

# Two Recent Supreme Court Decisions and Changing Demographics Underscore the Importance of US Citizenship

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## INTRODUCTION

Asian Americans comprise the fastest growing racial group in the United States; their numbers now exceed 20 million.<sup>1</sup> Two recent Supreme Court decisions, both decided on June 27, 2019—*Department of Commerce v. New York* and *Rucho v. Common Cause*—play a critical role in determining whether the growing number of Asian Americans can translate into political, economic, and social power in the United States.<sup>2</sup> *Department of Commerce* dealt with blocking a citizenship question on the 2020 Census, and the Court in *Rucho* refused to decide a challenge to partisan gerrymandering. Both decisions underscore the importance of citizenship and naturalization in the United States to maximize power. On one hand, the Asian American population in mainland United States has historically been relatively small; therefore, naturalization did not have an appreciable impact

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1. Abby Budiman et al., *Key Facts About Asian Origin Groups in the United States*, PEW RES. CTR. (May 22, 2019), <https://www.pewresearch.org/fact-tank/2019/05/22/key-facts-about-asian-origin-groups-in-the-u-s> [https://perma.cc/G2H4-88KU].

2. Dep’t of Commerce v. New York, 139 S. Ct. 2551 (2019); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

on the nation. On the other hand, in current times, a decision to naturalize can impact political outcomes with the appreciable growth in minority populations in the United States while anti-immigrant forces in power actively resist that population change through nativist rhetoric and draconian immigration policies. This article will discuss the impact of *Department of Commerce v. New York* and *Rucho v. Common Cause* against the historical backdrop of anti-Asian immigration laws to present-day challenges of becoming a US citizen in an increasingly anti-immigrant climate.

### I. HISTORICAL DENIAL OF US CITIZENSHIP TO ASIANS

The recognition of the growing political clout of Asian Americans is preceded by a long and shameful history of the US government denying persons of Asian ancestry this coveted opportunity to naturalize. For more than a century and a half—from 1790 when naturalization was restricted to “free white persons” until the Immigration and Nationality Act of 1952 when Asians were no longer excluded from the United States—persons of Asian descent were either unable to apply for naturalization or unable to immigrate to the United States.<sup>3</sup> After anti-immigrant sentiment intensified toward Chinese laborers mining for gold on the West Coast in the late nineteenth century, the Chinese Exclusion Act of 1882 restricted Chinese laborers from entering the United States.<sup>4</sup> While the law itself was xenophobic, the United States applied this discriminatory law barring Chinese laborers from China to even US-born citizens of Chinese descent. The government used the Chinese Exclusion Act to also bar persons born in the United States whose parents were both Chinese nationals from returning to the United States after they traveled abroad.

*United States v. Wong Kim Ark* was a case in point. Born in the United States to Chinese nationals, Ark Wong left the United States to travel. Upon his return, US Customs detained him at the port. The Fourteenth Amendment, ratified in 1868, states “All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.” However, the government claimed that although Ark Wong was born in the United States, he was not subject to the jurisdiction of the United States and, therefore, was not a US citizen. The court ruled for Ark Wong, finding that a person born in the United States is a citizen and subject to its political jurisdiction. The court recognized:

[T]housands of persons of both sexes who have been heretofore considered as citizens of the United States, and have always been

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3. See generally *Takao Ozawa v. United States*, 260 U.S. 178 (1922) (establishing that a Japanese national was denied US citizenship because he was not considered Caucasian); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (establishing that an Indian national’s US citizenship was cancelled because he was not a “free white person” as commonly understood).

4. ASIAN AM. RES. WORKSHOP ET AL., OUR ROOTS IN HISTORY: COMMEMORATING THE 100TH ANNIVERSARY OF THE FIRST CHINESE EXCLUSION ACT 6 (1982).

treated as such, will be, to all intents and purposes, denationalized and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens, and whose right as such is not, and never has been, questioned, because birth within the country seems to have been recognized generally as conclusive on the question of citizenship.<sup>5</sup>

The US government did not repeal the Chinese Exclusion Act until 1943 and only after China helped the United States fight Japan during World War II. A string of anti-Asian exclusionary laws followed the Chinese Exclusion Act that not only denied entry into the United States, but also “justified” legal discrimination toward Asians already living in the United States. The Immigration Act of 1917 created an “Asiatic barred zone” that excluded immigrants from all Asian countries, including India, except for Japan and the Philippines.<sup>6</sup> Then came the Immigration Act of 1924, which barred Asians from all Asian countries, except the Philippines,<sup>7</sup> from entering the United States because Asians were ineligible to become US citizens. By denying citizenship to persons of Asian descent, the United States could then justify the separate and inferior treatment of Asians already living in the United States. These legally sanctioned discriminatory policies ranged from anti-miscegenation laws, laws prohibiting Asians from testifying against whites in court,<sup>8</sup> from integrating with whites in schools,<sup>9</sup> from owning land in the United States,<sup>10</sup> and restricting their means of livelihood by denying them permits to run laundry mats,<sup>11</sup> to interning over 120,000 persons of Japanese ancestry, of which 70,000 were US citizens,<sup>12</sup> in detention camps during World War II.<sup>13</sup> The Immigration Act of 1924 was not repealed until 1965. A non-discriminatory quota system where “no single country was allowed more than 20,000 visas” was then put into place.<sup>14</sup>

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5. In re Wong Kim Ark, 71 F. 382, 386 (N.D. Cal. 1896), *aff'd sub nom.* United States v. Wong Kim Ark, 169 U.S. 649, 18 S. Ct. 456 (1898).

6. See Seema Sohi, *Immigration Act of 1917 and the “Barred Zone”*, in ASIAN AMERICANS: AN ENCYCLOPEDIA OF SOCIAL, CULTURAL, ECONOMIC, AND POLITICAL HISTORY 534–35 (Xiaojian Zhao & Edward J.W. Park eds., 2013).

7. As a result of the 1898 Spanish American War, the Philippines was still a territory of the United States at this time. See *The Immigration Act of 1924*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> [<https://perma.cc/L7ZW-KW7K>].

8. See *People v. Hall*, 4 Cal. 399 (1854).

9. See *Gong Lum v. Rice*, 275 U.S. 78 (1927).

10. Florida was one of the last states to have an alien land restriction still on its books, a provision that was finally repealed on Election Day, Tuesday, November 6, 2018. Florida voters passed an amendment to repeal the Alien Land Law added in 1926 from their state Constitution. See *Repeal of ‘Alien Land’ Law Goes on Ballot*, NEWS 4 JAX (Apr. 16, 2018), <https://www.news4jax.com/news/2018/04/17/repeal-of-alien-land-law-goes-on-ballot> [<https://perma.cc/2CG4-Y733>].

11. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

12. Matt Ford, *The Return of Korematsu*, ATLANTIC (Nov. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/11/the-shadow-of-Korematsu/416634> [<https://perma.cc/E3TM-9GS2>].

13. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

14. Muzaffar Chishti et al., *Fifty Years: The 1965 Immigration and Nationality Act Continues to*

Asians challenged these discriminatory immigration policies preventing persons of Asian descent from naturalizing for nearly a century. Today, Asians, eligible for naturalization, should not take this hard-fought right for granted. Both of the recent Supreme Court decisions and increasingly restrictive immigration policies in response to changing demographics in the United States are a clarion call for lawful permanent residents, including those of Asian descent who are eligible to naturalize but have not done so, to become US citizens.

## II. FUNDING FOR FEDERAL PROGRAMS BASED ON CENSUS DATA

The enumeration clause in the US Constitution mandates Congress to conduct a count every ten years of all persons living in the United States.<sup>15</sup> This includes persons of Asian ancestry—citizens and non-citizens alike.

Asian American and Native Hawaiian and Pacific Islander (NHPI) communities must fully participate in the Census without any barriers or fear so their communities, particularly children and the elderly, receive their fair share of federal resources to meet basic needs. Based on the population count, the federal government will disperse over \$1.5 trillion a year<sup>16</sup> for the next ten years for critical programs that will impact health, jobs, housing, education, bilingual language programs for adults and children, and infrastructure. Businesses, medical researchers, hospitals, and state and city planners all rely on census data to make strategic decisions that impact Asian American and NHPI communities.

Many Asian Americans and NHPI communities rely on federal programs such as Medicaid, Medicare, Section 8 housing vouchers, and bilingual education classes. Over 1.2 million in Asian American communities and almost 63,000 in NHPI communities do not have health insurance.<sup>17</sup> From 2016 to 2017, Asian Americans experienced the highest growth in homelessness among all racial groups (44 percent).<sup>18</sup> The Department of Housing and Urban Development recorded “approximately 6,700 Asian Americans in homeless shelters and living on the street during a one-night count in January 2017 and more than 10,000 living in transitional

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*Reshape the United States*, MIGRATION POL’Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [https://perma.cc/RLQ8-HM6G].

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

16. See Andrew Reamer, *Brief 7: Comprehensive Accounting of Census-Guided Federal Spending*, GW INS. PUB. POL’Y (Nov. 2019), [https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting for Dollars 2020 Brief 7A - Comprehensive Accounting.pdf](https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%202020%20Brief%207A%20-%20Comprehensive%20Accounting.pdf) [https://perma.cc/8TMJ-87S2].

17. See *Why the Census Matters for Asian Americans, Native Hawaiians, and Pacific Islander Communities*, ASIAN AM. ADVANCING JUST., [https://www.advancingjustice-aaajc.org/sites/default/files/2019-03/Census National Factsheet.pdf](https://www.advancingjustice-aaajc.org/sites/default/files/2019-03/Census%20National%20Factsheet.pdf) [https://perma.cc/PPB7-EJD8].

18. See *Advocates Worry Housing Issues May Lead to an Asian-American Census Undercount*, NBC NEWS (Aug. 21, 2018), <https://www.nbcnews.com/news/asian-america/advocates-worry-housing-issues-may-lead-asian-american-census-undercount-n900381> [https://perma.cc/6NFK-R4AA].

housing—temporary housing that shelters homeless individuals for up to 24 months or emergency shelter from October 2015 to September 2016.”<sup>19</sup> In 2014, 496,359 Asian English Language Learners and 25,616 Pacific Islander English Language Learners were enrolled in public schools from Fall 2009 through Fall 2014.<sup>20</sup> An undercount can affect federal funding for critical programs such as Medicaid and Medicare, Section 8 housing vouchers, and bilingual education.

### III. *DEPARTMENT OF COMMERCE V. NEW YORK*

The Department of Commerce, which oversees the Census Bureau, was mandated by law to submit questions for the 2020 Census to Congress by March 31, 2018. Just five days before this deadline, Commerce Secretary Wilbur Ross on March 26th announced he was adding a citizenship question to the 2020 Census.<sup>21</sup> This question had not been through the Census Bureau’s own vetting process,<sup>22</sup> which was already underway since 2015.<sup>23</sup>

Lawsuits seeking to remove the question from the 2020 Census were immediately brought in California, New York, and Maryland. The New York Attorney General brought the largest lawsuit, *New York v. Department of Commerce*, on behalf of eighteen states, the District of Columbia, fifteen cities and counties, and the US Conference of Mayors.<sup>24</sup> This lawsuit claimed that the citizenship question ran afoul of the Enumeration Clause of the Constitution and that the decision to add the question was arbitrary and capricious, in violation of the Administrative Procedure Act.<sup>25</sup> Nonprofit groups advocating for immigrant rights brought another lawsuit, *New York Immigration Coalition v. Department of Commerce*.<sup>26</sup> This lawsuit added an equal protection claim because the decision to add the citizenship question was allegedly motivated in part by invidious discrimination against immigrants of color.<sup>27</sup> The Honorable Jesse Furman, the presiding district

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19. *Id.*

20. Ins. of Educ. Sci., *Table 204.25 Public School Students Participation in Programs for English Language Learners by race/ethnicity: Fall 2009 Through Fall 2014*, DIG. EDUC. STAT. (2016), [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_204.25.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_204.25.asp) [<https://perma.cc/7KCR-3BRE>].

21. Press Release, U.S. Dep’t of Commerce, U.S. Department of Commerce Announces Reinstatement of Citizenship Question to the 2020 Decennial Census, <https://www.commerce.gov/news/press-releases/2018/03/us-department-commerce-announces-reinstatement-citizenship-question-2020> [<https://perma.cc/FGC2-HXGJ>].

22. Diana Elliot, *Five Reasons the Addition of a Citizenship Question to the 2020 Census is Detrimental to Its Goal*, BLOG URB. INST. (Mar. 28, 2018), <https://www.urban.org/urban-wire/five-reasons-addition-citizenship-question-2020-census-detrimental-its-goal> [<https://perma.cc/BX8Z-JADP>].

23. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2020 CENSUS OPERATIONAL PLAN (Nov. 2015).

24. *New York v. U.S. Dep’t of Commerce*, No. 1:18-cv-02921-JMF, Document 214, Filed 7/25/18, at 4 (S.D.N.Y.).

25. *Id.*

26. *New York Immigration Coalition v. U.S. Dep’t of Commerce*, No. 1:18-cv-05025, Document 1, Filed 06/06/18, at 1 (S.D.N.Y.).

27. *Id.*

court judge, consolidated the two lawsuits. Among the lawsuits brought against the citizenship question, the consolidated New York case, which was heard in November 2018, was the first to begin.<sup>28</sup>

The government's own witnesses confirmed the chilling impact that the addition of the citizenship question would have. The government's leading statistician at the Census Bureau and all the plaintiffs' experts agreed that the citizenship question would have chilled participation by primarily non-white, Hispanic households.<sup>29</sup> While not the central focus of the trial, a citizenship question on the Census would have also chilled participation among persons of Asian descent. An estimated 1.5 million undocumented Asians are living in the United States, of which nearly a half million live in California.<sup>30</sup> With one in seven Asian immigrants being undocumented, they are the fastest growing group of the estimated 11 million undocumented arrivals in the United States.<sup>31</sup> Nearly half are those who come from India and China and become undocumented after overstaying their visas.<sup>32</sup> A citizenship question could also chill participation by US citizens who live in a mixed family household.<sup>33</sup>

Both Judge Furman and the Supreme Court ruled that the Constitution gave the Commerce Secretary great deference to include a citizenship question. However, Judge Furman found that "Secretary Ross's decision to add the citizenship question to the 2020 Census questionnaire, while not inconsistent with the Constitution, violated the Administrative Procedure Act in several respects."<sup>34</sup> But what influenced the Supreme Court's decision was not that the addition of a citizenship question would chill participation and impact the accuracy of the count, nor the fact that the citizenship question was not properly vetted under the Census Bureau's own procedures. Instead, Chief Justice Roberts ruled with the four liberal judges of the Court—Justices Ginsburg, Breyer, Kagan, and Sotomayor—in favor of the plaintiffs because the Commerce Secretary Ross was disingenuous in his

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28. *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-02921-JMF, ECF No. 574 at 6 (S.D.N.Y.). As coordinator of New York Counts 2020, the author attended all 8 days of the bench trial and helped to get other interested coalition members to attend as well.

29. *Id.* at 7.

30. Karthick Ramakrishnan & Sono Shah, *One out of every 7 Asian immigrants is undocumented*, AAPI DATA (Sept. 8, 2017), <http://aapidata.com/blog/asian-undoc-1in7/> [<https://perma.cc/HG7W-PD5G>].

31. *Id.*

32. Jens Manuel Krogstad, *5 Facts About Illegal Immigration in the US*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/9GBC-NRMJ>].

33. Grace Hwang Lynch, *Asian Americans Could Be the Group Most Affected by the Census Citizenship Question*, PRI (May 21, 2019), <https://www.pri.org/stories/2019-05-21/asian-americans-could-be-group-most-affected-census-citizenship-question> [<https://perma.cc/9LQ4-W4A3>].

34. *New York v. U.S. Dep't of Commerce*, ECF No. 623 at 11. While Judge Furman found the reason the Secretary of Commerce gave for adding the citizenship question was pretextual, he did not find there was sufficient evidence to show the pretext was for invidious discrimination. Therefore, the Judge did not find an equal protection claim. *Id.* at 9.

purported reason for adding a citizenship question.<sup>35</sup> In a March 2018 memo, Ross wrote that he wanted to add the citizenship question, at the request of the Justice Department, to gather data to enforce the Voting Rights Act.<sup>36</sup> Additional discovery across multiple lawsuits revealed that Secretary Ross, rather than the Justice Department, initiated adding the citizenship question and that the real reason for its addition was partisan gain. Soon after Secretary Ross was appointed, Secretary Ross and Stephen Bannon, the former adviser to President Trump and outspoken critic against immigration, exchanged emails that led to Secretary Ross contacting Kris Kobach.<sup>37</sup> Kris Kobach is one of the architects behind the controversial S.B. 1070 in Arizona, which would allow local police to stop people they believed to be undocumented and a proponent of resurrecting the failed special registration of Arabs, Muslims, and South Asians. In an email to Secretary Ross, Kris Kobach opined that not asking people whether they are citizens during the census “leads to the problem that aliens who do not actually ‘reside’ in the United States are still counted for congressional apportionment purposes.”<sup>38</sup> These emails make no mention of the need to have citizenship data to enforce the Voting Rights Act. During the New York trial, the court shockingly found that then Attorney General Jeff Sessions blocked a meeting between the Census Bureau’s team and the Justice Department’s legal team to discuss alternative ways to obtain citizenship data besides putting the question on the survey.<sup>39</sup>

The US Supreme Court subsequently ruled on June 27, 2019: “Altogether, the evidence tells a story that does not match the Secretary’s explanation for his decision. Unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.”<sup>40</sup>

Through its lies, this administration has attempted to politicize the census, which is supposed to be a non-partisan, national survey. Chief Justice Roberts has defied efforts to politicize the Supreme Court.<sup>41</sup> What made the

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35. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

36. The Justice Department’s claim was that Section 2 prohibits diluting the influence of minority voters by depriving them of single member districts to elect the candidate of their choice. To remedy this situation, courts look to voting age population to determine if a minority group could constitute a majority in a district. Hansi Lo Wang, *Documents Shed Light on Decision to Add Census Citizenship Question*, NPR (June 19, 2018), <https://www.npr.org/2018/06/10/618567462/documents-shed-light-on-decision-to-add-census-citizenship-question> [<https://perma.cc/H6UN-87ZK>]; see Memorandum from Secretary Wilbur Ross to Under Secretary for Economic Affairs Karen Dunn Kelley (Mar. 26, 2018), <https://www.documentcloud.org/documents/4426785-commerce2018-03-26-2.html> [<https://perma.cc/59M6-3Y7E>].

37. *New York v. U.S. Dep’t of Commerce*, ECF No. 623, at 64.

38. *Id.* at 68.

39. *Id.* at 77–78.

40. *Dep’t of Commerce*, 139 S. Ct. at 2575.

41. Brian Naylor & Nina Totenberg, *Chief Justice Roberts Issues Rare Rebuke to Trump; Trump Fires Back*, WYPR (Nov. 21, 2018), <https://www.wypr.org/post/chief-justice-roberts-issues-rare-rebuke->

difference for Chief Justice Roberts was that the justification for adding the question was a pretext. The lies by the federal agencies gave a temporary victory to those seeking a census survey without partisan roadblocks. But even after the Supreme Court ruled, the administration still sought ways to pursue litigation and add the citizenship question, acts which caused a great deal of internal conflict. After a tense week following the Supreme Court's decision in which nine Justice Department lawyers wanted to be removed from the case,<sup>42</sup> the administration finally decided not to add the citizenship question to the 2020 survey.<sup>43</sup>

In addition to the 1.5 trillion federal dollars distributed to states based on census results, one of the main purposes of conducting a decennial census is to determine how the 435 seats in the US House of Representatives will be distributed across the fifty states. However, because of population decline and an undercount by people not completing the Census, New York State has steadily lost congressional seats through the decades. In the 1940s, New York State had forty-five congressional seats. By 2010, that number has steadily decreased to twenty-seven seats.<sup>44</sup>

The electoral college, the system by which we elect the president of the United States, is based on the candidate winning a majority of the electoral votes. Each state is awarded electoral votes equal to two votes (for each of the state's two US Senators) plus the number of House of Representatives seats the State has, which is based on its population. Both the 2000 and 2016 presidential elections resulted in the winning candidate receiving the majority of the electoral college votes but not the popular vote. In 2000, the presidential election hinged on Florida's twenty-five electoral college votes,<sup>45</sup> and in 2016, it came down to the electoral votes of three states—Pennsylvania, Wisconsin, and Michigan.<sup>46</sup> Therefore, everyone needs to be counted in the decennial censuses to ensure each state maximizes its number of allotted House of Representatives seats and electoral college votes.

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trump-trump-fires-back [https://perma.cc/2BJY-PZWD].

42. Dan Clark, *Manhattan Federal Judge Rejects Department of Justice's Request to Remove Census Case Attorneys*, N.Y.L.J. (July 9, 2019), <https://www.law.com/newyorklawjournal/2019/07/09/manhattan-federal-judge-rejects-doj-request-to-remove-census-case-attorneys> [https://perma.cc/33ML-MT3V].

43. Kelly Percival, *Trump Administration Abandons Citizenship Question*, BRENNAN CTR. FOR JUST. (July 12, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trump-administration-abandons-citizenship-question> [https://perma.cc/9456-8QLJ].

44. Kristin D. Burnett, *Congressional Apportionment: 2010 Census Briefs*, U.S. CENSUS BUREAU (Nov. 2011), <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-08.pdf> [https://perma.cc/E6WZ-DBT5].

45. Andrew Glass, *Gore Concedes Presidential Election to Bush, Dec. 13, 2000*, POLITICO (Dec. 13, 2017), <https://www.politico.com/story/2017/12/13/gore-concedes-presidential-election-to-bush-dec-13-2000-287285> [https://perma.cc/WL3K-PRNW].

46. John McCormack, *The Election Came Down to 77,744 Votes in Pennsylvania, Wisconsin, and Michigan (Updated)*, WASH. EXAMINER (Nov. 10, 2016), <https://www.washingtonexaminer.com/weekly-standard/the-election-came-down-to-77-744-votes-in-pennsylvania-wisconsin-and-michigan-updated> [https://perma.cc/5NTJ-JG6P].

For the growth in Asian American and NHPI populations to translate into political power, they must be counted in the 2020 Census. If Asian Americans and NHPs come out and are counted, their numbers can impact not only the presidential race, but also congressional, state, and local races.

Furthermore, census results are also used to draw political boundaries that define each congress member's jurisdiction and constituents. This process, referred to as redistricting, can have significant political consequences. Discovery during *New York v. Department of Commerce* revealed how the inclusion of a citizenship question may have significantly impacted future redistricting decisions. After the closing oral arguments in April 2019 and before the Supreme Court issued its decision in June 2019, the lawyers for the plaintiffs discovered that documents authored by Thomas Hofeller, a Republican strategist now deceased, were not submitted to the Court. These documents underscore that the genesis of adding the citizenship question was to "give Republicans and nonwhite Hispanics a political advantage when new voting districts are drawn" after the 2020 Census.<sup>47</sup> This logic is simple. If citizenship questions deter people from completing the census, then more immigrants will not be included in population totals that are used to draw districts. Since most immigrants live in democratically-controlled states,<sup>48</sup> an undercount would give a political advantage to Republicans and nonwhite Hispanics in the next round of redistricting.

Such an outcome would drastically impact the average American who has two fundamental ways of exercising political power: (1) voting; and (2) being placed in a district with people who vote similarly so they can elect the candidate of their choice. A major contributing factor to the 2012 election of Grace Meng, the first Asian American woman representing New York in Congress, was the sixth congressional district she ran in. This district, redrawn after the 2010 census, was 36.4 percent Asian.<sup>49</sup> Similarly, the growth of Asian Americans in the San Gabriel Valley from 2000 to 2010 led to California Assembly District 49 becoming 53.36 percent Asian and to the election of Ed Chao in 2012.<sup>50</sup> For these reasons, census and voting are closely linked.<sup>51</sup>

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47. Hansi Lo Wang, *Emails Connect Census Official with GOP Strategist on Citizenship Question*, NPR (June 15, 2019), <https://www.npr.org/2019/06/15/732669380/emails-connect-census-official-with-gop-top-strategist-on-citizenship-question> [<https://perma.cc/Z4JF-LMGP>].

48. Ronald Browstein, *Republicans Represent Almost None of the Places Most Immigrants Live*, CNN (July 16, 2019), <https://www.cnn.com/2019/07/16/politics/republicans-immigrants-2020-election/index.html> [<https://perma.cc/67ZD-VL3D>].

49. New York's 6th Congressional District, BALLOTEDIA, [https://ballotpedia.org/New\\_York%27s\\_6th\\_Congressional\\_District](https://ballotpedia.org/New_York%27s_6th_Congressional_District) [<https://perma.cc/7HSA-2FX3>].

50. ASIAN AM. ADVANCING JUST., A COMMUNITY OF CONTRASTS: SAN GABRIEL VALLEY (2018), [https://advancingjustice-la.org/sites/default/files/A\\_Community\\_of\\_Contrasts\\_SGV\\_2018.pdf](https://advancingjustice-la.org/sites/default/files/A_Community_of_Contrasts_SGV_2018.pdf) [<https://perma.cc/QSW5-G9J3>].

51. Supported by the Wallace H. Coulter Foundation, APIA Vote has embarked on an ambitious campaign to conduct voter registration and census education trainings to Asian Pacific Islander American communities in 34 cities across the United States from June–November 2019, as part of the Norman Y. Mineta Leadership Institute. See APIA VOTE, [www.apivote.org](http://www.apivote.org) [<https://perma.cc/95HX-Y8QL>].

IV. *RUCHO V. COMMON CAUSE*

Nevertheless, using population counts to form districts can be manipulated. The same day the Supreme Court announced its decision to block the citizenship question on the 2020 Census, it rendered another 5–4 decision in *Rucho v. Common Cause*. This case, however, was decided along ideological lines with Justices Roberts, Thomas, Alito, Gorsuch, and Kavanaugh in the majority. The conservative justices ruled that the judiciary cannot intervene in matters of political gerrymandering. In *Rucho*, the Supreme Court consolidated two cases, one in which Democrats charged that North Carolina’s congressional districting map unconstitutionally discriminated against them and one in which Republicans claimed Maryland’s map discriminated against them. Both maps were drawn favorably toward the dominant party controlling each state’s respective legislature and effectively prioritized partisan politics over voter preferences. The North Carolina map enabled Republican candidates to win ten out of thirteen seats, although they received only 49 percent of the statewide vote. Similarly, in Maryland, its “8 person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats” for fifty years.<sup>52</sup>

The Supreme Court ruled:

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that partisan gerrymandering is “incompatible with democratic principles” does not mean the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution and no legal standards to limit and direct their decisions.<sup>53</sup>

The consequence of this decision is that the election of state legislators becomes even more critical because they now have the green light to engage in excessive partisan gerrymandering with no check by the courts. While claims of racial gerrymandering are still within the court’s jurisdiction, state legislatures could use Asian American population numbers and party affiliation to align with partisan gerrymandering. Asian Americans and NHPI can monitor their state legislature’s drawing of congressional, state, and local redistricting maps by being appointed to their state’s Redistricting Commission if their state has passed legislation creating such a commission. Currently, state legislatures are responsible for drawing congressional districts in thirty-one states and legislative districts in thirty states. The remaining states have some form of a redistricting commission.<sup>54</sup> These commissions could be nonpartisan or bipartisan and can be composed of a

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52. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019) (Kagan, J., dissenting).

53. *Id.* at 2507.

54. *Id.*

mix of elected officials and non-legislators requiring state legislatures to pass their redistricting plan with a majority vote in each chamber and be subject to veto by the governor in most instances.<sup>55</sup> Alternatively, the commission can operate as an Independent Commission composed of neither public officials nor current lawmakers who draw and approve the final redistricting maps.<sup>56</sup>

#### V. THE IMPORTANCE OF BEING A US CITIZEN

Both of these Supreme Court decisions serve as a wake-up call for lawful permanent residents, especially those of Asian descent who are eligible to naturalize but have not done so.

While the citizenship question will not be on the 2020 Census, this question will likely be revisited in the 2030 Census. Although the finding that the administration concocted a false reason for adding the citizenship question grounded the 5–4 decision in *Department of Commerce v. New York*, Chief Justice Roberts opined, “[w]e do not hold that the agency decision was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decision making under the Administrative Procedure Act calls for an explanation for agency actions. What was provided here was more of a distraction.”<sup>57</sup> He further argues, “[w]e are presented in other words with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decision making.”<sup>58</sup> In other words, enforcing the Voting Rights Act could be a valid reason for adding the citizenship question if the record supported this explanation. With a ten-year cushion until the 2030 Census, there is time for such a record to be developed and for those who are eligible, to begin and complete the naturalization process.<sup>59</sup>

In the meantime, resistance will only intensify by the current administration to maintain the status quo as the United States slowly inches to become a majority non-white country in 2045.<sup>60</sup> Such successful, blocked, or pending efforts include a Muslim Ban,<sup>61</sup> regulations drastically limiting

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55. *Id.*

56. Those who sit on an Independent Commission are screened and selected by an independent entity. *Who Draws the Maps, Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), <https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting> [<https://perma.cc/E3TS-L8WN>].

57. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

58. *Id.* at 2575.

59. The approximate wait time to process a naturalization application in 2019 is approximately two years. Miriam Jordan, *Wait Times for Citizenship Have Doubled in the Last Two Years*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html> [<https://perma.cc/28QU-WQHH>].

60. Stef W. Kight, *United States Is on Its Way to Becoming a Non-White Majority by 2045*, BUS. INSIDER (May 1, 2019), <https://www.businessinsider.com/america-non-white-majority-future-by-2045-2019-5> [<https://perma.cc/VMW5-V85H>].

61. Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

the number of refugees allowed to enter the United States,<sup>62</sup> stringent public charge rules,<sup>63</sup> and proposed policies that would move to a point-based immigration system favoring high-skilled English-speaking workers over family petition visas.<sup>64</sup> If those in power cannot stop the growth of marginalized groups already in the United States, then they will attempt to curtail their collective political power through gerrymandered districts, felony disenfranchisement laws, restrictions on obtaining a green card—the precursor to becoming a citizen—and more stringent citizenship and voting requirements.

Delaying naturalization could lead to unexpected situations where immigrants find themselves deportable. Of the 13.2 million lawful permanent residents (LPRs), otherwise known as green card holders, residing in the United States as of January 1, 2014, approximately nine million are eligible to apply for US citizenship.<sup>65</sup> They must make an informed decision to become a naturalized citizen before federal agencies issue regulations making it more difficult to do so. The Trump Administration announced in July 2019 that it is planning to change the US citizenship test, which was last revised in 2008.<sup>66</sup> More recently, in November of 2019, the Department of Homeland Security announced its intention to increase by 61 percent the naturalization application fee from \$640 to \$1,170.<sup>67</sup>

LPRs can be deported for criminal offenses. Laws that make many criminal offenses deportable offenses for LPRs have already been passed and are now being aggressively enforced.<sup>68</sup> Fear of being deported or that the process will become increasingly difficult has been a motivating factor for

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62. Michael D. Shear & Zolan Kanno-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html> [<https://perma.cc/Y2QL-T44Q>].

63. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41, 292 (Aug. 14, 2019).

64. *President Trump's Bold Immigration Plan for the 21st Century*, WHITE HOUSE (May 21, 2019), <https://www.whitehouse.gov/articles/president-trumps-bold-immigration-plan-21st-century> [<https://perma.cc/WYL5-8SCY>].

65. LPRs usually have to wait five years—or three years if married to a US citizen—to apply for US citizenship. Of the approximate 13.2 million green card holders in the United States in 2014, 3.3 million are from Mexico, followed by China (0.7 million), Philippines (0.6 million), and India (0.6 million). The top ten countries represented include Vietnam and South Korea. “The leading countries of origin of the LPR population eligible to apply to naturalize are similar to those for the total LPR population.” DEP’T IMMIGR. STAT., ESTIMATES OF THE LAWFUL PERMANENT RESIDENT POPULATION IN THE UNITED STATES: JANUARY 2015 (2019), [https://www.dhs.gov/sites/default/files/publications/lpr\\_population\\_estimates\\_january\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015.pdf) [<https://perma.cc/G3Z7-MJG9>].

66. Shannon Van Sant, *Trump Administration Revising U.S. Citizenship Test*, NPR (July 20, 2019), <https://www.npr.org/2019/07/20/743786884/trump-administration-revising-u-s-citizenship-test> [<https://perma.cc/KP4J-PX6H>].

67. Christopher Ingraham, *The Cost to Become a U.S. Citizen Is Going up 61 Percent*, WASH. POST (Nov. 13, 2019), <https://www.washingtonpost.com/business/2019/11/13/cost-become-us-citizen-is-going-up-percent/> [<https://perma.cc/4QEL-BYXQ>].

68. Elizabeth R. OuYang, *Immigrants with Prior Criminal Record Risk Removal from the United States-Impact on Asian Immigrants*, 18 ASIAN AM. L.J. 157 (2011).

some to take the long-awaited step of becoming a naturalized US citizen.<sup>69</sup> One of the author's clients of Japanese descent lived in the United States as a permanent resident for twenty-five years before recently applying for citizenship in 2017.

Still, there are several thousand persons of Asian ancestry with LPR status who could become citizens but do not because they do not feel the urgency or fear that they could one day face deportation. However, mundane acts such as road rage, disputes over parking tickets, encounters with a disgruntled customer, and bizarre incidents can have far reaching and unintended consequences. Qingyou Li's situation is a case in point. A sixty-four-year-old respected, monolingual, lawful permanent resident, Mr. Li lived in Queens and had glaucoma in one eye. On December 14, 2014, Mr. Li was taking his usual after-dinner walk and did not see a dog leash extended across the sidewalk. He tripped over it, causing the leash to pull on the dog's neck, which caused the dog to bark loudly. The owner of the dog confronted Mr. Li, an argument ensued, and the owner punched Mr. Li in the eye. Allegedly, Mr. Li bit the arm of the owner's girlfriend who was holding Mr. Li back from striking back at her boyfriend. Police arrived and without providing adequate translation, arrested Mr. Li, but they did not arrest the dog owner.<sup>70</sup> Mr. Li was charged with assault, a misdemeanor. OCA-NY Asian Pacific American Advocates, a civil rights group, and the Chinese Mountain Club of New York, of which Mr. Li was a member, advocated for justice for Mr. Li and all criminal charges were eventually dismissed.<sup>71</sup> However, if Mr. Li had been convicted of a misdemeanor, he could have faced deportation.<sup>72</sup> After the charges were dismissed, Mr. Li applied for naturalization and became a US citizen.<sup>73</sup>

The greatest political benefit that comes with US citizenship is the right to vote. The *Rucho* decision gives states even more incentive to manipulate district lines for political gain. To have state level redistricting reforms check for this abuse, US citizens need to vote for state legislators who will pass bills to create redistricting commissions or redistricting plans. The *Rucho* decision may embolden states to use the voter eligible population rather than

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69. Daniella Silva, *Citizenship Application Backlog 'Skyrocketed' to Near 730,000 Under Trump, Report Finds*, NBC NEWS (July 2, 2018), <https://www.nbcnews.com/news/latino/citizenship-application-backlog-skyrocketed-under-trump-report-finds-n888146> [<https://perma.cc/AM4H-9JVJ>].

70. See Selim Algar, *Blind Man: I Was Attacked and Arrested for Being Tangled in Dog Leash*, N.Y. POST (Jan. 15, 2016), <https://nypost.com/2016/01/15/blind-man-i-was-attacked-and-arrested-for-being-tangled-in-dog-leash> [<https://perma.cc/2UFB-TJJF>]; see also *Drop All Charges Against Qingyou Li*, CHANGE.ORG, <https://www.change.org/p/district-attorney-richard-a-brown-of-queens-county-drop-all-charges-against-qingyou-li> [<https://perma.cc/4DLZ-UCD6>] (providing further details about the charges against Mr. Li).

71. See Algar, *supra* note 70.

72. *The Short Immigration Guide to How Arrests and Convictions Separate Families*, IMMIGRANT JUST. NETWORK (Sept. 2016), [http://immigrantjusticenetwork.org/wp-content/uploads/2014/02/Illustrated10pager\\_FINAL2\\_11.pdf](http://immigrantjusticenetwork.org/wp-content/uploads/2014/02/Illustrated10pager_FINAL2_11.pdf) [<https://perma.cc/Z6XC-HBXA>].

73. As part of OCA-NY, the author advocated on Mr. Li's case and after the charges were dismissed, she has since received a copy of his US passport confirming he is a naturalized citizen.

total population to draw state and local district lines, which may also force the Supreme Court to revisit *Evanwel vs. Abbott*.

In *Evanwel*, the plaintiffs, two Texas residents, backed by a conservative group that challenges racial and ethnic classifications and preferences, challenged the Texas legislature for drawing state Senate districts based on total population.<sup>74</sup> The plaintiffs claimed that states should draw these districts based on eligible voters (i.e. US citizens) rather than on total population. In a unanimous decision, the Supreme Court upheld the Texas legislature's use of total population to redistrict state and local district lines. Justice Ginsburg delivered the majority opinion:

Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public education system—and in receiving constituent services, such as help navigating public benefits and bureaucracies. By ensuring that each representative is subject to request and suggestions from the same number of constituents, total population apportionment promotes equitable and effective representation.<sup>75</sup>

However, the Supreme Court did not decide whether a state could use voter eligible population to draw state and local district lines if the state wanted to. Justice Ginsburg wrote that the Supreme Court “need not and do[es] not resolve whether . . . states may draw districts to equalize voter eligible population rather than total population.”<sup>76</sup>

If the Supreme Court revisits *Evanwel*, the current composition of the Supreme Court would decide this issue. If the majority of the Court decides states could use voter eligible population to draw district lines, LPRs and undocumented persons of underrepresented racial and ethnic groups would not be included in the drawing of district lines. This would lead to a lack of diverse and inclusive representation in Congress, state legislatures, and city councils—the antithesis of democracy at its best.

#### CONCLUSION

The lines in the sand are being drawn deeper and deeper between citizens and non-citizens, dividing communities rather than uniting them in the current volatile anti-immigrant climate, fueled by divisive rhetoric and nativist policies dictated from the Oval Office. The recent series of tweets by President Trump, calling for four non-white “Progressive Democratic Congresswomen” to “go back and help fix the totally broken and crime infested countries from which they came from” when three of whom were born in the United States and one other is a refugee from Somalia, who has been a naturalized American citizen since 2000, speak for themselves.<sup>77</sup>

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74. *Evanwel v. Abbott*, 136 S. Ct. 1120 (2016).

75. *Id.* at 1132.

76. *Id.* at 1133.

77. William Cummings, *Trump Tells Congresswomen to ‘Go Back’ to the ‘Crime Infested Places from Which They Came’*, USA TODAY (July 14, 2019),

These distinctions are being felt not only along political lines but also along economic and social lines. While the overall crime rate has gone down in the United States, hate crimes are on the rise.<sup>78</sup> Many nonprofit organizations whose primary mission is the provision of social services or education but not civic engagement, are now doing voter registration.<sup>79</sup> Simultaneously, we must educate immigrant communities on the importance of becoming naturalized citizens for their safety and to exercise their constitutional right to vote. By voting, they protect not only their interests but also the voices of the millions ineligible to apply for citizenship who also have a vested stake in policy and civic participation. The stakes are high. Taking the next step to naturalize and exercise the right to vote maximizes the opportunity to shape power and democracy at a pivotal time in US history.

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<https://www.usatoday.com/story/news/politics/2019/07/14/trump-tells-congresswomen-go-back-counties-they-came/1728253001> [<https://perma.cc/UJJ6-7C7K>].

78. Alison Faupel, Heather L. Scheuerman, Christie L. Parris & Regina Werum, *Hate Crimes Are on the Rise. What Does It Take to Get State Governments to Respond?*, WASH. POST (Aug. 13, 2019), <https://www.washingtonpost.com/politics/2019/08/13/hate-crimes-are-rise-what-does-it-take-get-state-governments-respond> [<https://perma.cc/K8N9-U5EL>].

79. See member organizations that are a part of APIA VOICE and partnering organizations with APIA VOTE. *Partner Organizations*, APIAVOTE, <https://www.apivote.org/partner-organizations> [<https://perma.cc/PRH4-DM5M>]; *Local Organizations Urge New York's Asian American Community to Increase Civic Participation on National Voter Registration Day*, MINKWON CTR. FOR COMMUNITY ACTION, (Sept. 25, 2018), <https://www.minkwon.org/newsroom/press-releases/09252018-midterms> [<https://perma.cc/7CKS-3JND>].