

Podcast Transcript:

Race and Regulation Podcast

Presented by the Penn Program on Regulation

Episode 7: Citizenship, Race, and Political Inequality with Ming Hsu Chen

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Music: Joy Ike's "The Fall Song"

Ming Hsu Chen: Now, in a regular year, the Census Bureau always has trouble counting everyone. We have a large country, we have a lot of people, and there are certain groups that are predictably hard to reach. That's a regular year. This has not been a regular year.

Cary Coglianese: That's Ming Hsu Chen, an expert on race, immigration, and the administrative state, delivering a lecture organized by the Penn Program on Regulation at the University of Pennsylvania. I'm Cary Coglianese, the director of the Penn Program on Regulation and a professor at the University of Pennsylvania. Welcome to our podcast, *Race and Regulation*.

In this series, we are talking about the most fundamental responsibility of every society: ensuring equal justice, and dignity and respect, to all people.

Advancing racial justice calls for all of us to understand better the racial dimensions of regulatory systems and institutions. We're glad you can join us as we hear from Ming Hsu Chen, a law professor at the University of California Hastings College of Law, speaking about racial inequality and the political process. Professor Chen argues that, instead of generating the right kind of political representation, various rules about voting, citizenship, and electoral districting have combined with demographic shifts in the United States to lead to what she calls "political misrepresentation."

MHC: Citizenship consists of being a member of a political community. And being part of a political community entails participating in a democratic society. This takes two forms. The first is voting rights, and that fosters direct participation. It is probably the most familiar to anyone

who thinks about political participation. The second is indirect representation, such as when members of Congress cast votes on behalf of the people in their districts. That representational equality requires that the elected representatives look out for all of the people in their district regardless of their race, and maybe more controversially, regardless of their citizenship status. Representation permits people who cannot vote or do not vote to have their voices be heard. This broad representation is based on the notion that legislators have a responsibility to represent all persons in order to protect the community's interest. Those direct and indirect forms of participation are, of course, intertwined because individual voters select the officials who will go on to represent them. And yet, representation is distinct from voting in other ways, including that it is not restricted to citizens in the way that voting is.

CC: In other words, even non-citizens are entitled to some meaningful representation of their interests and values—of their human dignity. And this is true even if they don't vote, just as it's true for those citizens who are eligible to vote but don't. Professor Chen argues that, once we recognize that all people deserve representation, it becomes clear that current rules are failing to meet this basic democratic necessity.

MHC: There are a number of efforts to exclude non-citizens from politics as there has been to exclude racial minorities from politics as well. One are voting laws that lower participation for Asian and Latino voters. Then also, I'll look at policies that change the formula for representation in ways that would skew the coverage of non-citizens as well as those Asian and Latino voters. We need to turn toward politics to enhance representational equality for these vulnerable groups.

CC: Professor Chen emphasizes how these vulnerable groups are growing in population size, which only creates more urgency to having their needs represented in politics and policymaking.

MHC: During the pandemic, migration and population growth slowed. The non-white population, however, has been growing even faster than predicted during this time. The data from the census in 2020 has revealed that the Asian American and Latino population is vastly expanding. The population is also becoming younger, and that also has a skewing effect on representational equality.

Now, this has implications for political engagement. For example, Asian Americans are naturalizing and engaging in politics at a higher rate. We could see that in the 2020 election. Voting was fifty-nine percent in 2020, which was up ten percent since 2016. And that rise in

voting consisted almost entirely of new voters. For the Latino population, naturalization and political engagement also continue to grow. Participation went up by six percent in 2020, reaching fifty-four percent as compared to the forty-eight percent in 2016. And the growth was concentrated in highly consequential states like Arizona, Florida, and Texas. These are not only populous states, but states where we have seen a lot of partisan shifting.

CC: And yet, Professor Chen notes that in too many of these states, regulations keep population growth from translating into growth in meaningful representation. Partly this derives from a history of racial discrimination in voting laws in the United States.

MHC: There have been formal barriers to voting, such as the disenfranchisement of individuals deemed outside the political community because they were slaves, because they were women, because they were poor, because they were disabled, or because they were illiterate. And those historical efforts to suppress political participation are continuous with the contemporary efforts to put up barriers for Latino and Asian voters. This consists both of the formal barriers to voting, such as voter identification laws and the closely related voter challenger laws or voter purge laws. And they also consist of more informal barriers that uniquely affect these groups, such as language barriers or other challenges recognizing surnames or barriers to naturalization.

CC: And political misrepresentation also starts with the very notion of who can be eligible to vote.

MHC: The eligibility to vote that is premised on citizenship might seem so taken for granted that we don't even think about it as a barrier. But federal laws do prohibit non-citizens from voting. There is no equivalent prohibition for state and local voting, but five states have gone out of their way to enact laws or have amended their state constitutions to explicitly state that non-citizens cannot vote. Those five states are Arizona, North Dakota, Colorado, Florida, and Alabama. To many people that won't seem like a problematic barrier, but it is a barrier, and it is worth noting that it hasn't always existed. There have been times in U.S. history where there has been U.S. non-citizen voting.

What we have been hearing about a lot more in the news is not a questioning of the eligibility to vote, but the proof that has to be furnished for eligible voters to be able to, in fact, cast an effective ballot.

Music: Joy Ike's "Wearing Love"

Voter identification laws have also been available since Jim Crow. They gained prominence in the wake of September 11, when Congress passed legislation that required voters to show ID. And they also passed additional legislation, the Real ID Act, that tightened up the requirements on what kinds of IDs would count, most notably state identification cards that have to include citizenship status and penalties for voters for using non-compliant state IDs, and they might, for example, have their ballots only count provisionally on election day. As of January 2020, thirty-four states have voter identification laws on the books, nineteen of those include photo identification requirements, and others are documentary proof of citizenship, or proof of residency.

Empirical studies show that these proof requirements really do work, they really do suppress voting, especially for newly naturalized citizens. More specifically, studies have shown that voter identification laws can depress racial minority voting while exerting a negligible effect on white voter turnout. For Hispanic and Latino voters, who are the largest foreign-born group in the United States, the turnout rate is 7.1 percent lower in states that have strict voter ID laws than in other states. For Asian American voters, the fastest growing foreign-born group, the turnout in strict states is five percent lower. But by comparison for white voters, putting in a strict voter ID law only reduces participation by 0.2 percent. So there is a real disparity in the effect of these laws, depending on the people that we are talking about. And again, mind you, these are all people who are, in fact, eligible voters. This is just about proving that eligibility.

CC: And regulatory enforcement cannot be ignored either. How these voter eligibility rules are enforced can shape what democracy means and how people relate to one another in society. For example, Professor Chen points to some state laws that allow private individuals to take action to challenge another person's eligibility to vote.

MHC: Essentially this is a private right of action or a private law enforcement action. Those laws are intended to ensure the integrity of elections, but they can be used by overzealous poll watchers to harass or intimidate minority voters. For example, in Georgia, there were three residents in a particular election that challenged three-quarters of the Latino voters in that county, alleging that the registered voters were not citizens when, in fact, they were. In the same year, in Alabama, poll watchers in a city council race, where there was a Vietnamese American candidate, challenged the Asian American voters saying, we figured if they couldn't speak good English, they possibly weren't American citizens. Those are some of the risks of raising the barrier so high for those who are, in fact, already eligible for citizenship but might just have a harder time proving it.

CC: Voting laws and their enforcement are not the only ways that representation can be limited and unequal.

MHC: There is another set of barriers that are not directly challenges to voting—that direct form of participation—but are challenges to indirect participation in the form of representation in Congress and electoral politics. One is a set of rules that have tried to exclude immigrants from apportionment and redistricting—that is, the number of seats that are given to a particular seat in Congress before the lines are drawn to divvy up those particular seats. Those efforts have included the effort under the Trump Administration to order the Census Bureau to actually subtract the undocumented population from the 2020 census count. Biden rescinded that executive order, and the Census Bureau has forgone a report on undocumented population but, nonetheless, state challenges to this idea of using the total population, including non-citizens, do continue. And we are seeing a round of redistricting that includes states like Missouri who, for the first time, are proposing to use citizen voting age population, or CVAP, instead of total population.

Evenwel v. Abbott was a Supreme Court case that settled that total population may be used for Congressional seating. But it didn't say that it must, and that's why we still have an open question about whether or not the formula can be changed from the more inclusive one of total population to the less inclusive, which would look at just the citizen voter age population. The theory of why you might include total population is, quote, directly from the *Evenwel* opinion, persons, not voters, that's the theory of the Constitution. Persons, not voters, have an important stake in any policies. For example, children, their parents, their grandparents, all have a stake in a strong public school system.

CC: Of course, if children, along with non-citizens, were to be left out of districting formulas, they would be overlooked by the democratic system—again, political misrepresentation. Professor Chen explains how the most recent census, conducted in 2020, has contributed to political misrepresentation.

MHC: Now, in a regular year, the Census Bureau always has trouble counting everyone. We have a large country, we have a lot of people, and there are certain groups that are predictably hard to reach. That's a regular year. This has not been a regular year. During the pandemic, there was a switch to online surveys, there was less door-to-door outreach, there was a lot of political wrangling to end the count early, even though there had been delays getting the whole process going. The results were unexpectedly good overall. The census participation actually remained

pretty high in 2020, but it was less high for the vulnerable groups that we are talking about today. The Census Bureau showed a non-response rate was highest among groups that typically would have required interviews to follow up, and those interviews were suspended during COVID-19.

CC: These realities in census administration have had unequal effects.

MHC: While the overall population total was relatively accurate, the count specifically of Hispanic, Black, and Native American minorities were skewed. That's because there is a statistical technique of imputation that can correct for the overall population, but didn't actually hold constant demographic variables. The result of that is that the census ended up undercounting the Latino population by four percent. It ended up having a response rate of twelve percent less than would have been expected. And even though the citizenship question that had been put on to the questionnaire—right up until the Supreme Court stopped it just weeks before census administration began—even though that question didn't go on, there may still have been a chilling effect on participation in the Latino community—in particular, in families that have mixed status, where one individual might be less comfortable participating or opening their door to a census worker if they know that there was someone else in their home that might be undocumented, which, of course, doesn't make them ineligible to be counted, but might open them up to the scrutiny of the federal government on other affairs.

To be fair, the pandemic stress might not have been prevented, but the political wrangling that happened behind this census effort was purposeful. There was proof of political manipulation and coverup in the *Commerce Department v. New York* case that went to the Supreme Court. In that case, the Supreme Court found that the effort to add that citizenship question was arbitrary and capricious under the Administrative Procedure Act. The census challenges occurred alongside other citizenship battles, which suggests that this was not inadvertent. There were battles over birthright citizenship, the definition of a constituent on the naturalization test in the immigration agencies, and the false premise of non-citizens and dead people who were voting in the 2020 election.

CC: One way of trying to correct for imbalances in voting, districting, and census rules is to take these battles to the courts. As Professor Chen notes, the Supreme Court did step in to settle the dispute over the citizenship question on the 2020 Census.

Music: Joy Ike's "Wearing Love"

But overall, Professor Chen questions whether the courts can serve as a guarantor of meaningful political representation in the United States. Part of the problem stems from a core tension in U.S. political law—a tension between treating immigrants as persons for Census purposes, but not as voters in elections. It is a commonly held idea, she says, that non-citizens should not be part of the political community.

MHC: This isn't necessarily a racist view. This is a really common conception, and it is reflected in the requirement of citizenship to be eligible to vote in federal elections. On the one hand, immigrants aren't citizens, so they can't vote. But on the other hand, they are persons. They can be represented in Congress and in the census count, so that does seem inconsistent. It could be that the right to vote is not exactly the same as the right to representation. And citizenship membership theory says that citizenship has multiple layers. So, non-citizens can be legally outsiders, but that doesn't mean that they are outsiders in every sense. Politically, socially, economically, they can be insiders at the same time that legally they are outsiders in the sense of being non-citizens. And even if they are legally outsiders at the border, it doesn't mean that they have to be considered outsiders in schools, in other domestic affairs.

Whether a person is considered an insider or an outsider is consequential because a lot of rights and responsibilities are assigned according to that legal status, the one that makes you an outsider or an insider.

CC: Now, in many respects, citizens and non-citizens do have the same rights.

MHC: Constitutional rights do apply to citizens and non-citizens. The Fourteenth Amendment applies to persons. That is consistent with some of the seminal cases like *Yick Wo*, *Graham v. Richardson*, and *Plyler v. Doe*. These are all cases that applied strict scrutiny to non-citizen discrimination by states under the equal protection clause. You have analogous provisions for civil rights laws as well.

CC: Yet, the Supreme Court has also held that certain public or political rights can be denied to non-citizens. For example, the Court has specifically held that states can discriminate against non-citizens over employment in certain kinds of government jobs.

MHC: There is a case in 1973 called *Sugarman v. Dougall* where the Supreme Court held a New York statute that denied all non-citizens the right to hold civil servant jobs was unconstitutional. The court reasoned that non-citizens were a prime example of a discrete and insular minority, and that classifications based on alienage were subject to close judicial scrutiny. But in dicta, the Court said what came to be known as this political function exception, and it laid the groundwork for states and local governments to pass a number of laws that would exclude non-citizens from participation in self-governance. That included exclusions from the police force, from being a schoolteacher, and even from attorney licensing.

We have to remember, though, that these laws, these public function exceptions to constitutional protection are supposed to be exceptions to the more general rule of equal protection, and they are supposed to be a narrow exception.

CC: But Professor Chen says that this exception has been incorrectly applied. Specifically, she thinks the Court has taken the wrong path in a number of political representation cases when it has allowed states to deny non-citizens the political rights it offers citizens.

MHC: In fact, I would say that the cases are ironic and wrongly decided. It's the very same thing that seals off non-citizens from judicial protection. It's the same thing that seals them off from political protection. So, you have a double harm. One of the reasons for the equal protection clause and excluding the strictest scrutiny to racial minorities is this idea of protecting them because of their lack of political recourse.

CC: The existence of political misrepresentation, in other words, should drive greater legal protections from discrimination. But it hasn't.

MHC: I think you either have to say non-citizens get higher protection from the courts or they should not be removed from politics, or maybe you should even say both of those things. But instead, we have chosen the route where courts don't extend that heightened protection and non-citizens still don't have direct access to political participation.

CC: If the courts can't always be counted on to protect those who are misrepresented in politics, then maybe the solution lies in politically overcoming that underlying misrepresentation.

Music: Joy Ike's "Wearing Love"

MHC: I am going to say something bold and that's to claim that non-citizens deserve to participate in politics. This goes to a more inclusive notion of representation. It's the idea that voters and non-voters, which means children and adults, as well as non-citizens and citizens, are all members of a political community and ought to receive equitable and effective representation. Non-voters, as we said, of course, are not voting; they get proxy representation. You are familiar with the idea of children having proxy representation from their parents. The analogy can carry over to the non-citizens, perhaps with mixed status families that invert the relationship where the immigrant parents might be represented by their citizen children. You might also see it in communities that have a lot of immigrants in them, diverse communities, gateway cities like New York or San Francisco. Those are places where you have immigrants and citizens who have a shared or a linked fate. That is to say they have shared community interests.

This fits together with the problem I had with the political function exception. Not only does the reasoning for allowing non-voting need to carry over to representation, it might be even more important to preserve that political representation to avoid that double harm that I described. If we think about discrete and insular minorities not just as another minority group that a court has to step in to rescue, but a reason to enhance access to the political process, you have the nub of my suggestion, that we need to find some alternative channels to enhance political power for these groups.

CC: What might these alternative channels look like? And how could society achieve them? One way is through civic engagement.

MHC: Political representation for non-citizens takes hold in the individual right to civic engagement. And that means rights for individual people to speak and to engage in civic organizations. In the realm of institutional politics, that also extends to a right to contribute to political campaigns that have a direct bearing on who will represent you in politics. Currently, there is a federal statute that prevents foreign nationals from making campaign donations in any federal, state, or local election. But those same regulations permit permanent residents, those who are lawfully living and working in the United States, to contribute to campaigns in order to protect what the courts have considered core political speech and the act of being able to contribute to a campaign and select an elected representative who will go on to represent your interests.

CC: Another idea would be to reverse exclusionary rules about government service by non-citizens.

MC: Aside from being able to be engaged in politics generally, being able to give money to select someone else to represent you, you could consider allowing non-citizens to hold public employment and maybe even to hold elected office. Right now, the Constitution expressly forbids non-citizens from holding federal elected office. Many of us are familiar with this because we have seen battles, sometimes ugly battles, about the citizenship status of Barack Obama, Ted Cruz, Kamala Harris, John McCain, across the political spectrum. We are very well aware that you have to be a citizen to run for high-level public office.

In addition to that eligibility requirement, and the state restrictions on civil servant jobs that have been permitted by the Supreme Court, there are federal appropriation bills that have prohibited the use of federal funds for the compensation of non-citizen government employees. This happens to me every year with my law students. I will have excellent green card holders, permanent residents who have spent the bulk of their lives in the United States that are not eligible for a federal clerkship because of this very appropriations limitation. It's only very narrow categories of non-citizens, including lawful permanent residents who are applying for naturalization, and refugees who have declared an intent to naturalize, who can be compensated as a federal government employee.

Naturalized citizens may hold an extremely small percentage of offices nationwide. Maybe it is important to allow immigrants to be represented in the federal government by others who understand immigration. That's the premise of a non-profit called New American Leaders group that essentially is a bootcamp for new leaders who come from immigrant populations and have become eligible for elected office. And it might even be time to reconsider that prohibition on civil servant jobs or the statutory and regulatory limitations on non-citizen employment with the federal government. All of those would complement the right to representation by elected officials and redistricting that create more of a right to an effective vote in Congress.

CC: A final direction for the future would be to end the exclusion of non-citizens from participating at the ballot box.

MHC: Non-citizens are not prohibited from voting in state and local elections. At the federal level they are, and with some very small exceptions, if they do, they can be punished with fines, imprisonment, or deportation. At the state level, there is no flat prohibition, but five states have

amended their constitution to preclude non-citizens. Those five states don't speak for everyone. None of these states has taken the step of amending their constitution to permit non-citizens to vote. But a growing number of cities and counties across the country have enacted some form of non-citizen voting. There are eleven jurisdictions in Maryland. They allow all non-citizens to vote in all local elections, regardless of whether the individual has lawful status.

San Francisco permits non-citizens to vote regardless of lawful status – so that means again, DACA, but also undocumented immigrants, but only in school board elections, if the non-citizen has a child in that school district. This again echoes the history of voting in the United States. Over forty states and territories have, at some time, given non-citizens the right to vote, and that started in the early years of the nation. But there was a retreat in the 1900s that led to states taking that back piece by piece.

CC: Today, non-citizen voting is still the exception across the United States.

MHC: Support for the kinds of measures I have mentioned in these progressive spots like San Francisco and the eleven different places in Maryland are not universal, and they probably won't be enacted universally across the country. Opponents might be anti-immigrant, or they might be people who hold to that common belief that you should accept the duties of citizenship before being allowed to vote. Or even that making voting too accessible will lessen the incentive to naturalize and become a citizen in the first place.

I believe that non-citizens should be able to participate in politics because they have a stake in their community. As communities across the nation are becoming more diverse, including more racial minorities as well as non-citizens, legislative strategies for empowering those individuals have become less effective for political equality. We need to look for alternatives by highlighting this lost ideal of a political community.

Music: Joy Ike's "Wearing Love"

CC: What might be some of these alternatives?

MHC: One idea is in this idea of communities of common interest. That is a concept that is protected under Section II of the Voting Rights Act. While there is not a strict definition or a subtle definition of the community of common interest, but it generally refers to a group of people in a specific geographic area and who share common interests that are linked to public policy issues. That can be economic, that could be historic, that could be cultural.

If a group can represent itself to a redistricting commission and make the case that they do have a shared characteristic that entitles them to be kept together in a single district, they can keep their community of interest intact and have more political influence, and better representation, a shield from the kinds of challenges and inequalities that we have been talking about. And we have seen that in instances where you have cross-racial coalitions, for example, you might have a community with, a poor community, that includes Asian, Latino, Black members that would otherwise be capped by redistricting. You could also use it to coalesce common interests within a racial group that is itself diverse, even if they may not be as geographically compact or as cohesive along partisan lines as other racial minorities whom the Voting Rights Act was initially designed to protect.

CC: How else could the United States move toward a system of political representation that includes non-citizens?

MHC: Other techniques that you could use to extend this idea of a more inclusive political order that go beyond legal status. So, if not this communities of common interest idea, municipal voting on the basis of residence in the school district, financial stakes on a parcel of land, reliance on the sea and water resources, a shared risk of wildfire in Los Angeles – these are all things that have managed to succeed. These are all stakes that are borne by all of the residents in the community, whether they are U.S. citizens or not. And acknowledging them means acknowledging that the immigrants live and work, they start families and businesses that are parts of these communities, and that the U.S. citizens rely on them as well. So, any harm to the U.S. citizen affects the whole community, non-citizen and citizen alike.

A calling for racial minorities to turn toward politics might, again, seem surprising. Most people who are concerned about immigrants would probably not trust politics since it has excluded non-citizens from participation for so long. There might be problems of feasibility given that race and immigration policies have been quite polarized in Congress and, in particular, there might be these persistent structural limitations in the present system that relies on political branches to protect non-citizens, even though there is a lack of political accountability to a non-voting or a minority population. But nonetheless, we could expand this conception of political community to

be more inclusive, and we could have a more robust articulation of the civic duties and shared values behind them.

CC: In the end, is a more inclusive political order even possible? Professor Chen offers reasons to be hopeful.

MHC: I have listed a few examples of states and localities that have tried to do this through local voting and this idea of communities of common interest. Again, it's probably not going to happen everywhere across the country. But, nationally, the U.S. does permit non-citizens to pay taxes, to serve in the military, to give to campaigns, and to be counted for electoral representation. And so, it has happened in some places and at some times. While regulations to expand the political community might currently be out of favor, it is something that could come back into favor.

Music: Joy Ike's "Walk"

CC: Time will then have to tell. For now, I want to thank you for listening to this episode of "Race and Regulation." We hope you have learned more about the racial dimensions of immigration and democratic representation in the United States.

This podcast has been adapted from a lecture delivered by Professor Ming Hsu Chen in 2022. She spoke as part of the Penn Program on Regulation's lecture series on race and regulation, co-sponsored by the Office of Equity and Inclusion at the University of Pennsylvania Carey Law School.

I'm Cary Coglianese, the director of the Penn Program on Regulation. For more about our program and free public events, visit us at PennReg.org. You can also find other episodes in our Race and Regulation series wherever you get your podcasts.

This podcast was produced by Patty McMahon, with help from Andy Coopersmith, our program's managing director. Our music is by Philadelphia-based artist Joy Ike.