be lawfully admitted and develop meaningful ties to the country.[141] According to Thuraissigiam, the federal government's approach is the first step toward allowing Congress to "eliminate *all* administrative process *and all* judicial review for anyone who the government claims was not lawfully admitted, and summarily deport them, no matter how many decades they have lived here, how settled and integrated they are, or how many members of their family are U.S. citizens."[142] This litigation calls the very parameters of personhood into question, with the government's asserted

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[130] Brief for Petitioner at 10–11, Nasrallah v. Barr, No. 18-1432 (U.S. Dec. 9, 2019).
[131] *Id*. at 35–39.
[132] *Id*. at 39–41.
[133] *Id*. at 41–42.
[134] Brief for the Respondent at 28, Nasrallah v. Barr, No. 18-1432 (U.S. Jan. 15, 2020).
[135] U.S. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 427 (2019) (mem.) (granting certiorari).
[136] Brief for Respondent at 38–45, U.S. Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Jan. 15, 2020).
[137] *Id*. at 4–8.
[138] *Id*. at 9–12, 25–33.
[139] *Id*. at 10, 38.
[140] *Id*. at 38–45.
[141] Brief for the United States at 21–27, U.S. Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. Dec. 9, 2019).
[142] Brief for Respondent, *supra* note 136, at 42 (emphasis in original).

requirement of lawful entry threatening to strip non-citizens of their ability to challenge dehumanizing treatment in court.

The stakes of the debate over who counts as a person for purposes of constitutional protection are high. Recently, there has been an interest in reviving personhood and human rights in the context of big data, privacy, and surveillance, all the product of technologies with global reach. Precisely because non-citizens enjoy limited protection when the federal government enforces immigration laws, they have been subject to pervasive data-gathering, experimental vetting and screening systems, and cybersurveillance.[143] There are mounting fears that these techniques eventually will find their way into domestic law enforcement, giving rise to what legal scholar Margaret Hu has termed "Algorithmic Jim Crow."[144] The language of personhood and human rights has assumed a significant place in efforts to combat these technological threats to individual privacy and liberty. Professor Hu argues that the Due Process Clause, in tandem with the Equal Protection Clause, can protect individuals from these incursions by valorizing what constitutional law scholar William Eskridge calls "the idea that the state is obligated to treat every person as a presumptively worthwhile human being who is entitled to respect and humane treatment."[145] These arguments will, of course, be largely unavailing if personhood is linked to lawful entry, rather than to human desert.

Should the Court adopt a constrained definition of constitutional personhood, a broader understanding of the construct can still do important normative work in other contexts. For example, intellectual property professors have urged private technology companies to adopt "human impact statements."[146] In assessing the repercussions for affected populations, these statements would consider demographic characteristics, including "race, ethnicity, gender, sexual orientation, national origin," as well as "other status-based categories."[147] The very length of this list of traits suggests that novel technologies shape the lives of a wide range of groups, that these impacts can be deleterious to everyone in a highly interconnected society, and that there is thus a need for protections not just for citizens, but for all persons. The efforts are still nascent, so it remains to be seen whether personhood, whatever its constitutional construction, can form the basis for a robust concept of social responsibility in the private sector.

## V. Conclusion

In 2020, it seems clear that a progressive citizenship agenda has not been realized. Instead, conservatives have acted decisively in using citizenship to eclipse claims of personhood, most notably by trying to suppress recognition of immigrants in the apportionment of political representation. Meanwhile, personhood remains much like Philip Larkin's description of home:

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[143] Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 680–84 (2017).
[144] *Id*. at 685.
[145] *Id*. at 691 (citing William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1210 (2000)).
[146] Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 112 (2019).
[147] *Id*. at 116.

"A joyous shot at how things ought to be, Long fallen wide."[148] And yet, personhood waits patiently for us to "turn again to what it started as,"[149] not just a check on our most inhumane impulses but a way to imagine a better world, one that cannot be forged through simple recitation of the rights of citizens alone.

[148] Philip Larkin, *Home is so Sad*, *in* PHILIP LARKIN, COLLECTED POEMS (2003), https://poets.org/poem/home-so-sad.
[149] *Id*.