

2000

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## Recommended Citation

Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000).  
Available at: <http://scholarship.law.umn.edu/lawineq/vol18/iss2/1>

*Law & Inequality: A Journal of Theory and Practice* is published by the  
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# Noncitizen Voting Rights: The History, the Law and Current Prospects for Change

Virginia Harper-Ho\*

## Introduction

In each of the past two sessions, the Massachusetts State legislature has considered a bill that may not seem of much import to most Americans but in fact raises issues touching on the very meaning of democracy and citizenship. The bill would approve the Town of Amherst's decision to grant permanent resident aliens the right to vote in local elections without becoming U.S. citizens.<sup>1</sup> Although a proposal advocating voting rights for noncitizens, or "aliens," might understandably be met with surprise or quickly dismissed as absurd, the Massachusetts bill does not represent a recent aberration in the American concept of political participation. In fact, the United States has a long history of noncitizen voting; noncitizens voted in the United States and even held public office from the Colonial Era through the 1920s.<sup>2</sup> Today, as immigrant populations swell in many major cities, scholars, politicians and American voters are beginning to reconsider the possibility of extending voting rights to noncitizens. In a few parts of the country, noncitizen voting rights have already

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\* J.D. expected 2001, Harvard Law School. My thanks to Ron Hayduk and Professor Phil Thompson, who commissioned this report and whose expertise and resources have been invaluable, and to Penda Hair, who was responsible for guiding my efforts. I am also grateful to Professor Erwin Chemerinsky for his insights into the Los Angeles Charter reform process. I owe special thanks to Sookyoung Shin, who assisted with research for the original draft of this report, developed for the Civil Rights Project of Harvard Law School and presented in draft form to the Aspen Roundtable on Comprehensive Community Initiatives. I acknowledge sole responsibility for any errors that remain.

1. See H.B. 209, 181st Gen. Ct. (Mass. 1999). The measure was passed by the Town of Amherst in 1998, introduced in the House on January 6, 1999, and passed the Massachusetts legislatures' joint committee on election laws on April 5, 1999. The bill has not yet come to the floor during the current session. If the bill dies at the end of the session, the Town may ask Representative Ellen Story to reintroduce it during the 2001-2002 session. See Telephone Interviews with Jessie Spears, Legislative Aide to Representative Ellen Story (Feb. 2, 2000; Mar. 23, 2000).

2. See *infra* Part I.

become a reality;<sup>3</sup> in most, however, proposals to enfranchise resident aliens continue to face sustained opposition.<sup>4</sup> As has been the case throughout the history of alien suffrage, the battle will no doubt be political, rather than legal.<sup>5</sup>

This Article examines the expansion and decline of noncitizen voting and explores the legal issues implicated in current efforts to reintroduce it in many cities across the country. Furthermore, this Article will focus attention on the potential for extending the vote to permanent residents at the local, rather than the national, level. While some scholars have argued in support of noncitizen suffrage at all levels, national participation raises more serious "legal, political and ideological obstacles" than does noncitizen voting at the local level.<sup>6</sup> In addition, this discussion does not imply that *illegal* immigrants should be entitled to participate in the political community, or even that all legal immigrants should do so. While many of the legal and policy arguments outlined below apply to alien suffrage generally, this Article suggests that extending the franchise only to "resident aliens," that is, permanent residents, may in fact best address the policy rationales and objections surrounding noncitizen voting.

This Article also intends to serve as a resource for groups and individuals interested in giving noncitizens a voice in their communities. Part I provides a summary of the history of alien suffrage.<sup>7</sup> Part II builds on that foundation with a presentation of the key legal arguments surrounding permanent resident voting.<sup>8</sup> Part III addresses the logistical concerns implicated in starting a

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3. Noncitizens have the right to vote in Chicago and New York school board elections, and at the local level in five Maryland towns (Takoma Park, Barnesville, Martin's Additions, Somerset and Chevy Chase). See *infra* Part IV.

4. Attempts to introduce noncitizen local voting rights have failed in Los Angeles, California, San Francisco, California, Washington, D.C. and Garrett Park, Maryland. Without support from the legislature, Amherst, Massachusetts will likely join the list. See *infra* Part IV.

5. See Wendy Aviva Shimmelman, *Local Voting Rights for Non-U.S. Citizen Immigrants in New York City: A Report Prepared for the Center for Immigrants Rights* 31-34 (July 1992) (on file with the author).

6. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1468 (1993) (arguing for local enfranchisement of nonresidents, but refraining from addressing the issue on a national scale).

7. See *infra* notes 11-102 and accompanying text. Throughout the discussion, the terms "aliens" and "alien suffrage" will be used interchangeably with "noncitizens" and "noncitizen voting," while "resident aliens" will refer only to those aliens who have been granted permanent resident status in the United States.

8. See *infra* notes 103-237 and accompanying text.

local movement for noncitizen voting rights.<sup>9</sup> Part IV contains a brief survey of current efforts to reintroduce noncitizen voting, and discusses legislation relevant to the introduction of alien suffrage in states likely to be affected by this issue.<sup>10</sup>

## I. History of Alien Suffrage

Alien suffrage in the United States existed in the Colonization period and continued through the early part of the twentieth century. During the nineteenth century, at least twenty-two states and territories gave voting rights to aliens.<sup>11</sup> Many factors have guided the ebb and flow of recognition of noncitizen voting, including shifts in the legal bases of voting rights, demographic changes in the immigrant population, and the rise and fall of xenophobic and nationalistic tendencies.<sup>12</sup> The brief discussion contained herein divides the history of alien suffrage into six periods: Colonization, post-War of 1812, pre-Civil War, Reconstruction, the turn of the 20th Century and recent developments.

### A. Early years: Colonization, the Revolution, and the War of 1812

The colonies did not universally follow the English tradition of excluding both aliens and naturalized citizens from voting and from public office.<sup>13</sup> While some scholars have suggested that the common definition of voters used at the time—"inhabitants" or "freemen"—was likely synonymous with the later term "citizens,"<sup>14</sup> in *Spragins v. Houghton*<sup>15</sup> the Supreme Court of Illinois dismissed that interpretation, noting that aliens voted under the early Constitutions of Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, Vermont

9. See *infra* notes 238-269 and accompanying text.

10. See *infra* notes 270-363 and accompanying text (examining California, New York, Texas and Florida).

11. See Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114-16 (1931).

12. See *infra* Part I.A.-E.

13. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP: 1608-1870* 123 (1978). There was, in fact, "little effort in the latter part of the eighteenth century to declare specifically that only citizens could vote, and voting by unnaturalized immigrants may well have been common . . ." Gerald Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH. L. REV. 1092, 1097 (1977). Aliens could also hold public office in the colonies. See *infra* notes 17-20 and accompanying text.

14. See Rosberg, *supra* note 13, at 1095.

15. 3 Ill. (2 Scam.) 377 (1840).

and Virginia, all of which granted the right to vote using the more general "freemen" terminology.<sup>16</sup>

It also has been established that unnaturalized immigrants voted and held local office throughout the colonies, including in Maryland as early as 1692,<sup>17</sup> South Carolina in 1704,<sup>18</sup> Pennsylvania as of 1747<sup>19</sup> and the Northwest Territory under The Ordinance of 1787.<sup>20</sup> States and territories originally part of the Northwest Territory also continued to allow alien suffrage,<sup>21</sup> although the territories only elected officials within their jurisdiction and non-voting delegates to Congress; they did not elect federal legislators or executive officers.<sup>22</sup>

Generally, however, the line between national and state citizenship during the eighteenth and early nineteenth centuries was not clearly demarcated, so those states which permitted noncitizen voting allowed it at all levels, local to national.<sup>23</sup> State citizenship, not national, was the dominant identity, to the point that several states granted foreigners state citizenship after the Revolution.<sup>24</sup> It took nearly "three decades to settle the exclusivity of the federal power to naturalize to national citizenship," though even then the possibility of a distinct state citizenship was not negated.<sup>25</sup>

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16. *See id.* at 384-85.

17. *See* KETTNER, *supra* note 13, at 122.

18. *See id.* at 123 & n.75 (citing the Act of 1704).

19. *See* Raskin, *supra* note 6, at 1400 n.51.

20. *See* 2 FEDERAL AND STATE CONSTITUTIONS 959 (Thorpe ed. 1909); *see also* Gerald Neuman, "We are the People": Alien Suffrage in German and American Perspective, 13 MICH. J. INT'L L. 259, 295 (1992).

21. *See* Neuman, *supra* note 20, at 295 & n.236 (citing OHIO CONST. OF 1802, art. IV, § 1; ILL. CONST. OF 1818, art. II, § 27). The first states to carry the alien suffrage provisions of the Northwest Ordinance into their state constitutions when they joined the Union were Ohio and Indiana. *See id.*

22. *See* Neuman, *supra* note 20, at 295.

23. *See* Raskin, *supra* note 6, at 1397. *See generally*, Neuman, *supra* note 20, at 292-93 (discussing the unclear or nonexistent demarcation between national and state citizenship in this period).

24. *See* Neuman, *supra* note 20, at 292-94; Raskin, *supra* note 6, at 1400. States which granted foreigners state citizenship after the Revolution were Vermont, Pennsylvania and Virginia. *See* Neuman, *supra* note 20, at 293-94 & nn.223-27 (citing VT. CONST. OF 1777, ch. II, § 38 (borrowing similar provisions from the Pennsylvania Constitution); VT. CONST. OF 1793, ch. II, § 39 (incorporating the same provision into the statehood constitution); PA. CONST. OF 1776 § 42 (making foreigners take allegiance to the state to become a citizen after one year's residence); VA. ACT OF DEC. 23, 1792, ch. 110, § 2; VIRGINIA CODE OF 1849, tit. 2, ch.3, § 1 (acknowledging "all persons who have obtained a right to citizenship under former laws" as citizens of the state)).

25. Neuman, *supra* note 20, at 292.

Through the colonial and early federal period, alien suffrage was often uncontested because voting rights were not based on citizenship, but on property ownership and race, as well as residence.<sup>26</sup> At the time the U.S. Constitution was ratified in 1788, almost every state required "some form of property ownership to qualify for the vote."<sup>27</sup> With the development of a more market-oriented society, a potential voter's "stake in society," as indicated by taxpaying, military service and general civic contributions, became the new basis of the right to vote.<sup>28</sup> While this rationale further substantiated denial of the vote to women, who generally were not involved in activities which would demonstrate a "stake in society," the "stake"-based conception left uncontested the right of White male immigrants to vote.<sup>29</sup> Up to the War of 1812, the states commonly extended voting rights to White male immigrants, as property ownership, race and gender, not citizenship, defined the voting population.

### *B. The War of 1812: Reversing the Spread of Alien Suffrage*

Even during the Colonization period and the years preceding the War of 1812,<sup>30</sup> state policies did not universally grant noncitizens the right to vote. Arguments opposing alien suffrage during that period drew on an anti-foreigner, and, more specifically, an anti-Irish Catholic prejudice.<sup>31</sup> Others feared

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26. See KIRK H. PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 133-34 (1977) (citing Washington D.C. as one of the many early examples of race-restricted voting rights). Porter also notes that from 1802 until its repeal in 1855, all White taxpaying residents could vote for the city council, presumably regardless of citizenship. *See id.*

27. Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 *YALE L.J.* 473, 476 (1997).

28. *See id.* at 477, 482-84.

29. *See id.* at 485. Cogan notes that the "stake in society" basis gave way by the 1840s to "white male suffrage," as women were deemed lacking in the "[c]apacity to exercise political power" and free choice that "intelligent" voting required. *Id.* at 485-86.

30. The War of 1812, fought between the United States and Great Britain, lasted from June 18, 1812 to December 24, 1814, when both sides signed the Treaty of Ghent in Belgium. See *ENCYCLOPAEDIA BRITANICA* (2000) at <<http://www.britannica.com/>>. The "war" arose from U.S. opposition to British maritime practices during the Napoleonic Wars, including forced conscription of U.S. sailors on the high seas and imposition of duties on U.S. trading vessels. *See id.* British instigation of Indian hostilities on the Canadian border also contributed to the conflict. *See id.* Although the U.S. failed to achieve any of its stated objectives (including expansion into Canada), and the unpopular conflict nearly sparked off a New England separatist movement, the U.S. proclaimed the "war" an American victory. *See id.*

31. *See infra* note 55 and accompanying text.

losing their political clout on the slavery issue if immigrants, who generally opposed slavery, had the right to vote.<sup>32</sup> Many states nevertheless recognized alien suffrage for those who met the race, gender and property qualifications. The War of 1812 "reversed the spread of alien suffrage" that dominated the political landscape up to that point<sup>33</sup> by stimulating a "rise of national consciousness" and producing "a militant nationalism and suspicion of foreigners."<sup>34</sup> Increasing concern about non-English immigrants who, it was thought, could not readily assimilate into American society also contributed to the demise of liberal attitudes toward alien suffrage.<sup>35</sup> In any case, after the War of 1812, states that joined the Union restricted the vote to citizens, and many states that had previously extended the vote to aliens reversed their position.<sup>36</sup> In 1835, Michigan's attempt to enter the Union as a state whose Constitution allowed alien suffrage raised objections from nativist Congressmen.<sup>37</sup> Though Michigan did win statehood, every other territory and state that joined the Union between 1830 and 1840 restricted the vote to United States citizens.<sup>38</sup>

### C. The Pre-Civil War Expansion Period

As some states moved to limit alien suffrage, other crosscurrents moved against that trend in the period, which led up to the Civil War. As a result, alien suffrage did expand into the frontier in an era of hot debate.<sup>39</sup> In 1845, the Wisconsin Territory took the first step in opening the door to compromise on alien

32. See PORTER, *supra* note 26, at 130.

33. Raskin, *supra* note 6, at 1398.

34. *Id.* at 1403-04.

35. See Rosberg, *supra* note 13, at 1097-98.

36. See generally Raskin, *supra* note 6, at 1409-17; Shimmelman, *supra* note 5, at 43. New states which adopted "citizens-only" voting provisions included: Louisiana (1812), Indiana (1816), Mississippi (1817), Alabama (1819), Maine (1820) and Missouri (1821). See Rosberg, *supra* note 13, at 1097. States which amended the definition of voters in their constitutions from "inhabitants to citizens" included: Maryland (1810), Connecticut (1818), New York (1821), Massachusetts (1821), Vermont (1828) and Virginia (1830). See *id.*

37. See Neuman, *supra* note 20, at 296. See also *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 380-83 (1840) (relating in detail Congressional debates concerning Michigan's conferral of the right to vote to noncitizens).

38. See, e.g., MICH. CONST. OF 1835, art. II, § 1; *Iowa Territorial Government Act*, ch. 96, 5 Stat. 235 (1838); IOWA CONST. OF 1846, art. III, § 1; FLA. CONST. OF 1838, art. VI, § 1; ARK. CONST. OF 1836, art. IV, § 2. See also Neuman, *supra* note 20, at 296-98.

39. See generally Neuman, *supra* note 20, at 296-300; Raskin, *supra* note 6, at 1406-09.

suffrage when it adopted a state constitution that enfranchised White male aliens if they had declared intent to apply for citizenship.<sup>40</sup> The provision did not require declarant aliens<sup>41</sup> to actually complete the naturalization process or relinquish their prior nationality.<sup>42</sup> The compromise came at an ideal time, since large areas of the West, including new territories, had opened for settlement by the mid-1800s, and offering immigrants voting rights and opportunities for political participation would encourage immigrant settlement in the region.<sup>43</sup> The “declarant alien” model adopted in Wisconsin provided a way to allay citizens’ fears and yet provide these incentives to attract new immigrant settlers, opening the way for a new wave of alien enfranchisement. Congress included declarant alien qualifications in the organic acts of the Washington, Kansas, Nebraska, Nevada, Dakota, Wyoming and Oklahoma Territories, which gave aliens in those territories the right to vote.<sup>44</sup> The Legislature did not, however, extend suffrage to aliens in territories acquired during the Mexican War (California, New Mexico and Utah).<sup>45</sup> Some of the territories that permitted alien suffrage incorporated the organic acts’ alien suffrage provisions into their state constitutions when they attained statehood.<sup>46</sup> In Ohio, Illinois, Michigan and Indiana,

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40. See Neuman, *supra* note 20, at 297.

41. Aliens declaring intent to naturalize are often termed “declarant aliens.”

42. See Neuman, *supra* note 20, at 297.

43. See Shimmelman, *supra* note 5, at 42-43.

44. See Oklahoma Territorial Government. Act, ch. 182, § 5, 26 Stat. 84 (1890); Wyoming Territorial Government. Act, ch. 235, § 5, 15 Stat. 178, 180 (1868); Dakota Territorial Government. Act, ch. 86, § 5, 12 Stat. 239, 241 (1861); Nevada Territorial Government. Act, ch. 83, § 5, 12 Stat. 209, 211 (1861); Kansas-Nebraska Act, ch. 59, §§ 5, 23 (1854); Washington Territorial Government. Act, ch. 90, § 5, 10 Stat. 172, 174 (1853); Idaho Territorial Government. Act, ch. 117, § 5, 12 Stat. 808 (1863); Idaho Revised Statutes, Rev. Stat. § 1860 (1874) (limiting the franchise to citizens and declarant aliens). See generally Neuman, *supra* note 20, at n.249.

45. See CAL. CONST. OF 1849, art. II, § 1; New Mexico Territorial Government Act, ch. 49, § 6, 9 Stat. 446, 449 (1850); Utah Territorial Government Act, ch. 51, § 5, 9 Stat. 453, 454 (1850). See generally Neuman, *supra* note 20, at 297-300 & 298 n.248.

46. See Neuman, *supra* note 20, at n.254. The states that incorporated the alien suffrage provisions of the territories from which they came in their new state constitutions were Illinois, Kansas, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Washington and Wyoming. See *id.* (citing ILL. CONST. OF 1848, art. VI, § 1; KAN. CONST. OF 1859, art. V, § 1; MINN. CONST. OF 1857, art. VII, § 1; MONT. CONST. OF 1889, art. IX, § 2 (grandfathering in declarant aliens, but restricting franchise to citizens); NEB. CONST. OF 1867, art. II, § 2; N.D. CONST. OF 1889, art. 5, § 121; OKLA. CONST. OF 1907, art. III, § 1; OR. CONST. OF 1857, art. II, § 2; S.D. CONST. OF 1889, art. VII, § 1; WASH. CONST. OF 1889, art. VI, § 1 (same); WYO. CONST. OF 1889, art. VI, § 5 (same)). The Constitutions of Nevada (1864), Wyoming (1889) and Oklahoma (1907) rejected alien suffrage. See Raskin, *supra* note 6, at 1408 & n.91.



noncitizens not only retained the right to vote when their states joined the Union, but they also participated in the Ohio, Illinois, Michigan and Indiana constitutional conventions.<sup>47</sup> States and territories that extended the franchise to aliens during the Westward Expansion include Michigan, Indiana, Wisconsin, Minnesota, Kansas, Oregon and Kentucky.<sup>48</sup>

In *Spragins v. Houghton*,<sup>49</sup> the Illinois Supreme Court discussed the policy motivations of the framers of the Illinois Constitution and the United States Congress itself.<sup>50</sup> Both had given French and Canadian immigrants the franchise throughout the Northwest Territory. The Illinois Supreme Court relied on these policies to support its finding that, on the basis of both textual and historical analysis, the word "inhabitants" in the suffrage provision was not synonymous with "citizens," but rather that the framers intended the term to include aliens.<sup>51</sup> The court noted that the intent of the framers of the Illinois Constitution in granting suffrage to immigrants was to "induce a flood of emigration to the state, and cause its early and compact settlement."<sup>52</sup> Legislators believed that immigrants in the Western states "were for the most part industrious and reliable men, such as would build up the community and develop its natural resources . . . . Hence, there was not the practical objection to bring against them that there was in New York and Massachusetts."<sup>53</sup> Furthermore, because aliens comprised a large percentage of the existing population, depriving them of the vote would make obtaining enough voters difficult.<sup>54</sup>

47. See Raskin, *supra* note 6, at 1402 n.59 (citing *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 395 (1840)).

48. See Neuman, *supra* note 20, at 296 & nn.236, 256 (citing MICH. CONST. OF 1850, art. VII, § 1; ILL. CONST. OF 1818, art. II, § 27); PORTER, *supra* note 26, at 127 & n.1 (citing Kentucky Convention, 1849, *Debates*, 1012); Raskin, *supra* note 6, at 1407 nn.88-89 (citing Oregon Territorial Government Act, ch. 177, § 5, 9 Stat. 323, 325 (1848); Minnesota Territorial Government Act, ch. 121, § 5, 9 Stat. 403, 405 (1849)); IND. CONST. OF 1851, art. II, § 2; Act of May 29, 1948, ch. 50, 9 Stat. 233 (admitting Wisconsin); KAN. CONST. OF 1859, art. V, § 1.

49. 3 Ill. (2 Scam.) 377 (1840).

50. Raskin, *supra* note 6, at 1404 & n.72 (quoting ILL. CONST. OF 1818, art. II, § 27 (1970)) (involving a challenge to the Illinois Constitution and stating that the vote will extend to "all white male inhabitants above the age of twenty-one years, having resided in the state six months").

51. *Spragins*, 3 Ill. (2 Scam.) at 402-05 (resting on the Northwest Ordinance, acts of Congress and textual analysis to distinguish "inhabitants" entitled to vote from United States "citizens" in the Illinois Constitution).

52. *Id.* at 398.

53. PORTER, *supra* note 26, at 122.

54. See *Spragins*, 3 Ill. (2 Scam.) at 397 (drawing attention to the large French and Canadian populations of Illinois who deserved democratic representation).

Still, the drive to include immigrant settlers in the voting population did not move forward without opposition. In the East, the American, or "Know-Nothing," Party denounced Wisconsin's decision to allow alien suffrage, gaining a hearing largely because of anti-foreigner prejudice.<sup>55</sup> Admittedly, not everyone in the East shared their antagonism, since Maryland, itself an Eastern state, drafted a new Constitution in 1850 which allowed all White male residents to vote regardless of citizenship.<sup>56</sup>

Growing tensions over slavery also influenced the debate over alien suffrage.<sup>57</sup> During the 1850s and 1860s, fierce congressional debate centered on the voting provisions of new states and territories, with northerners pushing to expand, and southerners pushing to limit the political influence of immigrants, "who were overwhelmingly hostile to slavery."<sup>58</sup> Both northerners and southerners agreed that "[n]o matter how ignorant and stupid the immigrant might be, he was more than likely to be sure of one thing—that he did not believe in holding slaves."<sup>59</sup> As slavery advocates spoke out against noncitizen immigrant voting rights, other old objections to alien suffrage also resurfaced; opponents asserted that foreigners could not assimilate, had no interest in American politics and that their ignorance made them prone to corrupt influences.<sup>60</sup>

The fact that until the Civil War the right to vote primarily remained linked to property ownership,<sup>61</sup> not citizenship, aided arguments in favor of alien suffrage. For example, noncitizens at the Michigan constitutional convention of 1850 argued that all property owners, including noncitizens, pay taxes and thus they too should have the right to vote.<sup>62</sup> States still shied away from making citizenship the key criterion for suffrage rights, in part because many feared it would also justify the enfranchisement of women and Blacks.<sup>63</sup> Consequently, White male immigrants

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55. See PORTER, *supra* note 26, at 113-15, 129-30. Porter notes that the anti-foreigner sentiment in the East was largely sparked by "[i]lliterate Irish Catholic hoodlums" who rioted at the polls and were manipulated by corrupt politicians. *Id.* at 114 (citing SCHOULER, HISTORY OF THE UNITED STATES, IV 202).

56. See PORTER, *supra* note 26, at 118.

57. See Raskin, *supra* note 6, at 1409; Rosberg, *supra* note 13, at 1116-17; PORTER, *supra* note 26, at 130.

58. Raskin, *supra* note 6, at 1409.

59. PORTER, *supra* note 26, at 130.

60. See *id.* at 129.

61. Some states began to impose additional requirements beyond property ownership. See *id.* at 111.

62. See *id.* at 124.

63. See Raskin, *supra* note 6, at 1401.

increasingly gained the right to vote at the same time that Blacks were unable to garner support for their enfranchisement.<sup>64</sup>

States that preferred to limit alien suffrage did so in some cases by requiring literacy tests or requiring additional residency beyond naturalization before an alien could vote.<sup>65</sup> In those territories and new states which recognized alien suffrage, most required residency from six months to one year, and, in some cases, a declared intent to naturalize as well.<sup>66</sup> While the "ideology of declarant alien suffrage in particular may have reflected a broad concept of democracy, it also rested on an empirical view of European immigrants as future U.S. citizens" for whom voting would be not only an inducement to settlement, but good preparation for shouldering the full rights and responsibilities of citizens upon naturalization.<sup>67</sup> Despite this expansion of alien suffrage in the decades preceding the Civil War, many groups were still left without the vote, as states that permitted alien suffrage restricted it to Whites.<sup>68</sup> As a result, Black immigrants were uniformly excluded from voting until after the Civil War.<sup>69</sup>

At the start of the Civil War Congress passed the Militia Act, and later the Enrollment Act of 1863, requiring that noncitizens must serve in the military (a duty now thought reserved for citizens).<sup>70</sup> Two longstanding concepts, alien suffrage and state citizenship, supported the legislation.<sup>71</sup> The Union mobilization of

64. See PORTER, *supra* note 26, at 131-34.

65. Connecticut passed a law in 1855 restricting the vote to those who could read the statutes. See *id.* at 118 (citing GEN. STAT. CONN., 1888, art. 11). A Massachusetts law of 1857 required a literacy test, and in 1859 Massachusetts required, in addition, that an alien must be a resident for two years after naturalization before she or he could be eligible to vote. See *id.*

66. See generally PORTER, *supra* note 26, at 118-30. States which required residency included: Michigan (1850); Iowa (1857); Kentucky (1850); and Minnesota (1857). See *id.* States which required intent to naturalize were: Wisconsin (1848); Indiana (1850); Minnesota (1857); and Kansas (1861). See *id.*

67. Neuman, *supra* note 20, at 307. See also Raskin, *supra* note 6, at 1406-07.

68. See PORTER, *supra* note 26, at 123.

69. See *id.* Blacks weren't the only excluded group, however; Chinese and Native Americans were also denied the vote. See Neuman, *supra* note 20, at 293 (noting Native Americans' disenfranchisement); Raskin, *supra* note 6, at 1425-28 n.191 (discussing the disenfranchisement of Chinese as late as the end of the nineteenth century).

70. See Raskin, *supra* note 6, at 1409 (citing JOHN W. CHAMBERS, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 53-54 (1987)).

71. A Prussian in Milwaukee objected to the draft, asserting his noncitizen status as a bar to the draft statute. See *id.* at 1410-11 (discussing *In re Wehlitz*, 16 Wis. 443 (1863)). The Supreme Court of Wisconsin rejected his contention that the Militia Act applied only to citizens and held that while not a U.S. citizen, he was a

aliens provided the final impetus for the Southern Confederacy to implement longstanding southern opposition to alien suffrage by banning alien voting in its Constitution.<sup>72</sup>

#### *D. Post-Civil War and Reconstruction*

After the Civil War, noncitizen voting regained all the ground it lost before the war. Thirteen states in the South and West adopted declarant alien suffrage, at least temporarily, "all of them evidently anxious to lure new settlers."<sup>73</sup> These states included Alabama, Florida, Georgia, Louisiana, South Carolina and Texas, as well as Missouri, another former slave state.<sup>74</sup> The former Confederate states may have included noncitizen voting rights provisions in their Constitutions in the hopes that the incentives would draw immigrants to spur on the Reconstruction.<sup>75</sup>

As alien suffrage spread, the impact of noncitizen voters at the polls increased as well, to the point that one critic of alien suffrage blamed "the weight of a foreign element" for results of the 1894 state elections in Wisconsin and Illinois.<sup>76</sup> In 1875, the number of states permitting noncitizen voting reached its peak when at least twenty-two states and territories granted aliens the right to vote.<sup>77</sup> As the nineteenth century drew to a close, "nearly one-half of the states and territories had had some experience with voting by aliens, and for some the experience lasted more than half a century."<sup>78</sup>

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citizen of the state, as evidenced by the fact that Wisconsin granted noncitizens the right to vote. *See id.*

72. *See id.* at 1413-14 (citing and discussing CONFEDERATE CONST. art. I, § 2, cl. 1 (1861)).

73. Raskin, *supra* note 6, at 1414. *See also* Rosberg, *supra* note 13, at 1099; Neuman, *supra* note 20, at 299 n.258.

74. *See* Raskin, *supra* note 6, at 1414. South Carolina enfranchised European declarant immigrants only. *See id.*

75. *See id.*

76. *Id.* at 1415 (citing Henry A. Chaney, *Alien Suffrage*, 1 MICH. POL. SCI. ASS'N 130, 136 (1894)).

77. *See* Aylsworth, *supra* note 11, at 114.

78. Rosberg, *supra* note 13, at 1099 & n.36 (listing Alabama, Arkansas, Colorado, Florida, Georgia, Missouri, Nebraska, North Dakota, Oregon, South Carolina, South Dakota and Texas as states whose constitutions at one time allowed alien suffrage, but noting the difficulties of making a comprehensive assessment).

*E. Late 19th and Early 20th Centuries: The End of Alien Suffrage*

Before alien suffrage officially ended in 1928, noncitizens had been voting for national Congressmen in various United States' territories for 70 years,<sup>79</sup> but by the turn of the century alien suffrage had been gradually disappearing as anti-foreigner sentiment increased.<sup>80</sup> By 1900 only eleven states still retained it; from 1910 to the start of World War I in 1914, four of those remaining eleven ended alien suffrage by constitutional amendment.<sup>81</sup> Many scholars note that the end of World War I was also the same year that four of the last states allowing noncitizens the vote moved to terminate alien suffrage.<sup>82</sup> In 1926, the Supreme Court of Arkansas affirmed a referendum curtailing alien suffrage, and so 1928 marked the first national election "in which no alien in any state had the right to vote" in national, state or local elections.<sup>83</sup>

The same hostile attitudes toward foreigners that boiled into post-World War I xenophobia<sup>84</sup> and led to the demise of noncitizen voting rights also sounded the death knell for an era of unlimited immigration.<sup>85</sup> The shift away from both alien suffrage and unlimited immigration can be explained in part by changes in the ethnicity of the immigrant population.<sup>86</sup> Up to the 1880s, the immigrant population largely hailed from the UK, Ireland, Germany and Scandinavia. But in the first decade of the 20th century, Mediterraneans and Central, East and Southern Europeans (largely Jewish, Polish or Italian) made up the bulk of

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79. See PORTER, *supra* note 26, at 121.

80. See Rosberg, *supra* note 13, at 1099. Chinese and Japanese immigrants in particular bore the brunt of stereotyping, harsh discrimination, suspicion and outright hatred. See MALDWYN A. JONES, AMERICAN IMMIGRATION 248-49 (1950).

81. By constitutional amendment, Alabama (1901), Colorado (1902), Wisconsin (1908) and Oregon (1914) withdrew the vote from noncitizens. See Aylsworth, *supra* note 11, at 115.

82. The four states were Kansas (1918), Nebraska (1918), South Dakota (1918) and Texas (1918). See Aylsworth, *supra* note 11, at 115. See also Rosberg, *supra* note 13, at 1099.

83. Aylsworth, *supra* note 11, at 114-15. Indiana and Texas abolished alien suffrage by constitutional amendment in 1921, Missouri followed in 1924, and the Arkansas referendum amending its constitution took effect in 1926. See *id.*

84. See Raskin, *supra* note 6, at 1394 n.137.

85. See Ron Hayduk, Immigration, Race and Community Revitalization (Oct. 1998) (draft report for the Aspen Institute Comprehensive Community Initiatives Project on Race and Community Revitalization) (on file with the author) (containing a thorough treatment of trends in immigrant demographics)).

86. See *id.* at 5.

the immigrant population.<sup>87</sup> To limit the inflow of these new immigrants, many states instituted immigration literacy requirements,<sup>88</sup> and by the early twentieth century "seven southern states and nine western states had followed" the lead of Connecticut and Massachusetts in enacting such requirements.<sup>89</sup> In 1924, the National Origins Act imposed "permanent quantitative or numerical restriction on immigration."<sup>90</sup> The end of unlimited immigration legitimized the nationalist protectionism of the twenties and signaled the end of any popular support for noncitizen voting rights. While the flow of immigrants began to build again after World War II, later acts, including the Immigration and Nationality Act Amendments of 1965 (Hart-Cellar Act), continued the same pattern of immigration restrictions.<sup>91</sup> In the end, the environment of unlimited immigration in which noncitizen voting rights thrived has never returned.

#### F. Current Examples

After lying dormant for decades, the issue of voting rights for noncitizens has once again attracted serious attention in numerous states and localities. As will be discussed in greater detail in Section IV of this Article, noncitizens now vote in school board elections in New York City and Chicago, and several Maryland cities, including the much-publicized Takoma Park, allow noncitizen voting in local elections. However, renewed efforts to introduce noncitizen voting in other communities have met with fierce opposition. It appears, then, that two distinct forces will shape the present debate over noncitizen voting: trends in immigration and societal opposition to granting rights to aliens.

In the 1980s and 1990s, Congress passed legislation that moved toward liberalizing, not restricting, national immigration. The Refugee Act of 1980<sup>92</sup> and the Immigration Reform and

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87. See *id.* at 4-5. See also Neuman, *supra* note 20, at 299; Raskin, *supra* note 6, at n.56.

88. See Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 495 (1997). See also Neuman, *supra* note 20, at 299 & n.259. Cf. JONES, *supra* note 80, at 222-25.

89. Cogan, *supra* note 88, at 495.

90. Hayduk, *supra* note 85, at 11.

91. See Immigration and Nationality Act, 8 U.S.C. §§ 1101-1111 (1952); Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 66 Stat. 175 (1965).

92. Refugee Act of 1980, P.L. 99-212, § 1, 94 Stat. 102 (1980).

Control Act (IRCA) of 1986<sup>93</sup> are two key examples. The United States has also "extended legal permanent resident status to nearly 2.7 million illegal aliens through a massive amnesty [and] a program to legalize illegal's [sic] dependants . . ." <sup>94</sup>

During the 1990s, the United States continued the trend by increasing its legal admissions of aliens, and Congress maintained the increased levels when it revamped U.S. immigration laws in 1996.<sup>95</sup> As a result, immigration has increased over the past two decades and approximately 800,000 noncitizens are currently admitted each year for permanent residence alone.<sup>96</sup> The Population Reference Bureau reported in June 1999 that 8 million legal immigrants have entered the United States in the 1990s, coming close to the 8.8 million who immigrated from 1900 to 1910.<sup>97</sup> Some observers estimate that there are at least 10 million legal aliens resident in the United States who are potential citizens and voters.<sup>98</sup> Trends in the immigrant population suggest an increased connection to human rights, increasing demographic diversity, and skill levels at both the high and low extremes of the educational spectrum, caused by the growth in both the service and high-tech sectors.<sup>99</sup> With the rise in immigration, issues relating to the rights of noncitizens would seem to be of greater political relevance, particularly when many localities contain sizeable immigrant populations. Lack of citizenship, coupled with linguistic, social and cultural barriers, has left large communities of Latino permanent residents, in particular, without political

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93. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 1(a), 100 Stat. 3359 (1986). IRCA was intended to stem the tide of new immigrants, but instead resulted in blanket amnesties for millions who came within its many loopholes. See Hayduk, *supra* note 86, at 12-13; Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, § 1(a), 104 Stat. 4978 (both codified at 8 U.S.C. tit. 8, ch.12 § 1101 (1999)).

94. Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 4 (1997).

95. *See id.*

96. *See id.*

97. See Frank Davies, *Massive U.S. Immigration to Continue, Researchers Say*, MIAMI HERALD, June 10, 1999, at 12A. These figures do not include the additional one million who are estimated to have entered the United States illegally. *See id.*

98. See Lorraine C. Minnite, et al., *Political Incorporation of Immigrants in New York 1* (September 2-5, 1999) (unpublished paper presented at the 1999 Annual Meeting of the American Political Science Association, Atlanta, Ga.) (on file with the author) (discussing studies by Raskin (1993), Fix & Passel (1994) and Passel & Clark (1998)).

99. *See id.* See also Hayduk, *supra* note 85, at 13-19 (discussing immigration trends, noting the impact of economic and political tensions in fueling recent immigration and recognizing that more immigrants are from Asia and Latin America than from Europe).

voice, even as politicians seek to woo the Latino vote in certain key regions.<sup>100</sup> However, illegal migration is also fueling the politics of the immigrant rights debate.<sup>101</sup> Consequently, the increase in new immigrants has been matched by a trend to promote a "national consciousness" and to restrict even the rights of *legal* immigrants; such sentiment works to effectively terminate any movement in favor of giving noncitizens voting rights, even at the local level.<sup>102</sup>

## II. Resident Alien Voting Restrictions and the Law

As the previous discussion of American history suggests, political, cultural and demographic shifts, not legal arguments, have determined whether noncitizens would enjoy the right to vote. Because these forces have, to date, prevented a nationwide rebirth of alien suffrage, most Americans mistakenly assume that granting noncitizens the right to vote is unconstitutional. However, as the following discussion will show, neither the Constitution, nor the Amendments relating to the franchise, bar states from giving noncitizens the right to vote. Similarly, the Voting Rights Act contains no provisions that would prevent the enfranchisement of noncitizens. The following section will address the legal obstacles to noncitizen voting rights and then discuss policy-based arguments that underlie the ongoing debate over noncitizen voting rights.

### A. Noncitizen Voting Rights and the Constitution

Contrary to popular misconceptions, the U.S. Constitution does not forbid nor require alien voting.<sup>103</sup> The voting rights of U.S. citizens are certainly afforded special protection, but courts have long recognized that noncitizens of the United States may

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100. See generally Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998) (discussing the linguistic, social and legal barriers to Latino American immigrant political participation and social integration); Paul Tiao, *Noncitizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 172 (1993) (stressing the obvious lack of representation created by denying the vote to Latino permanent residents in communities with large immigrant populations); *Latino Voting Rights Agreement is Signed*, B. GLOBE, Sept. 11, 1999, at B5; Susan Milligan, *Hispanic Vote Gains Influence for 2000 Vote; Candidates Court the Growing Minority*, B. GLOBE, Sept. 13, 1999, at A3; *The Right to Vote in Lawrence*, B. GLOBE, Nov. 12, 1998, at A24.

101. See Schuck, *supra* note 96, at 6.

102. See Hayduk, *supra* note 85, at 30-33.

103. See generally Raskin, *supra* note 6 (presenting a thorough review of alien voting rights and the Constitution); Rosberg, *supra* note 13 (representing the radical view that the Constitution actually mandates noncitizen voting).



still be citizens of their state, entitled to all rights that the state provides its citizens.<sup>104</sup> The Constitution does not preclude states from extending rights, including voting rights, to noncitizens beyond those constitutionally required. The following discussion addresses the varying conceptions of citizenship and discusses the Constitutional provisions relevant to the noncitizen voting question.

Beginning with *Dred Scott v. Sanford*,<sup>105</sup> the courts have acknowledged that state and national citizenship are distinct, though the rights which each confers have certainly been disputed. In *Dred Scott*, the Supreme Court referred to the "rights of citizenship which a state may confer within its own limits" and maintained that a state, though unable to effect a naturalization which would grant national rights, could grant an alien "the rights of a citizen . . . which the Constitution and laws of the State attached to that [grant]."<sup>106</sup> When a declarant noncitizen who had voted in Wisconsin tried to avoid being drafted by claiming he was a "legal alien," not a "citizen," the Wisconsin Supreme Court cited *Dred Scott* to support its finding that the defendant was a citizen of the state, if not yet of the nation, and thus eligible for the draft.<sup>107</sup> Justice Paine explained that "under our complex system of government there may be a citizen of a state who is not a citizen of the United States in the full sense of the term. This result would seem to follow unavoidably from the nature of the two systems of government."<sup>108</sup> Similarly, in 1889, the Louisiana Supreme Court acknowledged that a person might be a citizen of a particular state and not a citizen of the United States, stating that "to hold otherwise would be to deny to the state the highest exercise of its sovereignty."<sup>109</sup> Given the duality of state and national citizenship, a noncitizen may be granted certain rights and privileges as a state citizen that they cannot yet enjoy under United States citizenship.

However, even if the state-national dichotomy did not exist, national citizenship is not synonymous with the right to vote. Historically, suffrage was conditioned on property ownership, race

104. See *infra* notes 105-09 and accompanying text.

105. 60 U.S. (19 How.) 393 (1856).

106. *Id.* at 405. The U.S. Supreme Court reiterated the *Dred Scott* concept of separate state citizenship in its ruling on a Louisiana statute in *The Slaughterhouse Cases*. See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

107. See *In re Wehlitz*, 16 Wis. 468, 480 (1863) (citing to *Dred Scott*).

108. *Id.*

109. *Leche v. Fowler*, 6 So. 602, 602 (La. 1889).

and gender, not citizenship; legislators recognized that if citizenship automatically entailed voting rights, women, and perhaps Blacks, would then be entitled to vote.<sup>110</sup> The Supreme Court, in *Minor v. Happersett*,<sup>111</sup> distinguished citizenship and voting for the same reason, holding that women, though citizens, could not vote under the Missouri Constitution.<sup>112</sup> Furthermore, the Supreme Court has recognized the right to vote as a fundamental right, but not as a constitutional one;<sup>113</sup> thus, states can constitutionally deny the vote to certain *citizens* as long as there is a compelling state interest.<sup>114</sup> Citizenship alone does not guarantee the right to vote, and, as will be discussed below, it is not a necessary condition of the right to vote either.

### 1. Articles I and II of the United States Constitution

Under Article I, § 2 and Article II, § 1, states have the right to define the electorate, including the right to grant the franchise to noncitizens, if they so choose.<sup>115</sup> The Naturalization Clause of Article I, § 8<sup>116</sup> also bears on the right of a state or locality to enfranchise noncitizens. Extending voting rights to aliens would in no way contravene any of these provisions.

Article I, § 2, as recognized by the Supreme Court, gives the states, not the federal government, the responsibility of regulating voter qualifications.<sup>117</sup> Beyond the provisions of the Constitution which define the "core electorate," that is, the Fifteenth Amendment (prohibiting race restrictions), the Nineteenth

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110. See *supra* Part I.A., C.

111. 88 U.S. (21 Wall.) 162 (1874).

112. See *id.* at 165.

113. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (affirming the principle stated in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), that voting is a "fundamental political right, because preservative of all rights"). See also *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (finding apportionment schemes in six states unconstitutional under a strict scrutiny Equal Protection test and stating that "the right of suffrage is a fundamental matter in a free and democratic society"). The *Reynolds* Court went on to declare that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.*

114. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding a California law that denied felons the vote, even after they served their time). See also *infra* note 120.

115. See U.S. CONST. art. I, § 2 (providing that the House shall be elected "by the people of the states" and the states determine elector qualifications); U.S. CONST. art. II, § 1 (describing the process for Presidential elections).

116. The Naturalization Clause states: "The Congress shall have the Power . . . To establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

117. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (upholding states' right to decide if 18 year-olds can vote).

(prohibiting gender restrictions), the Twenty-Fourth (prohibiting the poll tax), and the Twenty-Sixth (granting 18 year-olds the vote), the states' right to determine voter qualifications cannot be limited.<sup>118</sup> In *Pope v. Williams*,<sup>119</sup> the Supreme Court, in upholding a Maryland statute requiring residency of one year before new residents could vote, noted that the state's right to regulate voting would permit a "[s]tate [to] provide that persons of foreign birth could vote without being naturalized" and that for a state to enact such a regulation would not be overstepping the bounds of its constitutional mandate.<sup>120</sup> While Congress has the power under Art. 1, § 4 to "define and broaden the *federal* electorate,"<sup>121</sup> as long as states do not restrict the rights of the core electorate laid out in the other provisions of the Constitution, they are free to define the political community as they see fit, particularly at the state and local levels where Congress has no constitutional authority to constrain this right.<sup>122</sup>

Some may raise an argument under Art. 1, § 8, the Naturalization Clause, that state or local enfranchisement of noncitizens is inconsistent with the federal power to naturalize, and is thus void under the Supremacy Clause.<sup>123</sup> Certainly, the states may not pass laws purporting to change an alien's immigration status; however, noncitizen voting "does not subtract from the obligations imposed on aliens by immigration law or

118. *See id.*; *see also* *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 625 (1969) (stating that "states have the right to impose reasonable citizenship, age, and residency requirements on the availability of the ballot"); *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959); *Reynolds v. Sims*, 377 U.S. 533 (1964). In his *Reynolds* dissent, Justice Harlan set out a lengthy historical analysis of how the Equal Protection Clause was never intended to limit states in setting voter qualifications. *See id.* at 589-632 (Harlan, J., dissenting).

119. 193 U.S. 621 (1904).

120. *Id.* at 632-33. Note that the Supreme Court later struck down residency requirements on Equal Protection grounds, but without in any way disparaging the general right of states to define the electorate. *See Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972).

121. *Oregon v. Mitchell*, 400 U.S. 112, 293 (1970). Article I, § 4 states: "the times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the places of choosing Senators." U.S. CONST. art. IV, § 4 (emphasis added).

122. *See Shimmelman*, *supra* note 5, at 24.

123. The Supremacy Clause states: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2

otherwise frustrate the purposes of such law."<sup>124</sup> Furthermore, the exclusive right of the federal government to naturalize in no way alters the concept of a state citizenship distinct from national citizenship, as discussed above.<sup>125</sup>

## 2. Article IV of the United States Constitution

While an argument can be made that noncitizen voting is inconsistent with a republican form of government, alien voting is not prohibited under Article IV, § 4, the Republican Guaranty Clause.<sup>126</sup> Given state authority to determine voter qualifications under the Constitution<sup>127</sup> and the long history of noncitizen rights,<sup>128</sup> it is unlikely that state regulations enfranchising noncitizens would be found to contravene basic republican principles.<sup>129</sup> Furthermore, the Supreme Court has consistently found state measures to be consistent with the clause,<sup>130</sup> or held that the republicanism of a state government is a non-justiciable political question left to Congress.<sup>131</sup> Thus, it is unlikely that the Supreme Court would find a state decision to recognize noncitizen voting a violation of the Republican Guaranty Clause.

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124. Raskin, *supra* note 6, at 1430-31.

125. See Neuman, *supra* note 20, at 292-94 (presenting a complete historical analysis of the naturalization power and showing that the state and federal governments exercised concurrent naturalization power in the 1700s). See also *Collet v. Collet*, 2 U.S. (2 Dall.) 294 (Pa. 1792). Even after 1817, when the naturalization power became the exclusive province of the federal government, state power to confer state citizenship remained. See *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

126. The Guaranty Clause states: "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST. art 4, § 4.

127. See *supra* notes 109-25 and accompanying text.

128. See *supra* Part I.

129. See Raskin, *supra* note 6, at 1421-23 & nn.168-76 (noting the high unlikelihood that the Republican Guaranty Clause could support a claim against enfranchisement of noncitizens).

130. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (finding the Rhode Island incumbent's declaration of martial law not violative of the Guaranty Clause). See also *Forsyth v. Hammond*, 166 U.S. 506 (1897) (holding that state legislative control over a municipal corporation's boundaries did not impinge on the republican form of government); *Attorney Gen. of Michigan v. Lowrey*, 199 U.S. 233 (1905) (finding the state legislature's act of reorganizing school districts consistent with a republican form of government).

131. See *Luther*, 48 U.S. (7 How.) at 42-43 (stating that the Guaranty Clause made nonjusticiable the question of which Rhode Island government was the sovereign government). See also *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding that Congress, not the Court, should decide the issue of whether a popular initiative was a "republican" institution).

### 3. The Fourteenth Amendment and the Equal Protection Clause of the United States Constitution

The Fourteenth Amendment, § 1 states that “[a]ll 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.”<sup>132</sup> Section 1 provides other protections as well:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>133</sup>

Clause 1 clearly defines citizenship, but in no way does it restrict or define the rights of noncitizens.<sup>134</sup> And while the Equal Protection Clause has been interpreted in reapportionment cases as the “one person one vote” principle,<sup>135</sup> nowhere has the clause been limited to a “one citizen one vote” standard; thus, a challenge that noncitizen voting would dilute citizen votes would be difficult to maintain.<sup>136</sup>

Furthermore, the Supreme Court has recognized that aliens “[are] entitled to the full shelter of the Equal Protection Clause.”<sup>137</sup> The fact that the Fifteenth Amendment, which enfranchised Blacks, was adopted just two years after the Fourteenth Amendment is evidence that the framers of the amendment did not intend it to guarantee voting rights.<sup>138</sup> The Supreme Court has acknowledged voting rights as “fundamental” rights subject to strict scrutiny review under the Equal Protection Clause,<sup>139</sup> but

132. U.S. CONST. amend. XIV.

133. *Id.*

134. The Privileges and Immunities Clause only applies to citizens, but has “never recovered from the narrow reading it received in *Slaughterhouse* and remains virtually a dead letter, although the modern Court’s expansive reading of the equal protection and due process clauses has largely mooted the issue.” GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW 448 (1986) (discussing *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873)).

135. The principle of *Reynolds v. Sims*, 377 U.S. 533, 566 (1964), that “the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators,” has been cited as the “one person, one vote” principle in subsequent cases. See, e.g., *Avery v. Midland*, 390 U.S. 474, 475 (1968). See generally STONE ET. AL., *supra* note 134, at 860-61.

136. Raskin, *supra* note 6, at 1423.

137. *Sugarman v. Dougall*, 413 U.S. 634 (1973) (striking down a ban on aliens working in the New York Civil Service by applying a strict scrutiny Equal Protection test).

138. See STONE ET. AL., *supra* note 134, at 850.

139. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

has also consistently refused to find that voting rights are a right of national or state citizenship.<sup>140</sup> The same interpretation of the Equal Protection Clause has been applied to noncitizens.<sup>141</sup>

However, to the extent that the Fourteenth Amendment guarantees the right to equal treatment in the election process, the Equal Protection Clause may lend support to noncitizen voting rights.<sup>142</sup> If, as Gerald Rosberg argues, alienage is a suspect class, the Equal Protection Clause would require state legislation denying the vote to aliens to pass a strict scrutiny test.<sup>143</sup> To pass the strict scrutiny test, a statutory classification must be based on a compelling state interest and must be narrowly tailored to further that interest.<sup>144</sup> A number of factors may be considered in determining whether a particular group is a suspect class: the immutability of the characteristic; a history of bias, discrimination or stereotype; a lack of political power; and the relation of the characteristic to one's ability to perform in society.<sup>145</sup>

The Supreme Court has declared alienage a suspect class and applied the strict scrutiny test on a number of occasions.<sup>146</sup> However, these cases do not mandate noncitizen voting; as the Supreme Court stated in *Sugarman v. Dougall*, "citizenship is a permissible criterion for limiting" voting rights.<sup>147</sup> The Court also noted that state-determined voter qualifications are "not wholly immune from scrutiny under the Equal Protection Clause. But [the Court's] scrutiny will not be so demanding where we deal with

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140. See generally Rosberg, *supra* note 13, at 1104-35 (describing equal protection claims for alien suffrage).

141. See *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976) (finding that the Constitution did not require Colorado to grant noncitizens voting rights in local elections).

142. See Rosberg, *supra* note 13, at 1108-09; Raskin, *supra* note 6, at 1430.

143. See Rosberg, *supra* note 13, at 1104-09.

144. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

145. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (stating that "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society"). See also *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (noting that aliens are a "discrete and insular" minority); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

146. See *Graham*, 403 U.S. at 372 (adopting a strict scrutiny test to strike down state statutes disqualifying aliens from welfare benefits on Equal Protection grounds). See also *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973) (applying the "close judicial scrutiny" test of *Graham* and finding a ban on aliens working in the New York Civil Service unconstitutional), discussed in *STONE ET. AL.*, *supra* note 134, at 745, 752.

147. 413 U.S. at 649.

matters resting firmly within a State's constitutional prerogatives."<sup>148</sup>

#### 4. Other Voting Rights Provisions and the Voting Rights Act

Simply stated, noncitizen voting also fails to run afoul of the other constitutional provisions related to the franchise, such as those embodied in the Fifteenth,<sup>149</sup> Nineteenth,<sup>150</sup> Twenty-Fourth<sup>151</sup> and Twenty-Sixth<sup>152</sup> Amendments. These provisions only apply to U.S. citizens and thus do not prevent noncitizens from being granted the right to vote by their state; they only stipulate that noncitizen voters will not be entitled to claim the protection of these amendments.<sup>153</sup> The legislative history of the Fifteenth and Nineteenth Amendments, in particular, demonstrate that this interpretation is not at all farfetched.<sup>154</sup> Noncitizen voting was clearly anticipated to extend beyond the passage of the Fifteenth Amendment, as seen by the controversy surrounding its use of the word "citizens" instead of "persons."<sup>155</sup> Legislators recognized that proposed versions that referred to "persons," not "citizens," prohibited any discrimination in voting rights and therefore would require the enfranchisement of noncitizen Chinese.<sup>156</sup> A sign that the framers also assumed

148. *Id.* at 648.

149. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

150. U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

151. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

152. U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

153. See Raskin, *supra* note 6, at 1425; Rosberg, *supra* note 13, at 1107-08.

154. See CONG. GLOBE, 40th Cong., 3d. Sess. 1030 (1869) reprinted in Raskin, *supra* note 6, at 1425-30 nn.191-94; 66 CONG. REC. 635 (1920) discussed in Raskin, *supra* note 6, at 1428-29 n.198.

155. See U.S. CONST. amend. XXIV, § 1.

156. Indiana Senator Oliver P. Morton voiced his fears about the implications of omitting the word "citizens" from the Amendment: "there can be no mistake about one thing: that if the words 'citizens of the United States' be stricken out, . . . the effect is to take away from any State the right to discriminate on account of race, color, or previous condition of slavery in the case of the Chinese, and that a Chinaman will be made eligible to office and will have the right to vote." Raskin,

noncitizen voting would continue beyond passage of the Nineteenth Amendment is that it was ratified in 1920 by Arkansas, Indiana and Texas, all of which permitted alien voting at that time.<sup>157</sup> While the Nineteenth Amendment grants female citizens additional protections not available to noncitizens, its history shows it was not intended to prevent alien suffrage.

Like the Constitutional Amendments, national mandates in the Voting Rights Act<sup>158</sup> cabin the States' freedom to determine voter qualifications.<sup>159</sup> The Act prevents states from denying the vote to certain groups of citizens, outlawing primarily racial barriers to the vote.<sup>160</sup> It also creates a rebuttable literacy presumption and restricts the use of literacy tests, defined as "any test of the ability to read, write, understand, or interpret any matter."<sup>161</sup> While the Act does set limits on a state's right to grant the franchise to citizens, it in no way restricts the right of a state to expand the franchise to noncitizens if it so chooses. In fact, in his discussion of Latino permanent residents, Paul Tiao presents an excellent argument in favor of noncitizen suffrage based on the principles established by the Voting Rights Act.<sup>162</sup> First, the Voting Rights Act and its amendments "apply only to citizens, and do not offer legally binding protection for noncitizens."<sup>163</sup> However, Tiao argues, the voting rights law embodies certain American core values, including non-discrimination and the notion of a political community, which apply to all residents.<sup>164</sup> Because the literacy, knowledge, character and residency requirements for naturalization are discriminatory and destroy permanent residents' ability to participate in the political community,

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*supra* note 6, at 1427 n.194. See also Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1147 (1996). See generally LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55 (1996).

157. See Raskin, *supra* note 6, at 1428-29 n.198 & 1430. Noncitizen suffrage continued in Arkansas until 1926 and ended in Indiana and Texas in 1921. See *supra* note 83.

158. 42 U.S.C. § 1971 (1998) (originally enacted as The Federal Voting Assistance Act of 1955, ch. 656, § 1, 69 Stat. 584).

159. See *supra* notes 105-25 and accompanying text (discussing states' right to set voter qualifications).

160. See 42 U.S.C. § 1971 (a)1 (1998).

161. 42 U.S.C. § 1971 (a)1, (a)3(B) (1998).

162. See generally Tiao, *supra* note 100.

163. *Id.* at 181.

164. See *id.*



preconditioning the franchise on naturalization frustrates the norms underlying the Voting Rights Act itself.<sup>165</sup> Those same norms support the enfranchisement of legal permanent residents, since giving permanent residents a voice without the current qualifications would build political community and demonstrate America's commitment to democratic norms.<sup>166</sup>

### *B. Rationales in Favor of Voting Rights*

At the national level, the franchise has never been expanded to include historically excluded groups through judicial action, but rather through the efforts of citizens who hear and debate "appeals from the voteless" and then decide to "extend rights of political membership to disenfranchised outsiders seeking entry and equality."<sup>167</sup> Therefore, public awareness of the policy rationales for and against extending the right to vote is essential to any expansion of the electorate that may come about. Because these policy rationales are most compelling at the local level,<sup>168</sup> and do not implicate valid foreign policy concerns that affect discussions of voting at the national level, this discussion will center on arguments for and against noncitizen voting at the local level, though the argument could generally be extended to the sub-local and state levels as well.<sup>169</sup>

#### 1. The Political Community: Democracy and Natural Rights

The first argument for noncitizen voting comes from an individualized view of democracy—the general democratic principle that "governments derive their just powers from the consent of the governed,"<sup>170</sup> where "the governed" includes resident aliens.<sup>171</sup> Giving voice to all those under the government's authority is also linked to the concept that "[d]emocracy rests on the human right of self-determination."<sup>172</sup> As discussed above, the Constitution permits the States to define the political community as they see fit; the Supreme Court has recognized both state and

165. *See id.* at 181, 207-08.

166. *See id.* at 218.

167. Raskin, *supra* note 6, at 1432.

168. *See id.* at 1394.

169. There are examples of attempts to pass legislation providing for noncitizen voting at the state level; one notable case was a bill proposed in 1993 by New York City Council Member Una Clarke. *See* J. Zamgba Browne, *Proposed Aliens Voting Rights Law Gaining Among Politicians*, N.Y. AMSTERDAM NEWS, May 1, 1993, at 3.

170. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

171. *See* Raskin, *supra* note 6, at 1394.

172. Neuman, *supra* note 20, at 271.

national citizenship within the federalist framework.<sup>173</sup> Thus, a state is free to confer state and local citizenship to those who have not yet met the federal requirements for national citizenship and to include non-U.S. citizens as part of the state or local political community.

If noncitizens are not able to vote, they are not able to select representatives who will protect their interests. This concern is especially serious in large metropolitan areas with a high population of noncitizen residents. Presumably, not all noncitizens would be qualified to vote (illegal immigrants and temporary residents, for example), but granting the vote even to the smaller subset of noncitizens with permanent residency status would better ensure that noncitizens as a whole have a voice.

## 2. Equal Obligations = Equal Privileges

Another key argument in favor of noncitizen voting at the local, if not state, level is that noncitizens have the same obligations as citizens and should therefore be entitled to the same civil privileges. First, certain categories of aliens are subject to the draft under selective service laws.<sup>174</sup> During the Civil War, for example, twenty-five percent of the Union Army was foreign born,<sup>175</sup> and after the Civil War, both noncitizens and Blacks in the North argued that they should be granted the right to vote since they had served in the war.<sup>176</sup> Although aliens generally have not otherwise been conscripted, declarant aliens were designated for conscription during the Spanish-American War and World War I,<sup>177</sup> and current draft statutes contain exemptions which cover most categories of non-immigrants.<sup>178</sup>

In addition to military service, noncitizens pay taxes just as citizens. Since the founding of the United States, opposition to taxation without representation has been a recurring theme in the battle for political rights.<sup>179</sup> Immigration laws require proof of tax

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173. See *supra* Part.II.A. and accompanying discussion.

174. See generally Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INTL. L.J. 501-17 (1972).

175. See JOHN W. CHAMBERS, *TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA* 53-54 (1987).

176. See Raskin, *supra* note 6, at 1414-15.

177. See Neuman, *supra* note 20, at 306.

178. See Rosberg, *supra* note 13, at 1110 n. 76.

179. See Raskin, *supra* note 6, at 1394 & 1443 n.62. See also *Stewart v. Foster*, 2 Binn. 109 (Pa. Sup. Ct. 1809) (arguing that noncitizens should have the vote in Pittsburgh if they had paid borough taxes for one year).

payment for five years prior to naturalization.<sup>180</sup> As a result, "many undocumented immigrants go out of their way to pay taxes, often without receiving a refund to which they are entitled because some payments are made under false Social Security numbers."<sup>181</sup> While this may not be the case for all legal immigrants, noncitizens who bear the duty of paying taxes should be granted the representation to accompany it.

Noncitizens' vested interest in local affairs is yet another factor in favor of their being granted a voice in the communities where they live. A commitment to the local community has been a baseline consideration in granting the right to vote since the founding of the colonies.<sup>182</sup> For example, property ownership was emphasized as a voter qualification in the 18th century because of the belief that it "demonstrated a permanent interest in the community."<sup>183</sup> The same goal was behind early voter taxpaying qualifications, though these provisions were all revoked by 1902.<sup>184</sup> This argument is one of the strongest in favor of noncitizen voting rights at the local level and has been made with some success by supporters of noncitizen voting rights in recent grass-roots efforts.<sup>185</sup> As recognized in the German context, the local government is analogous to other public entities in which resident aliens currently vote: universities and professional organizations, among others.<sup>186</sup> Noncitizens are residents of a community,<sup>187</sup> and

180. See Hayduk, *supra* note 85, at 30 n.22.

181. *Id.*

182. See *supra* Part I.A.-E.

183. Cogan, *supra* note 27, at 477.

184. See *id.* at 483 n.74 (citing as examples the following: CONN. CONST. OF 1818, art. VI, § 2 (giving alternative suffrage requirements of freehold, tax paying or militia service); DEL. CONST. OF 1792, art. IV, § 1; GA. CONST. OF 1798, art. IV, § 1; LA. CONST. OF 1812, art. II, § 8 (establishing taxpaying as an alternative to a property requirement); MASS. CONST. amend. III (1821) (amended 1891); MISS. CONST. OF 1817, art. III, § 1 (giving alternative suffrage requirements of militia service or tax paying); N.H. CONST. OF 1784, pt. II; N.Y. CONST. OF 1822, art. II, § 1 (giving alternative suffrage requirements of militia service, tax paying, or public highway duty); N.C. CONST. OF 1776, art. VIII (applying to assemblymen only); OHIO CONST. OF 1802, art. IV, § 1; R.I. CONST. art. II, § 2 (1842) (amended 1888) (giving a taxpaying alternative in legislative elections to the freehold suffrage requirement for native-born citizens); S.C. CONST. OF 1790, art. I, § 4 (giving a taxpaying alternative to the freehold suffrage requirement)).

185. See Ted Rohrlich, *Noncitizens on Sidelines as Hernandez Recall Sputters; City Council Effort Mirrors Many 1st District Issues, as Majority of Residents are Excluded Because they Can't Vote*, L.A. TIMES, Feb. 2, 1998, at A1; Mary Hurley, *City Weekly/Cambridge Notes (School Vote Eyed for Noncitizens)*, B. GLOBE, Feb. 21, 1999, City Weekly Section, at 6.

186. See Hayduk, *supra* note 85, at 275.

187. See *infra* Part III.A. (discussing the residency requirement).

local policies impact them to the same extent as citizens, if not more, in every area from taxes to education to zoning and community development. As the Chair of the Village of Marin's Additions Council noted in his testimony before the Maryland General Assembly Committee on Constitutional and Administrative Law:

We believe every resident in our community—regardless of ultimate national or state citizenship—is entitled as a fundamental right to participate in governing our municipal affairs . . . because the residents for whom we argue here, bear responsibilities within the municipality—such as keeping their properties neat and clean, removing snow from the sidewalk in front of their homes, recycling—responsibilities from which they receive no immunity merely because they may not be U.S. citizens. Certainly then, these residents should have a say in how our community will be run.<sup>188</sup>

As it stands, resident aliens are without a voice in shaping policies that will affect their daily lives, even in cities like Los Angeles and Jersey City, where ethnic minorities, many of whom are not citizens, constitute almost a third of the population.<sup>189</sup>

Other compelling policy interests also support noncitizen suffrage. First, allowing noncitizen permanent residents to vote is one way of educating future citizens in civic responsibilities and preparing them for citizenship. Although critics argue such preparation can be better obtained through other types of community involvement without “diminishing the value” of citizenship by granting its privileges to noncitizens,<sup>190</sup> allowing permanent residents to vote in local or school board elections does not strip away the privileges of citizenship. First, permanent residents would not be granted the right to vote at the state and federal level, a right that would still be reserved for citizens alone.<sup>191</sup> Second, allowing noncitizens to vote could benefit

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188. Hearings on H.R. 665 Before the Maryland General Assembly Comm. on Const. and Admin. Law (1992) (statement of Sharon Hadary Coyle) *discussed in* Raskin, *supra* note 6, at 1462 n.373.

189. See Hayduk, *supra* note 85, at 7.

190. *Citizen First, Then Voter*, S.F. CHRON., Feb. 8, 1996, at A22; *Casual Citizenship?*, B. GLOBE, Oct. 31, 1998, at A18 (arguing that the right to vote “must be preserved by vigilance and earned by sacrifice,” not granted to noncitizens who have not earned the privilege by naturalization).

191. Opponents of noncitizen voting rights have contended that opening local elections to noncitizens will “undermine their incentives to seek citizenship.” Charles W. Hall, *Noncitizens Prepare to Vote in Arlington Primary School Board*, WASH. POST, May 22, 1994, at B4 (quoting INS spokesman Richard Keeney). See also Deborah Sontag, *Noncitizens & Right to Vote*, N.Y. TIMES, July 31, 1992, at B1-B2 (quoting Daniel Stein, Executive Director of the Federation of American Immigration Reform).

"communities of color, the poor and working class, and urban residents" by increasing civil and political rights for all.<sup>192</sup> Finally, resident aliens are powerless and are not only highly vulnerable to discriminatory acts of government, but are also without recourse if they cannot vote. If they are left without political voice, their only outlet may be social unrest and outright violence of the kind that erupted during the riots by the Latino community in Mount Pleasant in the District of Columbia.<sup>193</sup> The Mount Pleasant riots were directly precipitated by the sense of exclusion among resident noncitizens.<sup>194</sup>

### C. Arguments Against Permanent Resident Voting and Responses

Despite the weight of the argument in favor of noncitizen voting, critics raise several objections that deserve attention.<sup>195</sup> The following section sets forth the primary arguments against noncitizen voting rights and counter-arguments for each. Concerns raised in recent years vary little from those raised in the early years of the introduction of suffrage for the first immigrants to America. Specifically, this discussion will address conceptions of democracy, immigrant loyalty, equal protection concerns, immigrants' alleged lack of "stake" in government, bloc voting, immigrant inability to vote responsibly and the danger of opening the door to voting by illegal aliens.

#### 1. Rejection of "Individualized" Democracy

In the German context, traditional political theory characterizes democracy as "a form of collective, not individual self-determination."<sup>196</sup> Therefore, during debates over noncitizen voting rights in Germany, it was argued that the collective will of the community as a whole would be threatened if outsiders could have a voice in that determination.<sup>197</sup> America, however, has a long tradition of individualized democracy (i.e. "one person one vote").<sup>198</sup> In the context of the American melting pot, the

192. *Id.* at 31 n.23.

193. See Jamin B. Raskin, *Their Chance to Vote*, WASH. POST, Oct. 13, 1991, at C8.

194. See Sontag, *supra* note 191.

195. See generally Rosberg, *supra* note 13, at 1109-35; Shimmelman, *supra* note 5, at 9-21 (refuting the key objections).

196. Neuman, *supra* note 20, at 277.

197. See *id.* at 277.

198. See *supra* notes 133-38 and accompanying text.

argument may not be as much that outsiders threaten the integrity of the community, but that democracy involves rights and privileges that vary depending on one's commitment to the community. An associated argument is that democracy does not mandate the political participation of all that are subject to the laws of the land or contribute in some way to the community.

In response to the 1998 decision of Amherst, Massachusetts to grant noncitizens the right to vote in local elections, one critic argued against a "narrow view of democracy" that would grant noncitizens the franchise merely by participation in a locality, such as paying taxes and being subject to decisions of local government, because "[t]axes are paid for municipal, state, and federal services rendered and aren't meant to be the price of admission to the voting booth."<sup>199</sup> While noncitizens must comply with state and federal laws, including tax obligations, proponents of noncitizen suffrage do not claim that taxpaying is a sufficient condition for exercise of the franchise. Noncitizens' commitment to and responsibilities in the local community are certainly more significant than at the state and federal levels (where other obstacles to noncitizen participation exist);<sup>200</sup> this level of participation weighs more heavily in favor of a definition of democracy that would allow all participants in a local community to enjoy privileges commensurate with their responsibilities as citizens of the community.

## 2. Questionable Loyalty

A number of key objections to noncitizen voting center on the question of potential conflicts of interest and divided loyalties. One argument is that since aliens stay in the United States at the discretion of officials, the government would in effect be able to manipulate the electorate by dictating how they should vote.<sup>201</sup> However, it is unlikely that the INS would have a vested interest in attempting to swing an election or the means of doing so if it so desired. Noncitizens, like citizens, are not required to vote and so could only be compelled to vote a certain way if they were illegally forced to vote in the first place. Second, even if the INS, or a political candidate working through the INS, could force a noncitizen to vote and to vote in a certain way, it is highly unlikely that this coercion could effectively compel the number of votes

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199. *Casual Citizenship?*, B. GLOBE, Oct. 31, 1998, at A18.

200. See Neuman, *supra* note 20, at 274-76 (describing the arguments in favor of nonresident voting on the local level).

201. See Neuman, *supra* note 20, at 279-80.

needed to swing an election while nonetheless remaining undetected.

Also, some have argued that "even if aliens could vote only at the local level, political parties would have an incentive to favor policies at the national level that would win them alien votes at the local level."<sup>202</sup> This argument presumes that all aliens will vote the same way; however, given the diversity of the noncitizen communities in most localities,<sup>203</sup> even if aliens were pressured by political parties or their home governments, it is unlikely that all could be pressured in the same direction. A recent discussion of the "three segments of the Hispanic voting influence" in Miami, Florida emphasizes that minority communities cannot be associated with a "single political outlook."<sup>204</sup>

Assuming that a party could shape their state and federal position to win the local noncitizen vote, it would only serve to benefit, not harm the larger local community. Presumably, a party's national policy would only win them local votes if the measures were seen by noncitizens to benefit them at the local level. Where noncitizens and citizens both have a vested interest in local policy, allowing policies that may benefit noncitizens to compete with other proposals would actually strengthen local democracy and could conceivably benefit not only noncitizens, but also other groups mentioned above, such as the poor, minorities and the working class.<sup>205</sup>

A stronger sentiment is that aliens could be bribed or otherwise pressured by their home governments.<sup>206</sup> However, noncitizens may actually have heightened incentives to loyalty.<sup>207</sup> Those who want to be naturalized in the future must exhibit loyalty to the United States during the pre-naturalization period.<sup>208</sup> Also, they, unlike citizens, are subject to deportation.<sup>209</sup> Furthermore, they have made a choice to reside in their locale and so should have an interest in supporting their place of residence.

202. *Id.* at 280.

203. *See infra* Part II.C.5.

204. Mark Silva, *Three Faces of the Hispanic Constituency*, THE MIAMI HERALD, Sept. 9, 1999, at 7A.

205. *See supra* note 192 (describing the plight of the underprivileged as including under-representation in voting).

206. *See id.*

207. *See* Shimmelman, *supra* note 5, at 20.

208. *See id.*

209. *But see* Schuck, *supra* note 94, at 15 (arguing that in practice, non-criminal aliens are highly unlikely to face deportation, given the regulatory and resource constraints on the INS).

As for nondeclarant aliens, the mere fact that a resident alien is not naturalized does not *per se* demonstrate lack of commitment to the United States, much less to the locality or the state. Some may be unable to take the step to naturalize because it would mean a complete renunciation of any access to their home country.<sup>210</sup>

A corollary to the disloyalty argument is that noncitizens are more likely to practice vote fraud.<sup>211</sup> Absent any other explanation beyond citizenship alone, there is no reason why aliens should commit fraud more than citizens do, especially given the threat of deportation. Furthermore, criminal penalties should be a sufficient deterrent for noncitizens and citizens alike.

Finally, the disloyalty argument contains implied deprecatory judgments about the ability of noncitizens to vote responsibly for the common benefit; such arguments are identical to those used to keep Blacks and women from voting and thus are highly suspect as the primary basis for denying such an important right.<sup>212</sup>

### 3. Equal Protection Concerns

Without clear criteria specifying which aliens can vote, the exclusion of some noncitizens from the vote but not others would raise Equal Protection concerns.<sup>213</sup> This obstacle can be easily overcome by establishing voter qualifications that are tailored to further a state interest upon which the distinction is based. Expanding the franchise to only permanent residents on grounds that they have demonstrated a heightened commitment to the political community would likely satisfy an equal protection challenge. Another variation of the objection would be that creating voter qualifications applicable only to aliens and not to nationals is a violation of the Equal Protection Clause. States are free, however, to make distinctions between groups as long as they can satisfy the standard of review; a state can pass the "strict scrutiny" standard by demonstrating a "compelling state interest"

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210. See Shimmelman, *supra* note 5, at 17 (citing the Dutch Report). Latinos, in particular, may feel that "the political power bestowed by American citizenship is not worth the sacrifice of social and political [or] economic benefits in their native countries," including, *inter alia*, the right to own property. Tiao, *supra* note 100, at 187-88.

211. See Rosberg, *supra* note 13, at 1115.

212. See Cogan, *supra* note 27, at 490 n.145 (quoting John Ross, NY Convention of 1821: "[Blacks are] incapable . . . of exercising [the] privilege [of voting] with any sort of discretion, prudence or independence").

213. See *supra* Part II.A.3.



behind the distinction and showing that the distinction satisfies those interests.<sup>214</sup> As will be discussed below,<sup>215</sup> there is little reason to assume that residency requirements for noncitizens would fail this test.

#### 4. Lack of Sufficient Stake in Government Affairs

The argument is made that aliens are not "inescapably" tied to the community, and thus could avoid the effects of government policies by returning to their home country.<sup>216</sup> While the wisdom of making such a blanket assumption is doubtful at best, several counter-arguments support the position that noncitizens *do* have a stake in local, if not state, affairs, and that the "lack of vested interests" argument has not been strongly supported even with respect to citizens.<sup>217</sup> Courts have held that citizens cannot be denied the vote based solely on the contention that they lack a sufficient stake in the jurisdiction,<sup>218</sup> a stance which led to the abandonment of residency requirements for citizens in federal elections and in most cases at the state and local levels as well.<sup>219</sup> As a result, students can now vote in the community of their school, even though they had been seen as having only a transitory stake in local or state affairs.<sup>220</sup> The "lack of vested interests" argument was similarly rejected with respect to military personnel.<sup>221</sup> Furthermore, not everyone who may have a stake in a local issue is automatically guaranteed the right to vote in that locale; transients and residents of neighboring areas may in fact have quite significant interests in the policies of a given locale, but a state could deny them the vote if it has a "compelling interest" for doing so.<sup>222</sup> As discussed above,<sup>223</sup> noncitizens do have a

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214. See STONE ET AL., *supra* note 134, at 854 (discussing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

215. See *infra* Part III.A.

216. See Neuman, *supra* note 20, at 277.

217. See *infra* notes 220-22.

218. See *infra* Part III.A.

219. See *Dunn*, 405 U.S. at 330. See also Neuman, *supra* note 20, at 317 & n.353 (noting that residency requirements at the local level have been relaxed).

220. See Raskin, *supra* note 6, at 1449 n.303.

221. See Rosberg, *supra* note 13, at 1113 (quoting *Carrington v. Rash*, 380 U.S. 89, 94 (1965)).

222. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (stating that New York could restrict voting rights to parents, property owners or those "primarily interested" as long as the "exclusion is necessary to promote a compelling state interest," but finding no compelling interest in the restriction at issue); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (expressly reaffirming states' power to limit the franchise to *bona fide* residents if compelling interests exist); see also *Holt v. City of Tuscaloosa*, 439 U.S. 60 (1978) (upholding denial of voting rights in city elections to

significant stake in local affairs, and while some may be able to return to their home country, the fact that not all are able or willing to do so also severely undermines the strength of this contention.

### 5. Bloc Voting

Many fear that noncitizens will vote as a bloc, forming coalitions that will disrupt the political landscape. However, this objection has not been seen as a valid reason to prevent alien shareholders from voting in shareholder elections.<sup>224</sup> Furthermore, the sheer national, ethnic and socioeconomic diversity of the noncitizen population should put such fears to rest. While the immigrant population was historically less skilled, since the Immigration and Nationality Act of 1965,<sup>225</sup> immigration policy has led to increased immigration of higher skilled workers;<sup>226</sup> thus, absent further revisions the overall skill level of the resident alien population should continue to rise. This rise in the number of high-skill workers, coupled with past trends of less-skilled immigrants, will further increase the socioeconomic diversity of the resident alien population. Finally, the Supreme Court has held that states cannot deny the vote to certain groups simply because of the way they may vote.<sup>227</sup> As the Court stated in *Dunn v. Blumstein*,<sup>228</sup> “‘differences of opinion’ may not be the basis for excluding any group from the franchise.”<sup>229</sup>

### 6. Noncitizens are Not Knowledgeable Enough to Vote Intelligently

An argument sometimes levied against noncitizen voting—that they are not capable of voting intelligently—was also commonly advanced to attack voting rights for women and Blacks. In striking down durational residency requirements, the Supreme Court rejected this argument, noting that even long-term residents

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county residents who were subject to the city’s “police jurisdiction” but not to the full measure of governing powers of the city).

223. See *supra* notes 182-89 and accompanying text.

224. See Rosberg, *supra* note 13, at 1113.

225. 8 U.S.C. §§ 1101, 1255 (1999) (originally enacted as Act of June 27, 1952, ch. 477, 66 Stat. 163).

226. See Hayduk, *supra* note 85, at 12-13.

227. See *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969).

228. 405 U.S. 330 (1972).

229. *Id.* at 355 (quoting *Cipriano*, 395 U.S. at 705-06).

may not be politically knowledgeable.<sup>230</sup> The Voting Rights Act Amendments have also eliminated literacy tests and other "knowledge-based" screening measures that have historically worked against minorities.<sup>231</sup> Thus, it is unlikely a similar contention against noncitizens would survive judicial review.

#### 7. The Noncitizen Vote Will Water Down Citizens' Votes

Ironically, the objection that noncitizen voting would dilute the citizen vote actually cuts in favor of noncitizen voting. The current system of apportionment is based on the whole population; aliens are counted in the census and included in this number.<sup>232</sup> Therefore, the votes of citizens in areas with a high resident alien population actually count more than the votes of citizens elsewhere, and resident aliens are under-represented—they are counted in the voter population without being given the right to vote. One example was documented in a 1998 report by the *Los Angeles Times*, which discovered that two-thirds of the adults resident in the First District of Los Angeles were noncitizens, resulting in an "inflation of white electoral influence" in an area where Whites are less than ten percent of the population but represent an overwhelming majority of the voting population.<sup>233</sup>

#### 8. Granting Resident Aliens the Vote Will Open the Door to Illegal Immigrant Voting

The Takoma Park referendum<sup>234</sup> extended the franchise to all noncitizens without stipulation, leading some to object that illegal immigrants might also be able to claim political rights.<sup>235</sup> However, illegal immigrants have no incentive to register anything officially, since registering is an easy way to get caught. Tighter registration restrictions could alleviate fears of potential abuses. If, as several sources suggest, even legal aliens do not

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230. See *id.* at 354-60.

231. See 42 U.S.C. § 1973 (1970).

232. See 2 U.S.C. § 2a (1999). See also *Gaffney v. Cummings*, 412 U.S. 735, 746-47 (1973) (describing the proportion of the census population too young to vote or disqualified by alienage or nonresidence); *Burns v. Ricardson*, 384 U.S. 73, 92-93 (1966) (discussing problems associated with using a registered voter or actual voter basis for reapportionment).

233. Rohrlich, *supra* note 185, at A17.

234. See *infra* notes 270-273 and accompanying text.

235. See Hall, *supra* note 191. This concern was raised by the Federation for American Immigration Reform in 1991. See Melanie Howard, *Ballot Proposes Vote for Aliens*, WASH. TIMES, Oct. 30, 1991, at B3.

participate in elections to the same extent as citizens,<sup>236</sup> worries that illegal immigrants will flood the polls seem unfounded at best.

From a legal standpoint, it is clear that neither the Constitution nor common law jurisprudence present a bar to the enfranchisement of noncitizens, as states are free to establish voter qualifications on their own. While principles of democracy and equal protection strengthen the argument in favor of noncitizen voting rights, the key obstacles remain largely political. Statutory changes permitting the extension of the franchise at the local level have been successful only where these political barriers could be overcome.<sup>237</sup>

### III. Logistical Considerations and Application

Because the enfranchisement of noncitizens must be done on a local level, an outcome in favor of alien suffrage must necessarily rest on grassroots movements that catch fire at the local level and spread upward through the legislative ranks. Logistical considerations for such movements include the determination of a target population and the compilation of relevant statistical data. A grassroots movement also requires choosing from among potential approaches and maintaining realistic expectations, since the key obstacle to alien suffrage remains a lack of political will and initiative.

#### A. Defining the Target Population

When a state or locality begins to consider extending the vote to noncitizens, it must first determine which noncitizens will fall within the scope of the new franchise rights. Historically, length of residency and declared intent to naturalize are the two prime conditions states have used to define the noncitizen electorate.<sup>238</sup> Takoma Park, for example, extended the vote to all alien residents who met a residency requirement, while a proposal considered in Washington, D.C. only reached permanent residents who had applied for citizenship.<sup>239</sup> In New York, even parents who are in

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236. See Abraham McLaughlin, *A Move to Extend Vote to Immigrants*, CHRISTIAN SCI. MONITOR, Oct. 26, 1998, at 3.

237. See *infra* Part IV. (offering case studies that demonstrate the difficulty of overcoming these political barriers).

238. See Rosberg, *supra* note 13, at 1097 n.31 (citing *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377 (1840) (determining that the state constitution allows alien inhabitants to vote).

239. See Shimmelman, *supra* note 5, at 27-28.

the country illegally can participate in school board elections, since no questions about citizenship or residency are asked.<sup>240</sup> Because voters should have established ties to their locale, as well as some commitment to the United States,<sup>241</sup> most scholars advocate extending the franchise to permanent residents who have met relevant residency requirements for the jurisdiction.<sup>242</sup>

One question that arises, however, is whether residency, which can no longer be used to "disenfranchise members of the core electorate on the basis of insufficient interest in the political process, [may] be used to identify interested persons outside the core electorate [i.e., resident aliens] for inclusion in the political community."<sup>243</sup> In *Oregon v. Mitchell*,<sup>244</sup> the Supreme Court validated a provision of the 1970 Voting Rights Act Amendments that allowed former residents to vote in their former state in a presidential election if they moved to another state too close to the time of the election to vote in the new state.<sup>245</sup> Citizens abroad are also eligible to vote in their former state of residency even though they are technically nonresidents of that state.<sup>246</sup> Although the Supreme Court has struck down residency requirements for citizen voting as not in furtherance of a "compelling state interest,"<sup>247</sup> a state most likely could show that a residency requirement for noncitizens does in fact pass this test, as residency may be the most equitable way of determining which permanent residents have a strong commitment to the locale.

The decision to make declared intent to naturalize a requirement for noncitizen voting is also a difficult one. "[T]he most significant question would seem to be whether a state may

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240. See William Carlsen, *Noncitizen Vote Plan Assailed: Teng's Proposal Called Lunacy* by Kopp, S.F. CHRON., Feb. 7, 1996, at A13.

241. See *supra* Parts II.B.2., II.C.2., 4.

242. See Raskin, *supra* note 6; see also Neuman, *supra* note 20; Tiao, *supra* note 100.

243. Neuman, *supra* note 20, at 317-18 & n.357. See also *supra* note 120 and accompanying text (noting that the Supreme Court struck down residency requirements on Equal Protection grounds, but without in any way disparaging the general right of states to define the electorate).

244. 400 U.S. 112 (1970).

245. See *id.*

246. See Overseas Citizens Voting Rights Act of 1975, 42 U.S.C. §§ 1973ff-1973ff(6) (1998).

247. See *Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972) (striking down residency conditions for voting in Texas, but expressly reaffirming state power to limit the franchise to residents where doing so furthers a "compelling governmental interest"); *Carrington v. Rash*, 380 US 89 (1965) (finding the permanent presumption of nonresidence for voting military personnel unconstitutional in light of its stated purposes).

extend voting rights to an alien who has freely rejected an opportunity to exchange a prior allegiance for exclusive allegiance to the United States."<sup>248</sup> However, the naturalization process and administrative institutions may deter some from naturalizing or declaring intent who would otherwise do so, such that mere lack of intent to naturalize is not *per se* a sign of mixed allegiance.<sup>249</sup> Furthermore, not all resident aliens are entitled to vote in their country of origin.<sup>250</sup> Thus, concern for the community may shape an alien's political participation more than his or her association with the other nation's interest, and therefore "using non-declarant alien status as a proxy for insufficient concern is extremely overinclusive and underinclusive."<sup>251</sup> Moreover, the other rationales for noncitizen voting outlined above also apply to both declarant and non-declarant aliens.<sup>252</sup>

### B. Relevant Data

On a practical note, to argue successfully for noncitizen voting, several types of data, some of which are not easily obtained, are essential. Information on immigration trends in the relevant region is necessary, but not in itself sufficient; a region may attract legal and illegal immigrants of every visa status. Therefore, merely citing the number of foreign-born residents, as several studies have done,<sup>253</sup> is not in itself conclusive. Once the class of noncitizen voters to be targeted is identified (i.e. resident aliens, resident aliens who have applied for naturalization, etc.), the number of noncitizens in that class becomes the relevant noncitizen population figure. Of key interest is the population of resident aliens relative to the total population. The importance of obtaining supporting data was emphasized by the efforts of the Immigrant Voting Rights Campaign of Cambridge, Massachusetts to give noncitizens the right to vote in school board elections.<sup>254</sup> The Voting Rights Campaign indicated that survey research was planned to document the citizenship of parents and pinpoint how

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248. Neuman, *supra* note 20, at 326 n.394. See also *Pope v. Williams*, 404 U.S. 861 (1971) (upholding a Maryland statute requiring intent to naturalize before noncitizens could vote).

249. See Neuman, *supra* note 20, at 326-27.

250. See generally Shimmelman, *supra* note 5, at 29 (proposing mechanisms to ensure that potential noncitizen voters are not entitled to vote in another locale).

251. Neuman, *supra* note 20, at 329.

252. See *Carlisle v. United States*, 83 U.S. 147 (1873).

253. See, e.g., Hayduk, *supra* note 85 (describing recent studies on noncitizen voting).

254. See Hurley, *supra* note 185.

many potential parent voters are currently ineligible to vote by virtue of their citizenship status.<sup>255</sup> Certainly, the size of the entire foreign-born community is also of interest, insofar as all noncitizens will likely reap the benefits of enfranchising a segment of their population. In addition, statistics reflecting the nation of origin and/or ethnic background of the noncitizen population is essential.

Beyond demographics, each locality must also identify the current statutory qualifications for voters, the legislative process required to change existing laws, if necessary, and the names of legislators who can be targeted as potentially supportive of noncitizen voting rights. Interaction with community action groups may assist noncitizen residents in addressing their concerns to the legislators who wield the most influence.

### C. Potential Approaches

Political action to permit noncitizen voting can take several forms. One commentator has suggested the following:

(a) the state legislature could pass legislation that would either enable localities, if they so chose, to enfranchise resident non-U.S. citizens or (b) would require localities to do so; (c) [cities] could pass a local law enfranchising non-U.S. citizens even in the absence of enabling legislation from the State; or (d) the necessary amendments could be made part of [a]... package [to be set before a State Constitutional Convention, if the state has such a procedure].<sup>256</sup>

The first option may be the most politically practical and the least intrusive on the freedom of localities to shape their own political community. Maryland is one state that has chosen this route, permitting passage of local measures that have enfranchised noncitizens in five towns.<sup>257</sup> In the absence of state legislation allowing localities to decide local voter qualifications, as in states where the state legislature must first approve all such local measures, garnering the political support needed in the legislature may be more difficult than passing a local measure. Such a situation reduces the probability that a locality may enfranchise its noncitizens.<sup>258</sup> More specific options relevant to particular states and locales are discussed below.<sup>259</sup>

255. *See id.*

256. Shimmelman, *supra* note 5, at 31.

257. *See infra* note 292 and accompanying text.

258. For example, in Massachusetts, the state legislature must approve the decision of a locality to enfranchise its citizens before that decision becomes law. As a result, the town of Amherst has failed repeatedly in its attempts to

#### D. Logistical Problems

In instituting noncitizen voting rights, there are a number of practical issues that must be addressed.<sup>260</sup> First, if a state permits localities to opt for noncitizen voting, a system must be established to identify which voters are qualified to vote at only the local level, and noncitizen voter qualifications must be established. One possible solution is advanced by a proposed amendment to the New York election law that would permit permanent residents to vote.<sup>261</sup> In order to ensure that noncitizen voters only vote in local elections, the amendment would require registration forms of a distinctive color for noncitizens, lists of special local voters, and the adjusting of voting machines to accept votes from special local voters.<sup>262</sup>

Second, safeguards must be implemented to prevent noncitizens from exercising political rights in more than one locality ("double voting"), whether in the U.S. or abroad; this could be accomplished by requiring registering voters to relinquish any right to vote elsewhere. Furthermore, when the franchise is extended to noncitizens, its exercise should certainly be optional, as it is for other voters. While perhaps obvious, emphasizing the non-mandatory nature of the right to vote is essential, since some foreign nationals may not want or be permitted by their country of citizenship to vote in the United States.<sup>263</sup>

#### E. Limits to Anticipated Results

The key obstacle to noncitizen voting is not legal barriers, but a lack of political will and initiative. One way to lessen political resistance may be to point out that permitting noncitizen voting may not have the dramatic impact its opponent's fear. If the American experience in any way follows the European one, the enfranchisement of noncitizens may not greatly affect election results since noncitizens would exhibit lower voter turnout than citizens and would cast their vote similarly to citizens.<sup>264</sup>

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enfranchise its noncitizens even though local measures passed in both 1996 and 1998. See McLaughlin, *supra* note 236; Telephone Interviews with Jessie Spears, Legislative Aide to Representative Ellen Story (Feb. 2, 2000; Mar. 23, 2000).

259. See *infra* Part IV.B.

260. See Shimmelman, *supra* note 5, at 27-35.

261. See Right To Vote For Alien Residents, A.B. 1017, 222nd Leg. (N.Y. 1999) available in LEXIS, NY-BILLTRK File.

262. See *id.*

263. See *id.* at 29.

264. See Shimmelman, *supra* note 5, at 45-46. See also Minnite, *supra* note 98 (presenting survey research and a general discussion addressing the question of



Noncitizens may also need training in the political process so they can understand how to use their vote to bring about change in their economic or social position.<sup>265</sup> Taking the opposite approach, however, and “[h]ighlighting the numerous cases where an enlarged electorate would have decided the outcome of a close election of import to such communities would drive home the potential benefits of noncitizen voting [and] forge progressive political majorities.”<sup>266</sup> The latter approach may seem more feasible in an era where minority interests could swing elections and where noncitizen populations are significant.<sup>267</sup>

In addition, the characterization of noncitizen political participation rates as below the norm has been challenged by a recent study which suggests that differences in political participation between foreign-born and native-born citizens may be explained by differences in mobilization, a pattern that may hold for noncitizens as well.<sup>268</sup> The study also emphasizes the foreign-born community’s complexity and diversity, factors that make blanket predictions of political participation doubtful at best.<sup>269</sup> While participation patterns for noncitizen voters and the impact noncitizen voting would have on overall results have not been adequately researched to date, such results may be of use to those attempting to build community support for noncitizen voting.

#### IV. Case Studies

There have been several recent efforts to reintroduce noncitizen voting in the United States. Although mostly unsuccessful, an examination of these efforts illustrates some of the issues related to advocacy for alien suffrage. As a practical matter, noncitizens do not have political power because they do not have the right to vote; inherent in this lack of voting power is

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why immigrants’ level of political involvement may be lower).

265. See, e.g., Shimmelman, *supra* note 5, at 47 (stating that the overwhelming majority of immigrants vote for mainstream parties).

266. Hayduk, *supra* note 85, at 31.

267. See *Citizen First, Then Voter*, S.F. CHRON., Feb. 8, 1996, at A22 (citing estimates by San Francisco Supervisor Mabel Teng that “20,000 to 30,000 legal noncitizens would like to vote in either school board or community college board elections in San Francisco”); Deborah Sontag, *Noncitizens and Right to Vote: Advocates for Immigrants Explore Opening Up Balloting*, N.Y. TIMES, July 31, 1992, at B1 (noting that about 10 million legal immigrants in the U.S. are not citizens, including one million in New York alone).

268. See Minnite, *supra* note 98.

269. See *id.*

an absence of electoral power. While this has a deleterious effect on all noncitizens, cities and states with a high percentage of noncitizens among the otherwise voting-qualified population are faced with a proportionately larger impact on the political landscape and a more pressing affront to the principles of democracy. Focusing, therefore, on cities and states with high noncitizen representation, this Part ends with a discussion of procedures required for the enfranchisement of noncitizens in the states of California, New York, Texas and Florida.

#### A. Current Events

Recent attempts to secure voting rights for noncitizens have been, for the most part, unsuccessful. A notable exception is Takoma Park, Maryland, where an amendment was made to the city charter in February 1992, allowing documented and undocumented aliens to vote and run for municipal office.<sup>270</sup> The idea began when a task force "started redrawing voting districts to match the 1990 census and noticed that many districts in the city of 15,000 had disproportionate shares of noncitizens."<sup>271</sup> After alien voting was narrowly approved by Takoma Park voters in November 1991,<sup>272</sup> the City Council gave it statutory status, allowing noncitizens to vote for the mayor and city council members, and on such local issues as city taxes and refuse collection.<sup>273</sup>

Takoma Park's referendum sparked interest from activists in various areas across the nation, including Texas, California, the District of Columbia and Arlington, Virginia.<sup>274</sup> In the District of Columbia, an immigrant voter bill was introduced in May 1992.<sup>275</sup> It was similar to the measure approved in Takoma Park, but narrower in that it would allow only legal permanent immigrants

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270. See Michael S. Arnold, *Getting Out the Vote Among Hispanics: Takoma Park Pamphlet Reflects Liberal Rules*, WASH. POST, Sept. 30, 1993, at M01; Beth Kaiman & Lynne K. Varner, *Immigrant Voting Advances in Takoma Park*, WASH. POST, Jan. 30, 1992, at M01.

271. *Takoma Park Asks Whether to Give Noncitizens Say*, BALTIMORE SUN, Oct. 27, 1991, at 5B.

272. See Melanie Howard, *Vote to Extend Voting Rights Seen as Likely to Start a Trend*, WASH. TIMES, Nov. 7, 1991, at B3.

273. See Kaiman & Varner, *supra* note 270.

274. See Howard, *supra* note 272; Stephanie Griffith, *Hispanics Seek Wider Clout in D.C. and Va.: Takoma Park Referendum on Voting Eligibility Spurs Immigrants' Interest*, WASH. POST, Nov. 7, 1991, at D06.

275. See Shaun Sutner, *Measures Designed to Enlarge Voter Rolls Stir Debate*, WASH. POST, May 21, 1992, at J1.

who had applied for U.S. citizenship to vote.<sup>276</sup> However, the bill's attempt to enfranchise noncitizens was defeated by intense opposition.<sup>277</sup> A similar proposal introduced in 1992 to extend voting rights to noncitizens in elections for the Los Angeles Unified School District died after garnering support from Latino parents, but not from Black families.<sup>278</sup>

Other attempts to enfranchise noncitizens include a 1993 resolution proposed by the Bell Gardens City Council in California, which would have called on state lawmakers to permit legal immigrants to have a voice in local politics.<sup>279</sup> Towns in Colorado and Texas have also initiated campaigns in favor of noncitizen voting rights.<sup>280</sup> In May 1994, noncitizens were allowed to vote in primary elections for a School Board race in Arlington, Virginia.<sup>281</sup> Amherst, Massachusetts entered the fray in 1996, when it passed a proposal that would give legal immigrants a voice in local elections.<sup>282</sup> The attempt failed at the state level when the bill approving the petition died at the end of session without making its way to the floor.<sup>283</sup> Amherst approved another petition in October 1998. By May 1999, the Massachusetts State Joint Committee on Election Laws passed the bill and sent it on to the House Committee on Steering, Policy and Scheduling. Like its predecessor, this bill will likely die at the end of the 1999-2000 session.<sup>284</sup> While the Town may ask Representative Ellen Story to re-introduce the bill during the 2001-2002 session, passage is doubtful given the lack of support from the legislature.<sup>285</sup> And most recently, a February 1999 campaign in Cambridge,

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276. *See id.*

277. *See* Hall, *supra* note 191.

278. *See* George Ramos, *Taking Issue With Giving the Vote to Noncitizens*, L.A. TIMES, Jan. 4, 1993, at 3; Mary Anne Perez, *Quezada's Bid for Noncitizen Vote Debated*, L.A. TIMES, Mar. 19, 1992, at 1. *See also* Sontag, *supra* note 267 (comparing the political climates of New York, Los Angeles and Takoma Park).

279. *See* Jill Gottesman, *Council Like Noncitizens' Voting Rights Government: The Advisory Measure Would Urge State Lawmakers to Allow Legal Immigrants to Participate in City and School Elections*, L.A. TIMES, Feb. 11, 1993, at 3.

280. *See* Memorandum from Ronald Baumgarten to Massachusetts Senator Nuciforo at 1 (Aug. 5, 1998) (regarding Alien Voting Rights and H.4641, the bill introduced by Amherst, Massachusetts in January, 1997 requesting a Special Act to allow aliens in Amherst to register to vote for local offices) (on file with author).

281. *See* Hall, *supra* note 191.

282. *See* Nicole Cusano, *Amherst Mulls Giving Noncitizens Right to Vote*, B. GLOBE, Oct. 26, 1998, at B1; McLaughlin, *supra* note 236.

283. *See* Telephone Interviews with Jessie Spears, Legislative Aide to Representative Ellen Story (Feb. 2, 2000; Mar. 23, 2000).

284. *See id.*

285. *See id.*

Massachusetts pushed to allow immigrants to vote in local School Committee and City Council elections, regardless of their citizenship status.<sup>286</sup> To the surprise of even its supporters, the motion passed on a 5-2 vote.<sup>287</sup> Massachusetts General Laws, however, stipulate citizenship as one of several requirements for voting in local elections or local meetings.<sup>288</sup> Therefore, as with the Amherst vote, the state legislature must approve a home rule petition before noncitizens will be eligible to vote in local elections.<sup>289</sup>

A large obstacle to enfranchising noncitizens, in addition to the inevitable political opposition, is the requirement in some states that municipalities follow the state's voting requirements as set forth in its constitution and/or statutes.<sup>290</sup> A notable exception, not surprisingly, is Maryland, which allows municipalities to set their own voting qualifications.<sup>291</sup> Thus, in addition to Takoma Park, five other small communities in Maryland's Montgomery County do not require voters to be citizens.<sup>292</sup> Recently, however, voters in Garrett Park, yet another Montgomery County community, narrowly rejected a proposal that would have extended voting rights to legal immigrants.<sup>293</sup>

Aside from the Maryland localities referred to above, New York City and Chicago also allow some noncitizen voting—noncitizen parents of schoolchildren are eligible to vote for school board members in both of these cities.<sup>294</sup> Supported in part by this precedent, New York Assembly Member Perry introduced a bill on

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286. See Hurley, *supra* note 185.

287. See *id.*

288. See Cusano, *supra* note 282.

289. Both the City Council and the school committee, through ballot referendum, "must vote to support the proposal . . ." Hurley, *supra* note 185. In contrast to Maryland, most states would require a constitutional amendment and/or amendment or repeal of statutory laws in order to enfranchise noncitizens at the local level. See *infra* Parts IV.B.1.-6. for examples. Like Amherst in Maryland and Cambridge in Massachusetts, Arlington, Virginia would also have had to first seek permission from its state legislature before adopting an ordinance allowing noncitizens to vote. See Griffith, *supra* note 274.

290. See Raskin, *supra* note 6, at 1460 & n.368. See also examples discussed *infra* Parts IV.B.1.-6.

291. See *Takoma Park Asks Whether to Give Noncitizens Say*, BALTIMORE SUN, Oct. 27, 1991, at 5B.

292. See Kaiman & Varner, *supra* note 270. Those towns are Barnesville, Somerset, the villages of Chevy Chase Sections 3 and 5, and Martin's Additions. See *id.*

293. See *Around the Region*, WASH. POST, June 19, 1997, at B7.

294. See N.Y. EDUC. LAW § 2590(c)(3) (McKinney Supp. 1999-2000); 105 ILL. COMP. STAT. ANN. 5/34-2.1(d)(ii) (West 1999).

January 6, 1999 that would amend the New York election law by adding a section providing for the qualification of "special local voters" as alluded to above.<sup>295</sup> No action has been taken on that bill to date, however, and an attempt in 1993 to pass identical legislation was unsuccessful.<sup>296</sup>

### B. Select States and Cities

Any successful enactment of alien suffrage at the state level must follow the constitutional and statutory procedures of the particular state. Depending on the jurisdiction, changes to the state constitution and/or state laws may be required. Although each state retains its own requirements, general tools for initiating change include legislative amendment, legislative referendum, citizen-sponsored initiative and citizen petition.

#### 1. California

To permit noncitizen voting in California would require a constitutional amendment, as state law expressly requires national citizenship.<sup>297</sup> In 1996, a judge in the Superior Court of San Francisco ruled that a change in voting rights could only be done by amending the state constitution and that a proposed local initiative giving noncitizens the right to vote for mayor, supervisor and other offices was beyond the authority of both the local and county governments.<sup>298</sup> Article II Section 2 of the California Constitution stipulates that "a United States citizen 18 years of age and resident in this state may vote."<sup>299</sup> In 1974, the California Court of Appeals for the Second District rejected permanent residents' constitutional challenge to the Article II citizenship requirement under the Fourteenth Amendment Equal Protection Clause.<sup>300</sup> The court, citing *Sugarman v. Dougall*,<sup>301</sup> held that a

295. See Right To Vote For Alien Residents, A.B. 1017, 222nd Leg. (N.Y. 1999).

296. See A.B. 6828 (N.Y. 1993). Another major city where enfranchising noncitizens appears reasonable, despite past failures, is Washington, D.C. In late 1997, D.C. Council candidates were unanimous in their belief that legal immigrants should be allowed to vote in local elections. See Vanessa Williams, *Another Chance to Adjust Lineup on D.C. Council; At-Large Seat at Stake in a City That's Weary of Special Elections*, WASH. POST, Nov. 27, 1997, at J1.

297. See Gottesman, *supra* note 279.

298. See *Ruling Ends Bid to Allow Voting by Noncitizens*, S.F. CHRON., May 11, 1996, at A13.

299. CAL. CONST. art. II, § 2.

300. See *Padilla v. Allison*, 38 Cal. App. 3d 784 (Cal. Ct. App. 1974).

301. 413 U.S. 634, 648-49 (1973).

state is not *required* to enfranchise aliens.<sup>302</sup> This provision is incorporated into the California Election Code, which states that those who qualify under Article II, Section 2 of the California Constitution and who register to vote according to the terms of the Code are eligible to vote within their territory of residence.<sup>303</sup> The local level falls under this provision as well, since “[e]very person is entitled to vote at a local, special, or consolidated election *who is registered* in any one of the precincts which compose the local, special, or consolidated election precincts, *in accordance with this code.*”<sup>304</sup>

The California Constitution can be amended by legislative referendum or by direct initiative.<sup>305</sup> A legislative amendment requires a two-thirds vote in each house to approve the proposal and a majority vote for ratification.<sup>306</sup> To amend the constitution by direct initiative, a petition must be signed by eight percent of the voters for all gubernatorial candidates in the last election and the amendment must be passed by a majority vote in a referendum.<sup>307</sup> Approved initiatives can be amended as specified or repealed, but not vetoed; defeated initiatives can be refiled.<sup>308</sup> Changes to statutes can be made by direct initiative, legislative referendum or citizen petition.<sup>309</sup> However, given the recent anti-immigrant sentiment in California, it appears highly unlikely that

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302. See *Padilla*, 38 Cal. App. 3d at 786-87.

303. See CAL. ELEC. CODE § 2000 (West 1999).

304. CAL. ELEC. CODE § 10,000 (West 1999) (emphasis added). Registration in accordance with the code would require a voter to satisfy the state Art. II citizenship requirement. See CAL. ELEC. CODE § 2000.

305. See THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES VOL. 32, 5-7 tbls.1.2-1.3 (1998-1999); CAL. CONST. art. XVIII, § 1.

306. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 5-6 tbl.1.2.

307. See *id.* at 7 tbl.1.3; CAL. CONST. art. I, § 8.

308. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 216-17 tbl.5.18.

309. See *id.* at tbl.5.14. Additional information on lobbying and legislative reform is contained in the following sources: *California Secretary of State Bill Jones* <<http://www.ss.ca.gov>>; Legislative Analyst's Office (last modified February 29, 2000) <<http://www.lao.ca.gov>>; Legislative Counsel of California, *Official California Legislative Information* (modified daily) <<http://www.leginfo.ca.gov>>; *Legislative District Maps of California*, California Journal (containing congressional, state senate, state assembly and Board of Equalization districts, with a written description of each, including voter registration and ethnic data); *The Legislative Process: A Citizen's Guide to Participation* (1997) (free publication of Senate Publications, Sacramento, CA 95814) (describing how to affect the legislative process in California); ED SALZMAN, THE CALIFORNIA JOURNAL POLITICAL ACTION HANDBOOK (5th ed. 1995) (discussing lobbying strategy and techniques, with a short description of the California legislative process).

the state would seriously consider giving voting rights to noncitizens in the near future.<sup>310</sup>

## 2. Los Angeles

As Richard Fajardo of the Mexican American Legal Defense Fund recently acknowledged, "nobody [in Los Angeles] is thinking seriously . . . about giving voting rights to noncitizens."<sup>311</sup> However, with its significant immigrant population, Los Angeles is an area where arguments in favor of noncitizen voting take on heightened significance. Poor voter participation in the First District of Los Angeles has not been due to a lack of civic consciousness, but rather to the fact that the large immigrant population is predominately composed of noncitizens who are ineligible to vote.<sup>312</sup> The fundamental fairness concerns raised by this lack of representation are most acute where entire neighborhoods may be underrepresented.<sup>313</sup>

The Election Code of the City of Los Angeles states that voters for all elections must be qualified and registered as required by the state of California and as stipulated in Section 408 of the new Los Angeles City Charter, adopted on June 4, 1999.<sup>314</sup> The Charter, which will go into effect on July 1, 2000, was designed by the Los Angeles Charter Reform Commission and submitted by the City Council.<sup>315</sup> The skewed state of local democracy in the First District and other areas that are largely composed of noncitizens first came to the attention of the Charter Reform Commission in the context of debates over whether to institute elected neighborhood councils.<sup>316</sup> Witnesses argued to the Commission that it should allow noncitizens to vote in city elections, but because California state law requires national citizenship, the city and the Commission lacked the power to

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310. See Rohrlich, *supra* note 185 (reporting that due to "recent expressions of anti-immigrant sentiment, almost no one expects Los Angeles' politicians to put themselves at the cutting edge of pro-immigrant change and approve expanded suffrage").

311. Rohrlich, *supra* note 185.

312. See Tiao, *supra* note 100, at 172.

313. See Rohrlich, *supra* note 185.

314. See LOS ANGELES, CAL., ELEC. CODE ch. I, § 16, Ordinance No. 172,275.

315. See LOS ANGELES, CAL., CITY CHARTER (1999).

316. See E-mail interview with Erwin Chemerinsky, Professor of Constitutional Law at the University of Southern California and Chair of the elected Charter Revision Commission (Sept. 24, 1999).

incorporate provisions into the new Charter that would enfranchise noncitizens.<sup>317</sup>

Given the current lack of political support for an amendment to the California Constitution, the new Los Angeles City Charter does not include any provisions which extend the franchise, but rather retains the previous Charter's reference to state and county law; Article IV, Section 408 of the new Charter states: "To be eligible to vote at any of the elections held under the Charter, a person must be registered in the manner and have the qualifications required by the general laws of this state respecting the registration and qualification of voters for state and county elections."<sup>318</sup>

Still, a number of innovations intended to increase citizen involvement in government were included in the new Charter, and may indirectly work to increase noncitizens' avenues for local participation. In an effort to address the concern that noncitizens would be excluded from participating in elected neighborhood councils because of the state law,<sup>319</sup> Article IX of the new Charter opts for non-elected neighborhood councils instead, in part to encourage noncitizen involvement.<sup>320</sup> This network of advisory neighborhood councils may not merely increase citizen involvement in City government, but may also broaden the forum for noncitizen voting rights movements. Article V, Section 552, for example, creates at least five "Area Planning Commissions" to move land-use decisions closer to affected neighborhoods.<sup>321</sup>

These structural changes may also have an impact on the viability of future noncitizen voting petitions—increased opportunities for noncitizen involvement may lessen their incentives to push for such petitions, or alternatively, the outlets for noncitizen participation may enable them to more successfully gain the support of the voting community in which they live to make a petition succeed. Which of these two scenarios will emerge remains to be seen.

### 3. New York

The New York State Constitution, Article I, Section 1, does not limit the franchise to U.S. citizens, but only to citizens of the

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317. *See id.*

318. LOS ANGELES, CAL., CITY CHARTER, art. IV, § 408 (1999).

319. *See Chemerinsky, supra note 316.*

320. *See LOS ANGELES, CAL., CITY CHARTER, art. IX (1999).*

321. *See LOS ANGELES, CAL., CITY CHARTER, art. V, § 552 (1999).*



state, thus encompassing non-U.S. citizens who are nonetheless citizens of New York.<sup>322</sup> Article I reads: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers . . ." <sup>323</sup> Article II, Section 1 also uses the term "citizen" in delineating qualifications for voters, and thus refers back to the state citizens mentioned in Article I.<sup>324</sup> In addition, the New York Constitution sets forth age and residency requirements: "Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election."<sup>325</sup>

While noncitizen voting would not contravene the voter requirements in the New York Constitution, it would require an amendment to the New York Election Law, which expressly makes U.S. citizenship a prerequisite for registering and voting in state elections.<sup>326</sup> Proposed legislation to change the Election Law would require a majority vote in both houses, and, realistically speaking, the active support of nearly all members of the legislature.<sup>327</sup> "All changes in election law are evaluated with explicit reference to their implications for the re-election of incumbent legislators . . . . [L]egislators must believe that the present electorate would support the proposal and that the newly-enfranchised voters would support the legislator's candidacy for re-election."<sup>328</sup>

It would appear that legislators are still reluctant to stand behind reform of the Election Law. As discussed above, a bill was

322. See Shimmelman, *supra* note 5, at 25-26.

323. N.Y. CONST. art I, § 1 (footnote omitted).

324. See Shimmelman, *supra* note 5, at 25-26.

325. N.Y. CONST. art II, § 1.

326. See N.Y. ELEC. LAW § 5-102 (Consol. 1998), reading as follows:

1. No person shall be qualified to register for and vote at any election unless he is a *citizen of the United States* and is or will be, on the day of such election, eighteen years of age or over, and a resident of this state and of the county, city or village for a minimum of thirty days next preceding such election.

2. The provisions herein with respect to a durational residency requirement for purposes of qualifying to vote shall not prohibit United States citizens otherwise qualified, from voting for president and vice president of the United States.

(emphasis added).

327. See Shimmelman, *supra* note 5.

328. See *id.*

introduced in the New York Assembly in 1993 that would amend the Election Law by adding a section that would provide for "special local voters."<sup>329</sup> That measure failed.<sup>330</sup> Another bill essentially duplicating the 1993 proposal was introduced in January 1999, although no action had yet been taken at the time of this writing.<sup>331</sup> The current bill would allow permanent residents who have been New York residents for three years and have applied for naturalization to vote in local elections; the highest local office noncitizens could vote for under the bill is that of mayor, and state offices are not included.<sup>332</sup>

Under the New York Education Law, Article 52A, Section 2590(c), noncitizen parents, may, however, register and vote in school board elections in the community school district where their child attends as long as they have not been convicted of a felony or engaged in voting fraud.<sup>333</sup> Although more recent estimates are not available, 56,000 noncitizens were registered as parent voters in 1992.<sup>334</sup> Section 2590(c)(3) establishes a registration system for the parent voters which offers parents the option to vote when their child registers with the school and at other times in order "to achieve the registration of the maximum number of parents possible. The registration process shall provide a procedure for determining when such parents shall cease to be eligible to vote as parent voters because their child no longer attends a school under the jurisdiction of the community board."<sup>335</sup> The latter provision addresses the point raised above concerning the need to identify that voters are restricted to the local or school board level and which are eligible to vote in all elections.<sup>336</sup>

Parent voters are also eligible to serve on the community board.<sup>337</sup> Furthermore, the New York State Education Commissioner has interpreted the Education Law to permit aliens who are parents to hold positions on community school boards.<sup>338</sup> Only U.S. citizens eligible to vote under the Election Law, however, may vote at a "school meeting or election for the election

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329. See A.B. 6828 (N.Y. 1993).

330. See *supra* notes 295-96 and accompanying text.

331. See A.B. 1017, 222nd Leg. (N.Y. 1999).

332. See *id.*

333. See N.Y. EDUC. LAW § 2590(c) (McKinney Supp. 1999-2000); N.Y. ELEC. LAW § 5-106 (Consol. 1998).

334. See Shimmelman, *supra* note 5, at 44.

335. N.Y. EDUC. LAW § 2590(c)(3)(a) (McKinney Supp. 1999-2000).

336. See *supra* Part III.D.

337. See N.Y. EDUC. LAW § 2590(c)(4) (McKinney Supp. 1999-2000).

338. See *Ambach v. Norwick*, 441 U.S. 68, 81-82 n.15 (1979).

of school district officers . . ."<sup>339</sup> New York does not have provisions for changing statutes by initiative or referendum.<sup>340</sup>

#### 4. New York City

As discussed above, noncitizens are free to vote in community school board elections and to serve on the school board throughout the state of New York.<sup>341</sup> The counsel to the drafting commission of the Charter of the City of New York, however, states that all other elections in the city are governed by the state Election Law, which currently requires national citizenship.<sup>342</sup> Adopted in 1989, the Charter refers to the "electors" or the election of City officials without specifying voter qualifications.<sup>343</sup> Nonetheless, statements by the counsel of the commission indicate that voter qualifications in New York City are set forth in the state Election Law.<sup>344</sup> Provisions for amending the Charter, upon the petition and vote of the electors of the city, are contained in Sections 40 and 41.<sup>345</sup>

#### 5. Texas

Enfranchisement of noncitizens in Texas would require a constitutional amendment, as the Texas Constitution explicitly requires U.S. citizenship. Article VI, Section 2 of the Texas Constitution provides that: "Every person . . . who shall have attained the age of 18 years and who shall be a citizen of the United States and who is a resident of this state shall be deemed a qualified elector . . ."<sup>346</sup> This definition of "qualified elector" applies to municipal elections as well, as provided by Section 3 of the Texas Constitution.<sup>347</sup> Similarly, Texas' Election Code states that a "qualified voter" must be a United States citizen.<sup>348</sup> A federal district court has found that the denial of the vote to aliens in the Texas Election Code is not unconstitutional.<sup>349</sup>

339. N.Y. EDUC. LAW § 2012 (Consol. 1998).

340. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 210, tbl.5.14.

341. See N.Y. EDUC. LAW § 2590(c).

342. See Shimmelman, *supra* note 5, at 23.

343. See, e.g., N.Y.C., N.Y., CITY CHARTER ch. 2, § 22 (1999); see also N.Y.C. CHARTER ch. 1, § 4 (1998).

344. See Shimmelman, *supra* note 5, at 23.

345. See N.Y.C. CHARTER ch. 2, §§ 40-41 (1999).

346. TEX. CONST. art. 6, § 2.

347. See TEX. CONST. art. 6, § 3 (stating that "[a]ll qualified electors of the State, as herein described, who reside within the limits of any city or corporate town, shall have the right to vote for Mayor and all other elective officers.").

348. See TEX. ELEC. CODE ANN. § 11.002 (West 1997).

349. See Texas Supporters of Workers World Party Presidential Candidates v.

The Texas Constitution can be amended by legislative referendum.<sup>350</sup> A legislative amendment requires a two-thirds vote in each house to approve the proposal and a majority vote for ratification.<sup>351</sup> There is no state provision for making changes to statutes by initiative or referendum.<sup>352</sup>

## 6. Florida

A constitutional amendment will also be required to give noncitizens the right to vote in Florida. Florida's Constitution expressly provides that qualified electors must be citizens of the United States: "Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered."<sup>353</sup> In *Barndollar v. Sunset Realty Corp.*,<sup>354</sup> the Supreme Court of Florida held that Article VI, Section 6 of the Florida Constitution, which provides that "elections in municipalities, shall . . . be provided by law,"<sup>355</sup> does not pertain to the qualifications of voters.<sup>356</sup> Rather, only electors as defined in the constitution may vote in municipal elections.<sup>357</sup> The City Charter of Miami expressly adopts all the general laws of the state relating to elections.<sup>358</sup>

The Florida Constitution can be amended by legislative referendum or by direct initiative.<sup>359</sup> A legislative amendment requires a three-fifths vote in each house to approve the proposal and a majority vote for ratification.<sup>360</sup> The number of signatures required on a proposal to amend the constitution by direct initiative must equal eight percent of the total votes cast in the state during the last presidential election and these must include eight percent of total votes cast in each of half of the congressional districts.<sup>361</sup> The amendment must then be passed by a majority

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Strake, 511 F. Supp. 149, 153 (S.D. Tex. 1981).

350. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 5 tbl.1.2.

351. See *id.*

352. See *id.* at 7 tbl.1.3.

353. FLA. CONST. art. 6, § 2.

354. 379 So. 2d 1278 (Fla. 1980).

355. FLA. CONST. art. 6, § 6.

356. See *Barndollar*, 379 So. 2d at 1280.

357. See *id.*

358. See MIAMI, FLA., CITY CHARTER § 16-4.

359. See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 5-6 tbls.1.2-1.3.

360. See *id.* at 5 tbl.1.2.

361. See *id.* at 7 tbl.1.3.

vote in a referendum.<sup>362</sup> Approved initiatives may be amended, but not vetoed or repealed; defeated initiatives may be refiled.<sup>363</sup>

### **Conclusion**

As American cities have become more ethnically diverse and immigrant populations across the United States continue to grow, the lack of political voice of those who are permanent residents should become an issue that rises to the forefront of our national consciousness. Granting permanent residents the right to vote in local elections is not only in keeping with the political history of the United States, but also with the true spirit of American democracy. It would also ensure that those who share the burden of responsibility in the community would have an opportunity to have a say in policy-making that impacts them. As the preceding discussion shows, the debate over the role noncitizens play in democracy at the grass roots will be shaped more by political than legal obstacles. Several communities across the country have already faced these obstacles and chosen to recognize the importance of giving noncitizens a voice at the local level. It is my hope that many more will do so.

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362. *See id.*

363. *See id.* at 216 tbl.5.18.