

Conservative Jurisprudence and Noncitizens' Political Voice

Nadia Almasalkhi

A joint publication from Berkeley Interdisciplinary Migration Initiative & the Othering & Belonging Institute at UC Berkeley

The Trump administration has come to an end, but its legacy will continue to affect immigrants, most notably through the court system. Many lawsuits raised against the Trump administration for its various policies towards immigrants are still being debated in U.S. courts. The decisions from these cases will set a precedent for how immigrants can be treated by future administrations. During his tenure, former President Trump appointed over fifty U.S. Court of Appeals judges¹ and three Supreme Court Justices, skewing the federal judiciary slightly towards the political right. How will conservative judges rule on cases related to immigration issues?

The work of Dr. Sarah Song, a BIMl-affiliate and Professor of Law and Political Science, unpacks how certain legal and political principles have been applied to the treatment of noncitizens in the United States, and thus offers us insight into how conservative judges could approach cases relating to immigrants' rights in the future. Professor Song explains that the value of personal liberty is a fundamental value in the U.S. Supreme Court's jurisprudence and has been especially prioritized by conservative jurists when interpreting the Constitution.² The concept of personal liberty is integral to Western democratic thought and gives rise to what Dr. Song refers to as

28 percent of active federal judges were appointed by former President Trump



¹ Gramlich, John. 2021. "How Trump Compares with Other Recent Presidents in Appointing Federal Judges." *Pew Research Center*, January 13.

Data from the Pew Research Center

² Song, Sarah. 2020. Interview with author, December 11.



“the coercion principle”³: the idea that because all individuals have a right to freedom, any restriction of personal liberties must be justified.

Government restricts personal liberties—in other words, “coerces” people—by creating and enforcing laws. Whether it is the criminal law or tax law, each body of law infringes on personal liberties. If we value personal liberties, then we must ask how the system of law can be justified to the individuals who are expected, on pain of punishment, to comply with them. In her 2009 article, “Democracy and Noncitizen Voting Rights,” Song describes the two most prominent perspectives regarding how government coercion should be justified. First, there is the view that infringements on personal freedom are acceptable as long as the government’s “institutions and laws”⁴ are considered to be fair or just (*the justice perspective*). The second view is that infringements on personal freedom are justified when the people who are subject to the government’s laws have actual “opportunities to participate”⁵ in governmental decision-making (*the democratic perspective*). Professor Song argues that if we follow the logic of the second, democratic approach to the coercion principle, then all people residing in the U.S. should have the opportunity to participate in government, including noncitizens, since they are also subject to the U.S. laws.

“If we value personal liberties, then we must ask how the system of law can be justified to the individuals who are expected, on pain of punishment, to comply with them.”

3 Song, Sarah. 2009. “Democracy and Noncitizen Voting Rights.” *Citizenship Studies* 13(6): 610.

4 Song (2009): 610.

5 Song (2009): 610.

Political voice for noncitizens

Municipalities across the country have moved towards enfranchising their noncitizen residents. For example, San Francisco passed a proposition in 2016 permitting the parents of San Francisco schoolchildren to vote in school board elections regardless of immigration status,⁶ and on the other side of the country, in November 2020, voters in Winooski, Vermont approved an amendment to the city charter that would allow all lawful residents to vote in local elections.⁷ Segments of the federal government, however, have been accused of working towards the opposite goal in recent years, particularly through the administration of the 2020 Census.⁸

The decennial census has significant implications for political voice and resources. The population data taken from the census is used to determine the allocation of seats in the House of Representatives, votes in the Electoral College, and federal funding among U.S. states and districts. While noncitizens cannot vote for their congresspeople, their congresspeople are still able to represent their interests as constituents and act as conduits for noncitizens’ political participation.

The census in the Supreme Court

With so much at stake, two separate cases regarding the 2020 Census have been argued in front of the U.S. Supreme Court since 2019. The first was *Department of Commerce vs. New York*, which was triggered when the Secretary of Commerce Wilbur Ross, appointed by President Trump, announced his plan to include a citizenship question on the 2020 census form. The state of New York sued to block that plan on the grounds that asking about citizenship would lead to an undercount of noncitizen residents, and therefore a major undercount of New York’s total population. The Supreme Court agreed unanimously that asking about citizenship on the census would likely lead to a significant undercount, and that such an undercount would have harmful consequences for the state of New York and the other co-plaintiffs.⁹ All policy decisions have trade-offs, though, so then

6 Department of Elections. 2020. “Non-Citizen Registration and Voting.” *City and County of San Francisco*.

7 Barton, April. 2020. “Vermont election results: Winooski backs voting rights for non-citizens in local elections.” *Burlington Free Press*, November 4.

8 Perales, Nina. 2020. “Symposium: A not-at-all disguised attempt to shift power away from Latino voters.” *SCOTUSblog*, November 28.

9 *Department of Commerce vs. New York*, 588 U.S. 9 (2019).



the Supreme Court had to determine whether the Department of Commerce had good reason to include the citizenship question anyway. The ultimate ruling blocked the inclusion of the citizenship question on the basis that the Department's stated reason for the decision was unconvincing; to the majority of the Court, the decision appeared inappropriately politically motivated.¹⁰ Conservative-leaning Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh disagreed, arguing that the Court should, in general, accept the executive branch's stated reasoning for its actions at face value and allow the executive branch to exercise "broad discretion" in decision-making.¹¹

The passing of Justice Ruth Bader Ginsburg and the subsequent confirmation of Justice Amy Coney-Barrett in the fall of 2020 tilted the Supreme Court further in a conservative direction. In late November 2020, with three Trump-appointed Justices on the bench, the Supreme Court considered another case relating to the Trump administration's handling of the 2020 Census: *Trump vs. New York*. In this case, President Trump had asked the Secretary of Commerce to exclude undocumented immigrants from his report on census population data, which will be used to allocate seats in the House of Representatives to states. The Court determined that they cannot rule on the matter since the Secretary of Commerce had not yet delivered the report.

The report was set to be delivered in January 2021, but on President Biden's first day in office he signed an executive order rescinding the Trump administration's directives. As a result, all individuals counted in the census will be counted in the data used to allocate seats in the House of Representatives, and the *Trump vs. New York* case is moot. While this appears to be a victory for noncitizens' political voice, the fact that the Supreme Court refused to issue a ruling on the matter—against the objections of the three liberal Justices¹²—means that the path is clear for future administrations to attempt this gambit again.

Conservative jurisprudence for cases like *Trump vs. New York*

Professor Song reminds us that noncitizens' rights have been affirmed in U.S. Supreme Court decisions before: as far back as 1886, the Court declared in *Yick Wo vs. Hopkins* that "all persons within the territorial jurisdiction"¹³ of the United States enjoy some protections under the Constitution.¹⁴ In more recent history, the Court's 1982 decision in *Plyler vs. Doe* affirmed this principle, stating, "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."¹⁵ This history is important because of the legal principle of stare decisis, which directs jurists to follow legal precedent. Even though stare decisis is popularly associated with conservative jurisprudence,¹⁶ it has been argued in recent years that contemporary conservative Justices do not consistently follow legal precedent.¹⁷ Arguments presented to conservative Justices regarding noncitizens' rights in the United States may then need to be supplemented with appeals to other conservative juridical values.

Professor Song's illustration of the coercion principle shows one argument that could be emphasized and perhaps even might appeal to the conservative Justices. Because the coercion principle recognizes the importance of personal liberty, it has the potential to win traction with conservative jurists.¹⁸ The democratic perspective on the coercion principle may be particularly convincing to Justices who seek to interpret the Constitution according to the intentions of the Constitution's ratifiers.¹⁹ American revolutionaries, including those who went on to ratify the Constitution, railed against taxation without representation, which suggests that the framers of the Constitution were sympathetic to the democratic approach to the coercion principle. The framers did not deliberate on undocumented immigration, but undocumented migrant workers are indeed subject

¹³ *Yick Wo vs. Hopkins*, 118 US 356 (1886).

¹⁴ Song (2009): 613.

¹⁵ *Plyler vs. Doe*, 457 U.S. 202 (1982).

¹⁶ Cook, Catherine. 2009. "Legislating from the Bench." *Harvard Political Review*, March 3.

¹⁷ Cherminsky, Erwin. 2019. "Cherminsky: Does precedent matter to conservative justices on the Roberts Court?" *ABA Journal*, June 27.

¹⁸ Song, Sarah. 2020. Interview with author, December 11.

¹⁹ Shapiro, Ari. 2009. "Conservatives Have 'Originalism'; Liberals Have...?" *National Public Radio*, June 23.; Holloway, Carson. 2019. "Liberalism, Originalism, and the Constitution." Commentary, *The Heritage Foundation*. July 8.

¹⁰ *Department of Commerce vs. New York*, 588 U.S. 23-29 (2019).

¹¹ *Department of Commerce vs. New York*, 588 U.S. 1 (2019) (Thomas, J., dissenting).

¹² *Trump vs. New York*, 592 U.S. 1 (2020) (Breyer, J., dissenting).



to U.S. tax laws, which they comply with and pay into.²⁰ By the logic of the democratic version of the coercion principle, because noncitizens are subject to the government’s laws, they are also entitled to have their voices and interests represented in government. Applying this democratic logic would allow the Court to protect what little political voice noncitizens have.

The coercion principle offered a compelling reason based on individual liberty for conservative Justices to block former President Trump’s plan to exclude undocumented people from being represented in population counts. Although threats to noncitizens’ political voice appear to have dissipated with the inauguration of President Biden,²¹ immigrant communities are still likely to witness challenges by state governments and future presidential administrations. Given that federal judges, including those appointed by former President Trump, hold lifetime appointments,²² appealing to conservative Justices on immigration matters will prove to be a useful skill for decades to come.

“By the logic of the democratic version of the coercion principle, because noncitizens are subject to the government’s laws, they are also entitled to have their voices and interests represented in government.”

²⁰ Hallman, Hunter. 2018. “How Do Undocumented Immigrants Pay Federal Taxes? An Explainer.” *Bipartisan Policy Center*, March 28.

²¹ Rodriguez, Sabrina. 2021. “Biden’s plan to outdo Obama, undo Trump’s immigration legacy has begun.” *POLITICO*, January 20.

²² Administrative Office of the U.S. Courts. n.d. “About Federal Judges.”

This brief is a joint publication from the Berkeley Interdisciplinary Migration Initiative and the Othering & Belonging Institute at UC Berkeley

Citation

Almasalkhi, Nadia. 2021. "Conservative Jurisprudence and Noncitizens' Political Voice." BIMl-Othering & Belonging Institute Policy Brief Series. Berkeley, CA: Berkeley Interdisciplinary Migration Initiative.

Design & Layout

Al Nelson, Carlin Praytor

Contact

Berkeley Interdisciplinary Migration Initiative
bimi@berkeley.edu
<https://bimi.berkeley.edu>

124 Moses Hall
Berkeley CA, 94720

About the Author

Nadia Almasalkhi is a BIMl Policy & Communications Fellow and a National Science Foundation Graduate Research Fellow in Sociology at the University of California, Berkeley. Before beginning graduate school, she worked as a casework intern in a refugee resettlement agency, legal assistant to immigration attorneys, and research assistant investigating the effects of trauma on refugees in the U.S. She holds B.A.s in International Studies and in Arabic and Islamic Studies from the University of Kentucky. Her research interests include the experiences of Middle Eastern emigrants, social movements, and the politics of immigration law. Her current research studies the Syrian American diaspora.