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# “WE ARE THE PEOPLE”: ALIEN SUFFRAGE IN GERMAN AND AMERICAN PERSPECTIVE

Gerald L. Neuman\*

## INTRODUCTION

The Gulf War and its aftermath have intermittently focused U.S. attention on the difficult path of democracy in Kuwait. Demands for powersharing have strong rhetorical appeal in this era of democratization, although in Kuwait they may actually represent the reassertion of a merchant oligarchy.<sup>1</sup> Yet even in the unlikely event that the government moves beyond powersharing to universal citizen suffrage irrespective of gender, a large proportion of Kuwait's population would still be left out of the political process. These excluded residents are aliens, usually “guestworkers” or refugees and their families, including many who were born in the country.<sup>2</sup> Prior to the war, they formed a majority of the population; since that time, retaliation against Palestinian residents has reduced their numbers.<sup>3</sup>

Western conceptions of democracy are quite equivocal about the political status of noncitizen residents. The historical, if not logical, interrelationships among the ideals of democracy, popular sovereignty and nationhood have made it seem legitimate to withhold voting rights from alien residents. This restriction of democracy sparks little political controversy in the United States at present, although academics

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1. See, e.g., John Kifner, *Power Struggle in Kuwait Blocks New Government*, N.Y. TIMES, Mar. 31, 1991, at A1.

2. See, e.g., *id.*; JACQUELINE S. ISMAEL, KUWAIT: SOCIAL CHANGE IN HISTORICAL PERSPECTIVE 117-18 (1982); Nasra M. Shah, *Foreign Workers in Kuwait: Implications for the Kuwaiti Labor Force*, 20 INT'L MIGRATION REV. 815 (1986). Although percentages differ from country to country, high proportions of resident aliens are typical of the small oil states of the Gulf. See, e.g., Georges Sabagh, *Immigrants in the Arab Gulf Countries: 'Sojourners' or 'Settlers'?*, in THE POLITICS OF ARAB INTEGRATION (Giacomo Luciani & Ghassan Salamé eds., 1988).

3. See Chris Hedges, *A Year Later, Kuwait Sinks into Malaise*, N.Y. TIMES, Aug. 2, 1991, at A1. The government reportedly plans to limit the use of foreign workers in the future so that Kuwaitis will no longer be a numerical minority. *Id.* at A6.

occasionally question it, and sometimes point out that aliens had full voting rights in many of the states until the 1920s.<sup>4</sup> In recent years, the more controversial issues have concerned the extension of this restriction to the exclusion of aliens from public employment, which has been defended on the same basis.<sup>5</sup> The status of alien residents is no doubt mitigated by the easy availability of naturalization in the United States, and by the conferral of citizenship on children born to alien parents within its territory — the *jus soli* principle. Nonetheless, alien suffrage exists in some U.S. municipalities, and alien suffrage may be reentering the political agenda in the wake of a well-publicized referendum victory in a Maryland town.<sup>6</sup>

In Western Europe, in contrast, alien suffrage has been a live political issue for decades. Resident aliens form a substantial percentage of the population of various nations, and proposals to improve their political rights have been actively considered at the national level, at the European Community level, and in the Council of Europe. Several countries have granted alien residents the right to vote in local elections, sometimes by constitutional amendment.

The question of alien suffrage has proven particularly controversial in the Federal Republic of Germany (FRG), which has a large population of former guestworkers and their descendants. A constitutional dispute took shape in terms that may seem counterintuitive to U.S. readers. Opponents of the proposals charged that legislation granting resident aliens the right to vote would be unconstitutional because it would violate the principle of popular sovereignty expressed in a constitutional declaration that “[a]ll state authority emanates from the people.” Far from a fringe position, this claim was vindicated by the FRG’s Federal Constitutional Court in the fall of 1990, when it invalidated statutes of two states granting certain resident aliens the right to vote in local elections.

By coincidence, the West German court’s deliberations on this controversy spanned the tumultuous year in which the residents of East Germany asserted their own popular sovereignty. What began as a democratization movement under the slogan “*Wir sind das Volk*” — “We are the People” — shifted into a call for national unification under the slogan “*Wir sind ein Volk*” — “We are one People.” Unfortunately, the initial consequence of economic merger with the wealthy neighbor was mass unemployment in the East; this in turn

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4. See *infra* notes 223-64 and accompanying text.

5. Compare, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) *with id.* at 447 (Blackmun, J., dissenting).

6. See *infra* notes 265, 267.

unleashed a violent refusal to share with resident foreigners that conveyed a different message: *Only we* are the people.<sup>7</sup>

The vulnerability of resident aliens to xenophobic outbreaks confirms their need for protection within the political process. Including them in the process would not necessarily cure the problem. But is even that partial solution barred by democratic principles? Or does the issue of alien suffrage illustrate a divergence between German and U.S. conceptions of democracy?

This article will explore the constitutional debate over alien suffrage in the FRG, both for its own interest and in order to compare it with understandings of alien suffrage in the United States. As the interdependence of national economies deepens and regional "common market" arrangements multiply, more nations (including the United States) may be called upon to rethink the question of alien suffrage. The thoroughness and the explicitness with which the German legal community has debated this issue has brought to the surface arguments and assumptions that remain latent in U.S. commentary on the political status of aliens. Thus, the German dispute and its resolution not only mark a stage in the evolution of nationalism and unification in Europe, but illuminate the place of aliens in political theory and legal thought.

## I. THE ALIEN SUFFRAGE MOVEMENT IN THE FEDERAL REPUBLIC OF GERMANY

This Part will give an account of the alien suffrage debate in the FRG. The first two sections (A and B) provide some historical and institutional background for understanding the vigorous argumentation in the German legal community on the constitutionality of alien suffrage. This argumentation is recounted in section C. I describe the Federal Constitutional Court's analysis in its twin decisions invalidating the alien suffrage laws in section D, and comment on the decisions' significance against the background of the preceding debate and other contemporary events in section E.

### A. *Bits of Background*

The movement for alien suffrage grew out of two linked phenomena in postwar Germany, the consolidation of the European Community and the long-term settlement of foreign guestworkers. Between 1961 and 1973, the FRG engaged in massive recruitment of foreign

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7. See, e.g., *Schon nahe am Pogrom*, DER SPIEGEL, Apr. 2, 1990, at 98; Stephen Kinzer, *A Wave of Attacks on Foreign Migrants Ignites German Fear*, N.Y. TIMES, Oct. 1, 1991, at A1.

workers, principally from Mediterranean countries.<sup>8</sup> By 1973, when recruitment from outside the European Community was halted, nearly four million aliens resided in the FRG.<sup>9</sup> Although many members of this population have since returned to their home countries, most have not, and their numbers have increased through births and through the immigration of absent family members.<sup>10</sup> Because German law makes nationality dependent on parentage and not on place of birth, the FRG's population now includes multiple generations of resident aliens.<sup>11</sup>

Officially, the FRG has viewed itself as "not a country of immigration."<sup>12</sup> Foreign labor was sought in the form of "guestworkers," who were expected to reside temporarily in the FRG and not to settle.<sup>13</sup> Unlike the United States, where workers who intend to reside indefinitely must usually seek permission for permanent residence, the FRG extended residence permits to new foreign workers in limited time increments, subject to discretionary renewal by alien control agencies.<sup>14</sup> This time-limited residence permit was the most common form of official permission to reside; under stricter qualifications an alien might eventually be granted a residence permit without time limit, or a more protective "residence entitlement."<sup>15</sup> Also unlike the United States, where nearly all permanent residents become eligible for naturalization as of right after five years, the FRG treated naturalization as an extraordinary privilege, to be granted or withheld in the discretion of the alien control agencies.<sup>16</sup> Ordinary guestworker families were dis-

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8. See, e.g., Hartmut Esser & Hermann Korte, *Federal Republic of Germany*, in *EUROPEAN IMMIGRATION POLICIES* 165, 170-72 (Tomas Hammar ed., 1985).

9. *Id.* at 171-73. Of the major sending countries, only Italy was an EEC member in 1973; Greece, Portugal, and Spain joined later, and Turkey and Yugoslavia are still nonmembers.

10. *Id.* at 173. The resident alien population was also substantially increased in the period since 1978 by an influx of asylum seekers. See Marilyn Hoskin & Roy C. Fitzgerald, *German Immigration Policy and Politics*, in *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY* 95, 104-05 (Michael C. LeMay ed., 1989).

11. See, e.g., Kay Hailbronner, *Citizenship and Nationhood in Germany*, in *IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* 67, 77 (William R. Brubaker ed., 1989).

12. See, e.g., Esser & Korte, *supra* note 7, at 189.

13. See, e.g., *id.* at 172-73, 179.

14. See Hoskin & Fitzgerald, *supra* note 9, at 100; Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 *N.Y.U. J. INT'L L. & POL.* 35, 41-42 (1990).

15. See Neuman, *supra* note 13, at 42-43. European Community nationals have more generous residence rights as a result of Community law, and are subject to a somewhat different regulatory regime. *Id.* at 45.

16. See Hailbronner, *supra* note 10, at 67-70; Neuman, *supra* note 13, at 44. Special rules govern naturalization of recognized asylees and spouses of German citizens, but these still preserve administrative discretion. See Hailbronner, *supra* note 10, at 70.

couraged from seeking naturalization during the 1970s and 1980s.<sup>17</sup>

The result of this process has been the *de facto* immigration of a large permanent population of aliens, whose relative size has been accentuated by the low birth rate among Germans.<sup>18</sup> Prior to the unification of Germany in October 1990,<sup>19</sup> resident aliens comprised more than seven percent of the population of the FRG,<sup>20</sup> and two or three times that percentage in most of the largest cities.<sup>21</sup> The living conditions of the alien population and their relations with the German population have long been regarded as serious social problems.<sup>22</sup> Cultural and religious differences have made the large Turkish population — by far the largest group, constituting one-third of the 4.5 million foreign residents<sup>23</sup> — particular targets of rejection and discrimination.<sup>24</sup> In this environment, alien suffrage has been praised as a means for the better “integration” of alien residents into German society as well as for increasing the responsiveness of government to their needs in education, housing, and social services.<sup>25</sup>

At the same time the FRG was coming to recognize the *de facto*

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17. See, e.g., Hailbronner, *supra* note 10, at 69-70; Hoskin & Fitzgerald, *supra* note 9, at 101. The new Aliens Act passed in 1990 creates certain windows of opportunity in which the former guestworkers and their children, and more generally aliens who have grown up in the FRG, are presumptively eligible for naturalization. Bertold Huber, *Das neue Ausländerrecht*, 9 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1113, 1121 (1990); Neuman, *supra* note 13, at 44 n.50.

18. See Esser & Korte, *supra* note 8, at 176. In using the expression “de facto immigration,” I do not mean to imply an unlawful status, but rather to reflect the fact that later developments belied the official expectation that the workers would remain in the FRG so long as they were needed yet would not settle there.

19. At least prior to unification, the resident alien population in East Germany was much lower. See Hanns Thomä-Venske, *Notizen zur Situation der Ausländer in der DDR*, 1990 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK [ZAR] 125, 126 (citing official estimate of roughly 200,000 resident aliens in East Germany). Alien suffrage in local elections was introduced in East Germany in March 1989, apparently in response to the enfranchisement of aliens in Hamburg and Schleswig-Holstein, and then was reenacted by the post-Communist government. See Zschalich, *Kommunales Wahlrecht für Ausländer — Erfahrungen und Probleme nach zwei Kommunalwahlen in der DDR*, 1990 ZAR 163. The German unification treaty specified that the continuation of alien suffrage in the new eastern states would depend on the outcome of the litigation then pending before the Federal Constitutional Court. See Sighart Lörler, *Das öffentliche Recht im Einigungsvertrag*, 10 NVwZ 133, 134 (1991).

20. See STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH 1990 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 59 (1990) (4.4891 million, or 7.3% of total population as of Dec. 31, 1988).

21. See DEUTSCHER STÄDTETAG, STATISTISCHES JAHRBUCH DEUTSCHER GEMEINDEN 36 (1988) (Dec. 31, 1987 figures). In order of population: West Berlin, 13.9%; Hamburg, 10.2%; Munich, 16.6%; Cologne, 15.6%; Essen, 6.4%; Frankfurt, 24.4%; Dortmund, 9.6%; Stuttgart, 18.7%; Düsseldorf, 16.9%; Bremen, 7.8%; Duisburg, 12.6%; Hannover, 10.5%. *Id.*

22. See, e.g., Esser & Korte, *supra* note 8, at 183, 190-98.

23. STATISTISCHES BUNDESAMT, *supra* note 20, at 59 (1990) (1.5237 million out of 4.4891 million as of December 31, 1988).

24. See, e.g., Esser & Korte, *supra* note 8, at 196, 200-01.

25. See, e.g., HELMUT RITTSTIEG, WAHLRECHT FÜR AUSLÄNDER 20-21 (1981).

immigration of the guestworkers, suffrage for a more limited category of aliens was being debated under the aegis of the European Economic Community ("European Community," or just "Community"). In the mid-1970s, political rights in municipal and other local elections were proposed under the rubric of "special rights" that Community members should grant to nationals of the other Community members residing in their territory.<sup>26</sup> Extension of the benefits of Community membership to "special rights" was seen as transcending a narrow economic view of the Community, and moving toward a political European Union.<sup>27</sup> Correspondingly, many doubted that the governing treaties gave Community institutions the authority to require such a grant of political rights, and maintained that an amendment or a separate treaty would be required.<sup>28</sup> In any case, the proposal was not sufficiently acceptable to the governments of the Member States to gain the approval of the Council.<sup>29</sup> The principal opposition has come from the countries with the highest proportion of alien residents, to wit, the United Kingdom, Belgium, Luxembourg, France, and Germany.<sup>30</sup>

Some Member States, however, were willing to enfranchise both Community and non-Community nationals. Ireland already permitted aliens ordinarily resident for six months to vote and stand for office in local elections regardless of nationality.<sup>31</sup> In 1981, Denmark extended similar rights to all aliens resident for three years.<sup>32</sup> The Netherlands amended its Constitution in order to remove a citizenship restriction, and then in 1983 extended these rights to aliens after five years' residence.<sup>33</sup>

Meanwhile, the European Parliament and the Commission maintained their interest in political rights for all Community nationals in

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26. See *Towards European Citizenship*, BULL. EC, Supp. 7/75, at 25-32 (1975) [hereinafter *1975 Report*]; GUIDO VAN DEN BERGHE, POLITICAL RIGHTS FOR EUROPEAN CITIZENS 31-36 (1982).

27. *1975 Report*, *supra* note 26, at 25, 28; VAN DEN BERGHE, *supra* note 26, at 35.

28. *1975 Report*, *supra* note 26, at 31; *Voting Rights in Local Elections for Community Nationals*, BULL. EC, Supp. 7/86, at 11 (1986) [hereinafter *1986 Report*].

29. *1986 Report*, *supra* note 28, at 11-12. The Council, composed of delegates of Member State governments, is the crucial repository of legislative power in the Community. See P.S.R.F. MATHUSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 34-52 (5th ed. 1990).

30. See *1986 Report*, *supra* note 28, at 15-16, 19.

31. *Id.* at 29.

32. *Id.* at 29-30. As a first step, resident nationals of the Nordic Union States — Finland, Iceland, Norway, and Sweden — had been granted the local franchise in 1977. *Id.* Sweden had permitted all foreign nationals to vote and run for office in local elections since 1975. See generally Ko-Chih R. Tung, *Voting Rights for Alien Residents — Who Wants It?*, 19 INT'L MIGRATION REV. 451 (1985) (analyzing the Swedish experience).

33. *1986 Report*, *supra* note 28, at 30-31.

local elections.<sup>34</sup> With the initiation of direct election of the European Parliament, this question became intertwined with the question of where Community nationals who resided outside their home States could vote in the election of the European Parliament itself.<sup>35</sup> The Commission invoked not only the goal of a "People's Europe," but also the need to protect Community nationals from losing their political rights when they exercise the rights of free movement and establishment within the Community, and to remove an "obstacle" to freedom of movement.<sup>36</sup> From this perspective, the Commission argued that conferral of voting rights was already within the implied powers of the Community.<sup>37</sup> This broader view of the Community's power received at least rhetorical reinforcement by the adoption of the Single European Act in 1986, whose preamble stated a determination "to work together to promote democracy."<sup>38</sup>

In June 1988, the Commission finally submitted a proposed Directive that would require Member States to permit nationals of other Member States to vote and to stand for office in local elections.<sup>39</sup> The European Parliament endorsed the Directive, while proposing various modifications,<sup>40</sup> some of which the Commission accepted.<sup>41</sup> The Directive describes itself as "contributing to respect for democratic rights," which it does within limits: it would apply only to local elections<sup>42</sup> and only to nationals of the Community's Member States.<sup>43</sup>

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34. Despite its name, the European Parliament plays only a secondary role in the enactment of Community legislation; it is, however, a political body directly elected by the voters of the Member States. See MATHUSEN, *supra* note 29, at 16-23. The Commission is the executive branch of the Community, and also has responsibility to draft legislation for submission to the Council. *Id.* at 52-53.

35. 1986 Report, *supra* note 28, at 42-44; VAN DEN BERGHE, *supra* note 26, at 187.

36. See 1986 Report, *supra* note 28, at 8; cf. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating lengthy durational residence qualification for voting in order to protect right of interstate travel).

37. 1986 Report, *supra* note 28, at 8, 12.

38. *Single European Act*, BULL. EC, Supp. 2/86, at 5 (1986); *A People's Europe*, BULL. EC, Supp. 2/88, at 29 (1988). On the other hand, a Danish proposal to amend the EEC Treaty to mandate local voting rights was not incorporated into the Single European Act. See 1986 Report, *supra* note 28, at 13-14.

39. Proposal for a Council Directive on voting rights for Community nationals in local elections in their Member State of residence, 1988 O.J. (C 246) 3.

40. See Texts adopted by the European Parliament, Mar. 1989, at 64-68.

41. See Amended proposal for a Council Directive on voting rights for Community nationals in local elections in their Member State of residence, 1990 O.J. (C 290) 4 [hereinafter *Amended Proposal*].

42. See *id.* art. 2. The Directive would also authorize Member States to exclude nonnationals from standing for offices "which involve duties extending beyond the municipality," such as Mayor, Deputy Mayor, or the equivalent. *Id.* pmb. & art. 7.

43. *Id.* art. 1(1). Moreover, the transition rules include a Luxembourg exception, postponing political rights in States where nationals of other Member States exceed 20% of total population. *Id.* art. 8.



Since that time, the proposed Directive has languished before the Council.<sup>44</sup> It remains to be seen whether a climate more favorable to its adoption will develop. The reigning conservative parties in the FRG have strongly opposed the concept.<sup>45</sup>

### B. Some Quick Definitions

1. "*Local.*" The term "local" will be used in this article to refer to units of government below the federal and state levels. In German contexts, "local" is usually a translation of the adjective "*kommunal*," which denotes both the counties (*Kreisen*) and the cities and towns (*Gemeinden*). As will become clear, these units have a special constitutional status in the FRG, unlike such submunicipal units as the boroughs (*Bezirke*) of Hamburg, which I will nonetheless also call "local," in keeping with normal English usage. The resulting imprecision is nicely captured in the European Community's definition of "local elections" in its voting proposal: "*Local elections*' shall mean elections which are defined as such by the Member States."<sup>46</sup>

2. "*Basic Law.*" The 1949 Constitution of the Federal Republic of Germany, as amended, is known as the *Grundgesetz* (GG), or Basic Law.<sup>47</sup> It expressly requires the creation of a Federal Constitutional Court (*Bundesverfassungsgericht*), whose duties include judicial review of the constitutionality of legislation and other exercises of public authority.<sup>48</sup> Under current law, the Court consists of two panels, or "Senates," of eight judges each, with jurisdiction over different classes of cases.<sup>49</sup> This Court is the only court in the FRG with the authority

44. See Answers to Written Questions, No. 395/90, 1990 O.J. (C 171) 42 ("the Presidency . . . cannot, at this juncture, anticipate whether it will prove possible for it to be adopted soon.").

45. See *infra* note 164 and accompanying text; DAS KOMMUNALWAHLRECHT FÜR AUSLÄNDER 278 (Klaus Sieveking et al. eds., 1989) (reprinting official position of Chancellor Helmut Kohl's party, the Christian Democratic Union).

46. Amended Proposal, *supra* note 41, art. 1(2).

47. See generally DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1989). An official translation of the text as it stood prior to unification appears, for example, in ULRICH KARPEN, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1988), and the amendments made in implementation of the Unification Treaty are translated in Federal Republic of Germany-German Democratic Republic: Treaty on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., 30 I.L.M. 457, 464-69 (1991). In quoting the Basic Law, this article will generally follow the official translation, modifying it only on a few occasions where it leaves German words untranslated.

48. GRUNDGESETZ [Constitution] [hereinafter GG] arts. 92, 93 (F.R.G.); KOMMERS, *supra* note 47, at 11-17.

49. KOMMERS, *supra* note 47, at 19-21. The judges are appointed for nonrenewable terms of 12 years. *Id.* at 24. The judges of each Senate are also divided into three-judge Chambers (*Kammern*) that dispose summarily of cases not warranting the attention of the full Senate. *Id.* at 21-23.

to find a state or federal statute violative of the Basic Law.<sup>50</sup> Understandably, it plays a predominant role in the development of German constitutional law.

3. *A "Citizen" and a "German."* Use of the nouns "citizen" and "German" in relation to the FRG creates surprising difficulties.<sup>51</sup> "German" is a defined term in the Basic Law, where it includes not only persons who are German nationals,<sup>52</sup> but also a category of "Germans without German citizenship," also known as "Germans within the meaning of Art. 116(1) GG," or more concisely as "status-Germans."<sup>53</sup> These are ethnic German refugees and their families, to whom the Basic Law grants a status intermediate between citizens and aliens.<sup>54</sup> This status was originally created in response to the East European countries' expulsion of their ethnically German minorities, such as the Sudeten-Germans, in the wake of the Second World War.<sup>55</sup> The status-Germans enjoy nearly all the constitutional rights of German citizenship without actually changing their nationality.<sup>56</sup>

50. See *id.* at 3-4. Other courts may reject a constitutional challenge to a statute, but if they are inclined to hold that a statute violates the Basic Law, they must suspend their proceedings and refer the case to the Federal Constitutional Court. *Id.* at 14-15. Other courts may, however, invalidate administrative regulations, local ordinances, and certain "preconstitutional" statutes enacted before 1949. *Id.* at 59.

51. From the perspective of technical accuracy, translation problems abound, although readers who are only superficially acquainted with U.S. nationality law may prefer to ignore this footnote. An individual's membership in a Nation State, denoted "nationality" in international law, is called *Staatsangehörigkeit* in German; the most precise English term for this is also "nationality," although the term "citizenship" is often used when attention is not being focused on the fact that the United States has noncitizen nationals. See 8 U.S.C. §§ 1101(a)(22), 1408 (1988). *Staatsangehörigkeit* is often translated as "citizenship," and I will not resist this custom, despite the ambiguity it creates. Often the best translation of "citizen," however, is *Staatsbürger*, since both connote full membership in the *political* community. Confusion is enhanced by the fact that in the United States today, nationality is the broader category, while in the FRG, as explained in the text immediately following, citizenship is the broader category.

52. Even this category has its subtleties because, with an eye to future unification, the FRG never recognized East Germany as a foreign state, and West German law always regarded the East Germans as sharing a common citizenship with its own citizens. See, e.g., Hailbronner, *supra* note 11, at 72-73.

53. See KAY HAILBRONNER, *AUSLÄNDERRECHT: EIN HANDBUCH* 40 (2d ed. 1989); Hailbronner, *supra* note 11, at 73. This article will use the concise term.

54. GG art. 116(1).

Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (*Volkszugehörigkeit*) or as the spouse or descendant of such person. *Id.*; see also Hailbronner, *supra* note 11, at 73.

55. See, e.g., Hailbronner, *supra* note 11, at 73. The category has since been used to accommodate voluntary migration of ethnic Germans from Eastern Europe and the Soviet Union. *Id.*

56. The purpose of the definition in the Basic Law was to extend to the status-Germans the rights that are expressly framed as rights of "Germans" rather than rights of "persons" in the Basic Law. These include freedom of assembly, freedom of association, the right to resist subversion of the constitutional order, the right to choose a profession, access to public employment, freedom of internal travel, equal rights in all the states, and freedom from extradition. See GG

They have a statutory right to naturalization, but for most purposes are not treated as aliens even if they do not exercise it, and they are eligible to vote and run for office. Terms like "citizen" are often used broadly to include status-Germans; context may make clear the intended coverage, but not always.

### C. *The Juristic Debate on Alien Suffrage*

The debate on voting rights for long-term resident aliens in West Germany has been multifaceted. This brief account will focus primarily on the constitutional status of alien suffrage in local elections and in elections for the federal legislature (*Bundestag*).<sup>57</sup> Jurists staked out their positions along a range of options, contending that alien suffrage in a particular category of elections was constitutionally required, within legislative discretion, constitutionally impermissible, or so contrary to basic constitutional principles that the constitution could not even be amended to permit it.<sup>58</sup> The actual proposals they discussed also varied in terms of the personal characteristics of the enfranchised aliens,<sup>59</sup> limiting the franchise to nationals of particular foreign coun-

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arts. 8, 9, 11, 12, 16, 20 & 33; Neuman, *supra* note 14, at 78-79. Judicial interpretation treats aliens as possessing weaker analogues of some of these rights, as part of the right of persons to free development of the personality under Article 2. *Id.*

57. It was generally agreed that aliens *could* vote in elections for purely advisory bodies, and a number of German cities instituted Alien Advisory Councils (*Ausländerbeiräte*) elected by aliens alone. See, e.g., Lutz Hoffmann, *Partizipation auf kommunaler Ebene: Ausländerbeiräte auf dem Weg zu Volksgruppenvertretungen?*, in *DAS KOMMUNALWAHLRECHT FÜR AUSLÄNDER* *supra* note 45, at 43 (Klaus Sieveking et al. eds., 1989). One could also analyze alien participation in trade unions, universities, and political parties. See, e.g., CHRISTOPH VON KATTE, *DIE MITGLIEDSCHAFT VON FREMDEN IN POLITISCHEN PARTEIEN DER BUNDESREPUBLIK DEUTSCHLAND: ZUGLEICH EINE DARSTELLUNG DER AMERIKANISCHEN RECHTSLAGE* (Schriften zum öffentlichen Recht Band 374, 1980) (arguing that the Basic Law requires exclusion of aliens from membership in political parties).

58. The sentence in the text leaves out a temporal dimension; some authors contended that the Basic Law could not presently be amended to grant voting rights to European Community nationals, but that such a grant might later become permissible after further progress toward European integration. See, e.g., MANFRED BIRKENHEIER, *WAHLRECHT FÜR AUSLÄNDER: ZUGLEICH EIN BEITRAG ZUM VOLKSBEGRIFF DES GRUNDGESETZES* 93-96 (Schriften zum öffentlichen Recht Band 287, 1976); Franz Ruland, *Forum: Wahlrecht für Ausländer?*, *JURISTISCHE SCHULUNG* 9, 12 (1975); Gunther Schwerdtfeger, *Welche rechtliche Vorkehrungen empfehlen sich, um die Rechtsstellung von Ausländern in der Bundesrepublik Deutschland angemessen zu gestalten? (Teilgutachten Ausländerintegration)*, in *1 VERHANDLUNGEN DES DREIUNDFÜNFZIGSTEN DEUTSCHEN JURISTENTAGES A107* (1980); *infra* notes 147-49 and accompanying text. I will also gloss over the question of which legislature (federal or state) is granting the voting rights; the additional considerations of federalism and limitations under different state constitutions are of less general interest. *But see* Helmut Quaritsch, *Staatsangehörigkeit und Wahlrecht*, *DIE ÖFFENTLICHE VERWALTUNG [DÖV]* 1, 4 (1983) (arguing that a state would violate interstate comity if it granted aliens voting rights, thus putting pressure on other states to do likewise); Erik Heyen, *Verfassungsaspekte einer Beteiligung von Ausländern an der Hamburger Bezirksversammlungswahl*, 41 *DÖV* 185, 193 (1988) (arguing a similar theory).

59. The characteristics typically involved length of residence, immigration status, or ability to speak German. See, e.g., RITTSTIEG, *supra* note 25, at 65-68; CHRISTOPHE SASSE & OTTO E.

tries,<sup>60</sup> and granting the right to run for office along with the right to vote,<sup>61</sup> but my description will be complicated enough without keeping track of these refinements.

In broad terms, the controversy centered on the meaning to be attributed to two key principles, democracy and popular sovereignty. These principles find express statement in Article 20 of the Basic Law, which contains both a declaration that “[t]he Federal Republic of Germany is a *democratic* and social federal state,”<sup>62</sup> and a provision known as the popular sovereignty clause: “All state authority emanates from the people.”<sup>63</sup>

Alien suffrage could be consistent with rule by the people to the extent that rule by the people need not mean rule *solely* by the people, or that “the people” could include the enfranchised aliens. The term translated as “the people,” *das Volk*, has a somewhat different range of meanings in German than in English.<sup>64</sup> *Volk* can be rendered either as

KEMPEN, KOMMUNALWAHLRECHT FÜR AUSLÄNDER? 53-55 (1974); Jörg Sennewald, *Kommunalwahlrecht für Ausländer?*, 1981 VERWALTUNGSRUNDSCHAU 77, 83.

60. Usually either all nations or only nations that belong to the European Community, but possibly limited in other ways such as nations that give resident Germans similar rights. See, e.g., DIETMAR BREER, DIE MITWIRKUNG VON AUSLÄNDERN AN DER POLITISCHEN WILLENSBILDUNG IN DER BUNDESREPUBLIK DEUTSCHLAND DURCH GEWÄHRUNG DES WAHLRECHTS, INSBESONDERE DES KOMMUNALWAHLRECHTS 138-39 (Schriften zum öffentlichen Recht Band 422, 1982); SASSE & KEMPEN, *supra* note 59, at 54-55, 74; T. Oppermann, *Sinn und Grenzen einer EG-Angehörigkeit, in STAAT UND VÖLKERRECHTSORDNUNG: FESTSCHRIFT FÜR KARL DOEHRING* 713, 722-23 (Kay Hailbronner et al. eds., 1989); Manfred Zuleeg, *Die Vereinbarkeit des Kommunalwahlrechts für Ausländer mit dem deutschen Verfassungsrecht, in AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK IN EUROPA* 153, 176-78 (Manfred Zuleeg ed., 1987).

In the end, however, the Federal Constitutional Court held that the status-Germans were the only class of persons lacking German nationality who could be permitted to vote in local government elections. See *infra* notes 168-88 and accompanying text.

61. German terminology treats the right to run for office as a “passive voting right,” in contrast with the “active” right to cast a vote. Many writers viewed these two rights as going hand in hand, e.g., BIRKENHEIER, *supra* note 58, at 86; KARL A. LAMERS, REPRÄSENTATION UND INTEGRATION DER AUSLÄNDER IN DER BUNDESREPUBLIK DEUTSCHLAND UNTER BESONDERER BERÜCKSICHTIGUNG DES WAHLRECHTS 44 (Schriften zum öffentlichen Recht Band 328, 1977); Ruland, *supra* note 58, at 9, 13; Sennewald, *supra* note 59, at 83, but some regarded alien candidates as even more shocking than alien voters, e.g., Karl Doehring, *Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland*, 32 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [VV DSTRL] 7, 36 (1974). Conversely, some authors argued that aliens could be permitted to run for office in contexts where they could not vote, since popular sovereignty entailed the right of the citizens to choose whomever they pleased. See Klaus-Peter Dolde, *Zur Beteiligung von Ausländern am politischen Willensbildungsprozess*, 26 DÖV 370, 372 (1973); Hilbert Freiherr von Löhneysen, *Kommunalwahlrecht für Ausländer*, 34 DÖV 330, 331 (1981).

62. GG art. 20(1) (emphasis added).

63. GG art. 20(2)(1) (“Alle Staatsgewalt geht vom Volke aus.”) The paragraph continues: “It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.” GG art. 20(2)(2).

64. The word “*Volk*” evokes in some American readers a strong negative reaction, for they associate it with the worst excesses of German nationalism. In some contexts, German speakers share this reaction, and the derived adjective *völkisch* has negative connotations in political dis-

"people" or as "nation,"<sup>65</sup> and is more frequently used in the latter sense than is the English term "people." Moreover, traditional interpretations of the Basic Law ascribe slightly different referents to several of the appearances of the term *Volk* in its provisions.<sup>66</sup> And since several of the provisions refer specifically to the German people (*das deutsche Volk*),<sup>67</sup> the question arises whether the noun without the adjective should be interpreted more broadly.<sup>68</sup>

The argument that the Basic Law could not be amended to provide for alien suffrage may ring strange to American ears.<sup>69</sup> But German constitutional doctrine highlights the notion of an unconstitutional constitutional amendment. Article 79 of the Basic Law, which defines the amendment process, expressly forbids amendments "affecting the division of the Federation into states, the participation on principle of the states in legislation, or the basic principles laid down in Articles 1 and 20."<sup>70</sup> Whether this prohibition entrenches an exclusion of aliens

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course. Other derivatives have positive, even pacific connotations, such as *Völkerrecht*, the *ius gentium*, or international law. Readers should not assume the worst whenever the term appears.

65. Klaus Stern in his *Staatsrecht* notes a range of meaning for *Volk* in political discourse, including: the mob, the unpropertied masses, those outside the nobility; the nation in the sense of a group with common descent and language, possibly living in more than one country; the "ruled," meaning all the subjects of the State; all the people to be found within the State; the electorate under current voting laws; the historical continuity of all the past, present, and future members of the State; and the State itself. 2 KLAUS STERN, *STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND* 5-6 (1980) (citing J. HELD, *SYSTEM DES VERFASSUNGSRECHTS DER MONARCHISCHEN STAATEN DEUTSCHLANDS, ERSTER TEIL* (1856)).

66. See, e.g., 2 STERN, *supra* note 65, at 24-25; Rolf Grawert, *Staatsvolk und Staatsangehörigkeit*, in 1 *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 663, 673-74 (Josef Isensee & Paul Kirchhoff eds., 1987) [hereinafter *HANDBUCH DES STAATSRECHTS*]; Roman Herzog, *Art. 20*, in MAUNZ-DÜRIG, *GRUNDGESETZ KOMMENTAR* 34 n.1.

67. See, e.g., GG pmb., arts. 1, 56 & 146.

68. See, e.g., BREER, *supra* note 60, at 68-69 (discussing but rejecting this interpretation).

69. It should not, however, given that Article V of the U.S. Constitution purports to outlaw three kinds of amendments. The one prohibition that still has contemporary relevance forbids an amendment that would involuntarily deprive a state of its equal representation in the Senate. The U.S. literature also contains occasional arguments for additional, implied limitations on the amending power. See, e.g., Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980). Opponents of suffrage for women and for black men have invoked both the concept of implied limitations and a strained reading of the entrenched right to equal representation in the Senate as prohibiting amendments that tamper with "the people" by extending the electorate of a nonconsenting state. See, e.g., *Leser v. Garnett*, 258 U.S. 130 (1922); G.S. Brown, *The Nineteenth Amendment*, 8 VA. L. REV. 237 (1922); Arthur W. Machen, *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910); William L. Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1 (1920); see also CLEMENT E. VOSE, *CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900*, at 22-62 (1972) (describing activities of Marbury and his circle). In a rather different vein, Akhil Amar has recently suggested other implied limitations that might be derived from the concept of popular sovereignty. Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1045 n.1 (1989).

70. GG art. 79(3). Article 1 declares human dignity inviolable and acknowledges inalienable human rights; Article 20 declares basic principles of state organization. By its wording and its predominant interpretation, Article 79(3) restricts only amendments of the constitution itself, not the content of a future superseding constitution adopted by the German people in accordance

from the electorate was also an issue in the alien suffrage debate.

## 1. Pro-Suffrage Arguments

### a. Global Considerations

The strongest proponents of alien suffrage maintained that the Federal Republic could not live up to its own constitutional principles without extending rights of political participation to long-term resident aliens.<sup>71</sup> They argued that the restriction of the franchise to citizens reflected a defective understanding of "democracy." Democracy rests on the human right of self-determination.<sup>72</sup> Democracy means rule by the people, in the sense of those subject to the government's commands.<sup>73</sup> That group includes the entire resident population, not merely those with a particular nationality.<sup>74</sup>

The proponents of alien suffrage generally conceded that the authors of the Basic Law expected that the franchise would be limited to Germans.<sup>75</sup> The original scheme of rights under the Basic Law includes express guarantees of equal access to public office, freedom of association, and freedom of assembly, all for Germans only.<sup>76</sup> An amendment in 1968 added an express guarantee of the right to resist subversion of the constitutional order, again guaranteed only to Germans.<sup>77</sup> Nonetheless, the provisions of the Basic Law that protect

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with Article 146. 1 KLAUS STERN, STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 167, 176 (1977).

In fact, the German conception of unconstitutional constitutional provisions goes further than Article 79(3). In an early decision the Federal Constitutional Court accepted the theoretical possibility that even an original provision of the Basic Law could transgress principles of substantive justice to such an unbearable degree that it must be rejected as "unconstitutional." Judgment of Dec. 18, 1953, Bundesverfassungsgericht [Constitutional Court], 3 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 225 (F.R.G.).

71. See, e.g., Brun-Otto Bryde, *Ausländerwahlrecht und grundgesetzliche Demokratie*, 44 JURISTENZEITUNG 257 (1989); Götz Frank, *Ausländerwahlrecht und Rechtsstellung der Kommune*, 23 KRITISCHE JUSTIZ 290, 298 (1990); Zuleeg, *supra* note 60, at 157-58.

72. See, e.g., Bryde, *supra* note 71, at 258; Frank, *supra* note 71, at 298; Zuleeg, *supra* note 60, at 158.

73. See, e.g., RITTSTIEG, *supra* note 25, at 60; Bryde, *supra* note 71, at 257-58; Frank, *supra* note 71, at 298-99; Manfred Zuleeg, *Einwanderungsland Bundesrepublik Deutschland*, 35 JURISTENZEITUNG 425, 430 (1980).

74. RITTSTIEG, *supra* note 25, at 60; Bryde, *supra* note 71, at 258; Frank, *supra* note 71, at 298-99; Manfred Zuleeg, *Grundrechte für Ausländer: Bewährungsprobe des Verfassungsrechts*, 89 DEUTSCHES VERWALTUNGSBLATT [DVBL] 341, 347-48 (1974).

75. See, e.g., RITTSTIEG, *supra* note 25, at 63-64; Zuleeg, *supra* note 73, at 430; Hans Meyer, *Wahlgrundsätze und Wahlverfahren*, in 2 HANDBUCH DES STAATSRECHTS, *supra* note 66, at 269, 273.

76. GG arts. 33(2), 9(1) & 8(1) (respectively). Similarly, an interstate guarantee of equal civic rights applies only to Germans. GG art. 33(1).

77. GG art. 20(4). This right of resistance reflects in part the traditional right of the people to resist subversion of the constitution by the rulers, but also includes a right to resist subversion of the constitution "from below," by revolutionary actors. 2 STERN, *supra* note 65, at § 57.

the right to vote do not explicitly frame it as a right of Germans, but rather state that the people must be represented by means of "general, direct, free, equal and secret elections."<sup>78</sup> The Basic Law contains no unambiguous prohibition on extension of the franchise to non-Germans.

The proponents of alien suffrage argued that the conditions justifying the assumption that only Germans would vote were transformed by the conversion of West Germany into a *de facto* country of immigration.<sup>79</sup> As a result of this immigration, resident aliens comprised more than seven percent of the population of West Germany, and more than twenty percent of the population of some cities. Excluding so large a portion of the population from political participation, it was argued, undermined Germany's effort to build a democratic society.<sup>80</sup> Under these circumstances, the ambiguity of the reference in Article 20 to the "people" should permit a reinterpretation in favor of alien suffrage.<sup>81</sup>

Some even argued that alien suffrage was constitutionally required by these changed circumstances.<sup>82</sup> Resident aliens held a highly vulnerable position in German society, being dependent on discretionary public policies for employment, housing, education, and even the bare right to remain.<sup>83</sup> Without voting rights, resident aliens were powerless to ensure government attention to their needs.<sup>84</sup> A broad reading of the democracy principle was therefore reinforced by the "principle of social justice," which imposed on the State a constitutional goal of intervention to redress extreme social inequality.<sup>85</sup>

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78. GG arts. 28(1) (for state and local elections) & 38(1) (for federal elections).

79. See *supra* notes 12-25 and accompanying text.

80. See, e.g., Bryde, *supra* note 71, at 260; Zuleeg, *supra* note 60, at 185.

81. See, e.g., RITTSTIEG, *supra* note 25, at 60-61; Frank, *supra* note 71, at 297-99; Fritz Franz, *Volkssouveränität contra Demokratie?*, in INTEGRATION OHNE PARTICIPATION? 97, 105-06 (Ulrich O. Sievering ed., 1981); Meyer, *supra* note 75, at 273-74; Zuleeg, *supra* note 73, at 430-31.

82. See Ekkehart Stein, *Demokratie in 1 KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* 1271 (Luchterhand 1984); Manfred Zuleeg, *Menschen zweiter Klasse?*, 26 DÖV 361, 370 (1973); Wolfgang Roters, *Art. 28*, in 2 INGO VON MÜNCH, *GRUNDGESETZ-KOMMENTAR* 207, 209 (2d ed. 1983) (at local level only). The leading advocate of the constitutional necessity of alien suffrage was Professor Manfred Zuleeg, now a Justice of the European Community's Court of Justice. He maintained that the Basic Law required that voting rights at the federal, state and local levels eventually be afforded to long-term resident aliens, but he approved experimentation with the local franchise as the first stage in a progressive extension. See Zuleeg, *supra* note 74, at 349; Zuleeg, *supra* note 60, at 172-75.

83. Zuleeg, *supra* note 74, at 347.

84. *Id.*

85. Zuleeg, *supra* note 60, at 160. The "principle of social justice" (*Sozialstaatsprinzip*) rests on the declaration in Article 20 that the Federal Republic is a "social federal state." While not judicially enforceable as such, it places obligations on the legislature, and also affects the interpre-

Another arguably relevant feature of the Basic Law was its effort to transcend the traditional conception of the self-enclosed sovereign State. The Preamble to the Basic Law speaks of a "resolve . . . to serve the peace of the world as an equal partner in a united Europe," and to that end Article 24 authorizes the Federal Republic to transfer sovereign powers to transnational institutions.<sup>86</sup> The most prominent recipient of an Article 24 transfer is the European Community.<sup>87</sup> Arguably, then, admission of resident aliens to the electorate would be consistent with the Basic Law's conception of an "open State."<sup>88</sup> This might be especially true if the expansion of the electorate were limited to European Community nationals.<sup>89</sup> Some authors viewed the Basic Law as facilitating the transition from national citizenship to a true European citizenship,<sup>90</sup> or more broadly as capable of transcending outdated notions of nationality.<sup>91</sup>

Moreover, some proponents emphasized that, in one sense, alien suffrage was already a reality in Germany. The category of status-Germans under Article 116 included ethnic Germans who lacked German nationality and even their alien spouses of whatever origin. These noncitizens were not treated as aliens for immigration purposes<sup>92</sup> but their enfranchisement punctured many of the theoretical arguments against alien suffrage.<sup>93</sup> (Most opponents, however, shrugged off the

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tation of other constitutional provisions. See generally KOMMERS, *supra* note 47, at 41-42; Kunig, *The Principle of Social Justice*, in KARPEN, *supra* note 47, at 187.

86. GG pmb. & art. 24(1).

87. 1 STERN, *supra* note 70, at 381-83.

88. Frank, *supra* note 71, at 295-96; cf. Zuleeg, *supra* note 60, at 164.

89. See, e.g., SASSE & KEMPEN, *supra* note 59, at 56-57 (especially for European Community nationals); Oppermann, *supra* note 60, at 722-23 (European Community nationals only); Zuleeg, *supra* note 60, at 176-78 (starting with European Community nationals). A few aspects of the opposing view are discussed *infra* notes 147-49 and accompanying text. I will not enter into the complexities of the German debate over the European Community's jurisdiction to tamper with voting rules in Member States, the constitutionality from the German perspective of an agreement to confer such authority on the European Community, or the consequences of any possible unconstitutionality. See, e.g., *id.* at 182; SABINE NIEDERMAYER-KRAUSS, KOMMUNALWAHLRECHT FÜR AUSLÄNDER UND ERLEICHTERUNG DER EINBÜRGERUNG 122-94 (1989); Karl Doehring, *Nationales Kommunalwahlrecht für europäische Ausländer?*, in EUROPAISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT 109-11 (Wilhelm G. Grewe et al. eds., 1981); Ralf Jahn & Norbert K. Riedel, *Gemeinschaftsrechtliche Einführung eines kommunalen Wahlrechts für EG-Ausländer und innerstaatliches Verfassungsrecht*, 8 NVWZ 716 (1989); Ulrich Karpen, *Kommunalwahlrecht für Ausländer*, 42 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1012, 1016 (1989); Alexander Schink, *Kommunalwahlrecht für Ausländer?*, 103 DVBL 417, 426 (1988).

90. See, e.g., Oppermann, *supra* note 60, at 722-24; Zuleeg, *supra* note 60, at 176-77.

91. RITTSTIEG, *supra* note 25, at 57-58.

92. Section 1(2) of the Aliens Act of 1965 defined "alien" as a person who was not a German within the meaning of Article 116 of the Basic Law, thus assimilating the status-Germans to citizens. Ausländergesetz § 1(2) (1965).

93. See, e.g., RITTSTIEG, *supra* note 25, at 53-54; Meyer, *supra* note 75, at 272; Zuleeg, *supra* note 60, at 155-56.



status-Germans as a historically contingent, narrow exception.)<sup>94</sup>

### b. Local Considerations

Some commentators found the arguments for alien suffrage more persuasive at the local level than at the national level. It was possible to accept the premise of the fundamentally different relationship that citizens and resident aliens had to the national government,<sup>95</sup> and yet to view them as similarly situated in relation to local government.<sup>96</sup> The participation of the state governments in federal lawmaking through the Federal Council (*Bundesrat*),<sup>97</sup> however, made reservations about alien suffrage at the national level equally applicable to the election of the state legislatures.<sup>98</sup>

The argument for alien voting on the local level alone drew further support from a characterization of local self-government as differing in kind from the self-government of the federation and of the states in German federalism. Two variants of this argument were put forward. Both of them seized on the hybrid character of local government authority, and they emphasized opposing elements. The more popular variant emphasized the agency relationship between local government and the state.<sup>99</sup> It characterized the authority of the federation and the states as original State authority, directly resting on the grant of power from the people, in opposition to the authority of local self-governing bodies, which was derivative, delegated from the states. According to this theory, local elections do not provide the source of

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94. See, e.g., BIRKENHEIER, *supra* note 58, at 73; Karpen, *supra* note 89, at 1014; Quaritsch, *supra* note 58, at 9; Hans Heinrich Rupp, *Wahlrecht für Ausländer?*, 22 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 363, 365 (1989). I cannot resist adding my personal view that even a historically contingent, narrow exception creates severe difficulties for the claim that a nationality qualification is so deeply rooted in the popular sovereignty clause that the Basic Law could not be amended to permit alien suffrage.

95. See *infra* notes 117-24 and accompanying text.

96. See, e.g., BREER, *supra* note 60, at 110, 125; Joachim Henkel, *Politische Integration und Repräsentation ausländischer Arbeitnehmer in der Bundesrepublik Deutschland*, 5 ZEITSCHRIFT FÜR PARLAMENTSFragen 91, 107, 114 (1974); Schink, *supra* note 89, at 422-23, 426; Christian Tomuschat, *Die politischen Rechte der Gastarbeiter*, in GASTARBEITER IN GESELLSCHAFT UND RECHT 80, 85-86, 98-99 (Tuğrul Ansay & Volkmar Gessner eds., 1974).

97. The Federal Council consists of representatives of the state governments, bound by their instructions. Among its other powers, its approval is required for a wide variety of laws affecting the states, and it has advisory and suspensive functions regarding all other legislation. GG arts. 76-77; see DAVID P. CONRADT, *THE GERMAN POLITY* 152-54, 175 (3d ed. 1986); KOMMERS, *supra* note 47, at 106-13. The participation of the state governments in federal lawmaking is entrenched in the Basic Law by Article 79(3), which forbids, among other things, amendments "affecting the division of the Federation into states [or] the participation on principle of the states in legislation."

98. See, e.g., BREER, *supra* note 60, at 75; SASSE & KEMPEN, *supra* note 59, at 46.

99. See, e.g., BREER, *supra* note 60, at 104-05; EDZARD SCHMIDT-JORTZIG, *KOMMUNALRECHT* 22, 39 (1982); Bryde, *supra* note 71, at 260; von Löhneysen, *supra* note 61, at 332.

local government authority, but are rather a supplementary legitimating element for an authority already delegated to the local government by the citizenry. Article 28(1) of the Basic Law required electoral representation of the people in the counties and communes,<sup>100</sup> but this did not preclude the representation of others as well.<sup>101</sup> Alternatively, the "people" at the local level might be defined more inclusively than the people at the national level; obviously, Article 28 did not require that the entire German people vote in each local election, and thus the terms could not have identical meanings.<sup>102</sup>

The permissibility of aliens' participation in the choice of the agents exercising delegated power paralleled the permissibility of employing aliens directly as agents, that is, as appointed public officials.<sup>103</sup> Although German law gives citizens preferred access to appointed public office, exceptionally qualified non-Germans may also be employed.<sup>104</sup> Local government could also be analogized to a variety of public entities that serve as vehicles for self-determination by functionally defined segments of the population — for example, universities, professional self-regulatory bodies, trade unions, and governing boards which include representatives of beneficiaries in the social security system. Otherwise-qualified aliens currently enjoy voting rights in all of these.<sup>105</sup>

The second variant employed the same analogy with self-regulatory bodies to deemphasize the "State-like" aspect of local governmental authority, reasserting the historical role of local governments as intermediate between State and civil society.<sup>106</sup> The predecessors of

100. GG art. 28(1).

101. See Franz, *supra* note 81, at 105-06; von Löhneysen, *supra* note 61, at 332; Zuleeg, *supra* note 60, at 174-75.

102. See BREER, *supra* note 60, at 119. Further support was drawn from Article 28(2), which guarantees the right of the communes to regulate "affairs of the local community" [*Angelegenheiten der örtlichen Gemeinschaft*]. This arguably broader term might confirm the propriety of including aliens in the local electorate. See *id.*, at 111; Bryde, *supra* note 71, at 260-61; Roters, *supra* note 82, at 207; Zuleeg, *supra* note 60, at 175.

103. See Bryde, *supra* note 71, at 260.

104. See BUNDESBEAMTENGESETZ [Federal Public Officials Act] § 7(2); BEAMTENRAHMENREGELUNGSGESETZ [Public Officials Framework Act] § 4(2).

105. See, e.g., BREER, *supra* note 60, at 114-18; Bryde, *supra* note 71, at 260; Manfred Zuleeg, *Zur Verfassungsmäßigkeit der Einführung des Kommunalwahlrecht für Ausländer in Nordrhein-Westfalen*, 1987 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRVSCHR] 322, 328-29.

106. See SASSE & KEMPEN, *supra* note 59, at 37-44; Schwerdtfeger, *supra* note 58, at A110-A111. Most writers, however, regardless of their attitudes toward alien suffrage, rejected this reprivatization of local government as anachronistic. See, e.g., BREER, *supra* note 60, at 32-33; SCHMIDT-JORTZIG, *supra* note 99, at 22-23 & n.7; Frank, *supra* note 71, at 299-300; Josef Isensee, *Kommunalwahlrecht für Ausländer aus der Sicht der Landesverfassung Nordrhein-Westfalens und der Bundesverfassung*, 1987 KRVSCHR 300, 306-07; Zuleeg, *supra* note 60, at 173-74.

modern local governments, in Germany as in England, were corporate bodies with self-governing privileges.<sup>107</sup> In nineteenth century Germany, local self-government served to defend the autonomy of bourgeois society against the administrative apparatus of the monarchy.<sup>108</sup> The characterization of local self-government as a "right" survived into the twentieth century, and even into the Basic Law.<sup>109</sup> Such exercises of local autonomy need not be equated with the exercise of "state authority" subject to the popular sovereignty principle.<sup>110</sup>

For some commentators, these arguments were merely supplementary, demonstrating that aliens could still be given the local franchise, regardless of how the issue was resolved at the state and federal levels.<sup>111</sup> Others, however, took highly differentiated positions, including the view that alien suffrage in local elections was already constitutionally permissible, but that alien suffrage in state and national elections could not be introduced even by constitutional amendment.<sup>112</sup>

## 2. Anti-Suffrage Arguments

Commentators who denied the constitutionality of alien suffrage rejected attempts to derive it from an equal right to self-determination. Many observed that in traditional German political theory, a State must have a people to act as the "subject" of its power, and that this people consisted of the citizens of the State.<sup>113</sup> The German concept of popular sovereignty had been influenced by French Revolutionary

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107. See 1 STERN, *supra* note 70, at 399-403; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1081-95 (1980).

108. See SASSE & KEMPEN, *supra* note 59, at 39-40.

109. SASSE & KEMPEN, *supra* note 59, at 37, 40-41. These authors pointed out that the guarantee of local self-government was included in the bill of rights portion of the Weimar Constitution, and that although this "institutional guarantee" was deleted from the basic rights catalog of the 1949 Basic Law, it was still framed as a right in Article 28. See GG art. 28(2); WEIMAR CONST. art. 127, translated in THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS 177 (Elmer E. Hucko ed., 1987).

110. See SASSE & KEMPEN, *supra* note 59, at 44-46; Schwerdtfeger, *supra* note 58, at A110. For a similar approval of alien voting in "these minor municipal corporations," see Woodcock v. Bolster, 35 Vt. 632, 640-41 (1863), discussed *infra* notes 283-84 and accompanying text.

111. See Bryde, *supra* note 71, at 260; Zuleeg, *supra* note 60, at 174-75.

112. See, e.g., SASSE & KEMPEN, *supra* note 59, at 45-46 (local suffrage already constitutional, but not state or federal suffrage; no position taken on amendability); Schwerdtfeger, *supra* note 58, at A107, A110 (amendment unnecessary for local suffrage, and impermissible for state or federal suffrage); von Löhneysen, *supra* note 61, at 331-32 (amendment unnecessary for local suffrage, permissibility for state or federal suffrage unclear).

113. See, e.g., KARL DOERING, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 87-88 (3d ed. 1984); Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in 1 HANDBUCH DES STAATSRECHTS, *supra* note 66, at 893, 903-04; Josef Isensee, *Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland*, 32 VVDSTRL 49, 92-93 (1974).

thought,<sup>114</sup> which had located sovereignty in the "Nation."<sup>115</sup> These opponents of alien suffrage characterized democracy as a form of collective, not individual, self-determination, and maintained that it would be endangered by giving outsiders a decisive voice in collective decisions.<sup>116</sup>

Much of the literature emphasized two circumstances relating to citizenship that supported the superior claim of citizens to political participation: "inescapability" (*Unentrinnbarkeit*) and "affectedness" (*Betroffenheit*).<sup>117</sup> First, aliens were not inescapably tied to the fate of the community. Aliens within the national borders were subject to its territorial sovereignty, but nonresident aliens were not subject to the nation's personal sovereignty independent of location.<sup>118</sup> They could therefore avoid the consequences of ill-conceived policies by returning to their homelands, which were obliged to receive them.<sup>119</sup> Germans had no such guaranteed refuge, for no country was obliged to receive and naturalize them.<sup>120</sup> Aliens, therefore, did not have the same incentives as citizens to vote responsibly. Some authors employed the trope of the nation as a "community of fate" (*Schicksalsgemeinschaft*), and resisted efforts to reinterpret this notion as including long-term resident aliens.<sup>121</sup>

Second, even while aliens resided within the national territory,

114. Albert Bleckmann, *Das Nationalstaatsprinzip im Grundgesetz*, 41 DÖV 437, 438 (1988); Böckenförde, *supra* note 113, at 889-90; Peter M. Huber, *Das "Volk" des Grundgesetzes*, 42 DÖV 531, 534 (1989); Quaritsch, *supra* note 58, at 6.

115. See LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN art. 3 (France 1789) ("Le principe de toute souveraineté réside essentiellement dans la nation."); Cranston, *The Sovereignty of the Nation*, in *THE FRENCH REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE* (C. Lucas ed., 1988). Article 3 of the current French Constitution repeats this popular sovereignty principle, and limits the franchise to French nationals. See FR. CONST. art. 3; CHARLES DEBBASCH ET AL., *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 532-35 (3d ed. 1990).

116. *E.g.*, Böckenförde, *supra* note 113, at 904-05, 911-12; Grawert, *supra* note 66, at 685-86; Isensee, *supra* note 113, at 92-93; Quaritsch, *supra* note 58, at 9.

117. I will have more to say on the merit of these arguments later, in Part III(B).

118. *See, e.g.*, Isensee, *supra* note 106, at 303; Schink, *supra* note 89, at 422. In U.S. law, this distinction is expressed in terms of exercise of prescriptive jurisdiction on the basis of the principle of territoriality and on the basis of nationality. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 & cmts. c & e (1987).

119. *E.g.*, BIRKENHEIER, *supra* note 58, at 62-63; LAMERS, *supra* note 61, at 37-38; 1 STERN, *supra* note 70, at 324; Bleckmann, *supra* note 114, at 438; Böckenförde, *supra* note 113, at 905; Doehring, *supra* note 61, at 37; Isensee, *supra* note 113, at 93. Some, however, viewed this argument as losing its force at the local level. *E.g.*, BREER, *supra* note 60, at 112; Henkel, *supra* note 96, at 107; Ruland, *supra* note 58, at 12-13; Sennewald, *supra* note 59, at 82-83.

120. *E.g.*, BIRKENHEIER, *supra* note 58, at 63; Ruland, *supra* note 58, at 11; *see also* Schink, *supra* note 89, at 422. A foreign country that permitted Germans to reside within its boundaries would enable them to escape the territorial sovereignty of Germany but not its personal sovereignty. Naturalization would enable the emigrant to exchange German nationality for another.

121. *See, e.g.*, Bleckmann, *supra* note 114, at 438; Böckenförde, *supra* note 113, at 903-05; Doehring, *supra* note 89, at 115; Isensee, *supra* note 113, at 93-94 n.111; Rupp, *supra* note 94, at

they were not affected by government decisions to the same degree as citizens because aliens did not have equal civic duties; the civic duty most prominently invoked was military service.<sup>122</sup> Some further argued that aliens were so much less affected by government decisions that giving aliens equal votes would violate principles of equality, whether a notion of democratic equality inherent in the concept of democracy itself,<sup>123</sup> or the fundamental constitutional principle of equality before the law.<sup>124</sup>

Others were willing to assume that aliens might be equally affected by government actions, but argued that being affected by a government decision did not entail a right to participate in it. They rejected

365. *But see* Zuleeg, *supra* note 74, at 347-48 (membership in the "community of fate" not limited to citizens).

122. *E.g.*, LAMERS, *supra* note 61, at 39; Bleckmann, *supra* note 114, at 438; Doehring, *supra* note 89, at 115; Isensee, *supra* note 113, at 94; Ruland, *supra* note 58, at 11; *see also* BREER, *supra* note 60, at 52-53 (denying aliens suffrage at the national level only); Schink, *supra* note 89, at 422-23, 424 (same).

The chain of inference between military service and voting is more complex and confusing than superficial attention might suggest. Aliens may be excused from military service as a matter of legislative expediency, domestic political theory, international courtesy, bilateral or multilateral treaty, customary international law, or constitutional command. The current German draft statute contemplates conscription of citizens, resident stateless persons, and resident aliens whose countries of nationality conscript Germans. *See* Rupert Scholz, *Art. 12a, in GRUNDGESETZ KOMMENTAR, supra* note 66, at 18-19. Various categories of citizens are statutorily exempt from military service. *See id.* at 19-24. The Basic Law expressly guarantees the right of conscientious objectors to perform alternative civilian service, provides for conscription of women only for civilian service during a "state of defense," and forbids women to perform "service involving the use of arms," even voluntarily. GG art. 12a; Scholz, *supra* at 14. It authorizes conscription of "men," with no apparent limitation by nationality. *See* GG art. 12a(1); Scholz, *supra* at 18-19. *But see* Michael Wollenschläger & Eckhard Kressel, *Wehrpflicht für Ausländer?*, 8 NVwZ 722, 722-28 (1989) (contending that military service is a fundamental duty that can be imposed only on citizens). It was widely argued in the alien suffrage debate that conscription of resident aliens would violate international law. *See, e.g.*, LAMERS, *supra* note 61, at 39; Isensee, *supra* note 113, at 94 n.113. Conceivably this was one of the "general rules of international law" made binding by Article 25 of the Basic Law, *see* BIRKENHEIER, *supra* note 58, at 64-65. Although the United States has frequently engaged in conscription of resident aliens, *see infra* notes 302-07 and accompanying text, Professor Karl Doehring has explained this as reflecting a special rule for countries of immigration, *see* Günther Jaenicke & Karl Doehring, *Die Wehrpflicht von Ausländern*, 16 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 523, 559 (1955/56), and of course "The Federal Republic of Germany is not a country of immigration," *see supra* note 12 and accompanying text. Thus, not all citizens may constitutionally be drafted, and not all citizens who may be drafted are actually drafted, and most resident aliens are freed from conscription by a practice whose ultimate legal basis is uncertain. Nonetheless, "the compensatory relationship between democratic rights and duties, which arises compellingly from the requirement of democratic equality, persists even when it is not actualized in the individual case." BIRKENHEIER, *supra* note 58, at 66 (author's translation).

123. *See, e.g.*, BIRKENHEIER, *supra* note 58, at 62; LAMERS, *supra* note 61, at 38-40; Isensee, *supra* note 113, at 93-95, 105; Ruland, *supra* note 58, at 11; Hans-Hermann Schild, *Kommunalwahlrecht für Ausländer?*, 38 DÖV 664, 670-71 (1985); Schink, *supra* note 89, at 423; *see also* BREER, *supra* note 60, at 66 (but not at local level); Sennewald, *supra* note 59, at 82 (same).

124. The Federal Constitutional Court in its decision expressly declined to reach this issue. *See infra* paragraph following note 196 and accompanying text.

such a "democracy of the affected" as fallacious and unworkable.<sup>125</sup> The proper correlate to subjection to law was protection by law, not political participation.<sup>126</sup>

As previously mentioned, these arguments were widely accepted as establishing the unconstitutionality of alien suffrage at the national level. Extending the argument to local elections, however, required further elaboration. Part of the analysis rested on the "homogeneity principle" in Article 28 of the Basic Law, which required the states to "conform to the principles of republican democratic and social government based on the rule of law, within the meaning of this Basic Law."<sup>127</sup> Homogeneity was said to require that the "people" at the local level be the geographically defined subset of the "people" at the national level.<sup>128</sup> True local governments were geographical subdivisions of the State, and could not be compared with functionally defined vehicles for occupational self-determination like universities, trade unions, and professional boards.<sup>129</sup>

Several commentators expressly addressed the claim that the vulnerability of resident aliens in Germany justified extending them voting rights to protect their interests at the local level. Some responded that an instrumental approach to the distribution of the franchise was illegitimate; voting rights must be determined as a matter of principle and not used to further ulterior policy goals.<sup>130</sup> Aliens' vulnerability was also turned against them as a reason for denying them the right to vote. Given the dependence of aliens on the discretion of government officials, including officials at the local level,<sup>131</sup> for permission to continue residing in Germany, alien suffrage would give the executive the power to manipulate the composition of the electorate for political advantage.<sup>132</sup> Some also expressed concern that aliens would be vulnera-

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125. See Isensee, *supra* note 106, at 304-05 (rejecting *Betroffenendemokratie*); see also Böckenförde, *supra* note 113, at 904 (possible only in utopian world without Nation States).

126. See NIEDERMEYER-KRAUSS, *supra* note 89, at 72-74; Isensee, *supra* note 106, at 304; Karpen, *supra* note 89, at 1014; Hans-Jürgen Papier, *Verfassungsfragen des kommunalen Ausländerwahlrechts*, 1987 KRVSCHR 309, 312-13.

127. GG art. 28(1).

128. See, e.g., Grawert, *supra* note 66, at 674; Papier, *supra* note 126, at 309-10; Quaritsch, *supra* note 58, at 2-3; Rupp, *supra* note 94, at 364.

129. See, e.g., Isensee, *supra* note 113, at 96-97; Papier, *supra* note 126, at 313; Rupp, *supra* note 94, at 364. One author, however, doubted the propriety of letting aliens vote even in trade unions. Doehring, *supra* note 61, at 37.

130. See, e.g., LAMERS, *supra* note 61, at 37; Isensee, *supra* note 106, at 304. One author coupled this assertion with a rejection of interest group pluralism as a normatively proper understanding of the political process. Quaritsch, *supra* note 58, at 11-12.

131. German immigration law is largely enforced at the state and local level. See Neuman, *supra* note 14, at 43.

132. Doehring, *supra* note 89, at 117-18; Isensee, *supra* note 113, at 95; Karpen, *supra* note 47, at 1017; Schild, *supra* note 123, at 670-71 (1985); Schink, *supra* note 89, at 422; 2 Ingo von

ble to pressure from their home countries, further disqualifying them from voting.<sup>133</sup> Experience with municipal voting by aliens elsewhere in Europe also showed that foreign governments might prohibit their citizens from participating;<sup>134</sup> it was intolerable for the process of German self-determination to be thus rendered subject to the discretion of foreign governments.<sup>135</sup>

More generally, aliens might be disqualified from voting by their doubtful loyalty.<sup>136</sup> Some commentators placed significant weight on the notion that citizens were subject to a special duty of loyalty to the State, a duty which aliens owed to their homelands.<sup>137</sup> In more concrete terms, there was a danger that aliens would use their votes to influence government policy in ways that furthered the interests of their home countries.<sup>138</sup> Aliens from different countries (e.g., Greece and Turkey) were also likely to embroil Germany in their rivalries.<sup>139</sup> These dangers were most salient at the national level, but could arise even at the local level.<sup>140</sup> Moreover, 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>141</sup>

The opponents of alien suffrage often maintained that the constitutionally proper route to voting rights for resident aliens was naturali-

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Münch, *Art. 38 in 2 VON MÜNCH*, *supra* note 82, at 461 (at national level). On the other hand, some proponents of alien suffrage argued that the status of resident aliens must be rendered more secure in order to shield them from these pressures. *See, e.g.,* Otto Behrend, *Kommunalwahlrecht für Ausländer in der Bundesrepublik*, 26 *DÖV* 376, 378 (1973); Henkel, *supra* note 96, at 115-16. One proponent argued that only aliens in the most protected immigration status should be permitted to vote. BREER, *supra* note 60, at 137-38.

133. VON KATTE, *supra* note 57, at 99-100; Doehring, *supra* note 89, at 116-19.

134. *See* NIEDERMAYER-KRAUSS, *supra* note 89, at 210-11; 1986 *Report*, *supra* note 28, at 9, 31; Ben Koolen, *Beteiligung von Ausländern an den Kommunalwahlen in den Niederlanden*, 1990 *ZAR* 131, 135. The reported incidents involve Moroccan and Indonesian residents in the Netherlands.

135. *See* Doehring, *supra* note 89, at 118-20; Schink, *supra* note 89, at 422.

136. *See, e.g.,* LAMERS, *supra* note 61, at 39-40; Bleckmann, *supra* note 114, at 438-39; Doehring, *supra* note 89, at 116-17; Quaritsch, *supra* note 58, at 12; Ruland, *supra* note 58, at 11.

137. *See* VON KATTE, *supra* note 57, at 85-86; Doehring, *supra* note 89, at 119; Schink, *supra* note 89, at 422-23. Other opponents of alien suffrage, however, rejected reliance on a "general duty of loyalty" going beyond concrete legal duties. *See, e.g.,* Isensee, *supra* note 113, at 94 n.113.

138. LAMERS, *supra* note 61, at 39-40; VON KATTE, *supra* note 57, at 99-100, 110; Bleckmann, *supra* note 114, at 438; Doehring, *supra* note 89, at 116-17. One author labelled alien voters as a potential "second front." Ruland, *supra* note 58, at 11.

139. *See* Bleckmann, *supra* note 114, at 438; Karpen, *supra* note 89, at 1017; Quaritsch, *supra* note 58, at 13.

140. *See* Bleckmann, *supra* note 114, at 438; Quaritsch, *supra* note 58, at 12-13.

141. *See* BIRKENHEIER, *supra* note 58, at 26; Bleckmann, *supra* note 114, at 438; *cf.* Henkel, *supra* note 96, at 115 (welcoming this linkage); Zuleeg, *supra* note 73, at 431 (same).

zation.<sup>142</sup> Some argued with evident sincerity for more generous naturalization policies.<sup>143</sup> Not surprisingly, others favored restrictive naturalization policy in these or other writing.<sup>144</sup>

Some commentators also seized on a weakness of the argument for alien suffrage: the difficulty of specifying the category of aliens entitled to vote. In German constitutional law as in U.S. constitutional law, discriminatory denial of the franchise normally triggers a requirement of compelling justification.<sup>145</sup> Yet many proponents of alien suffrage behaved as if they had discretion to choose which aliens would vote in which elections, and to employ criteria of linguistic ability or length of residence that could not be applied to German voters. This paradox allegedly demonstrated that democratic principles did not justify alien suffrage, or that politically feasible proposals would themselves violate equality before the law.<sup>146</sup>

The equality argument could also be used against those who argued that the Basic Law's "openness to Europe" via Article 24 modified popular sovereignty in favor of European Community nationals.<sup>147</sup> More directly, the European option was criticized as a distortion of Article 24, which permitted the federal legislature to transfer sovereign authority to supranational institutions in which the FRG participated as a member but not to dilute the representation of the German people at home by admitting aliens to the franchise.<sup>148</sup> There was disagreement as to whether Article 24 could someday be the vehicle for the submersion of German nationality into a fully unified European nationality, at which date all Europeans could vote, or whether the supersession of the Basic Law by a new constitution would be necessary first.<sup>149</sup>

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142. See, e.g., Isensee, *supra* note 113, at 96; Burkhard Kämper, *Kommunalwahlrecht für Ausländer in Nordrhein-Westfalen?*, 22 ZRP 96, 99 (1989); Ruland, *supra* note 58, at 11.

143. See, e.g., BIRKENHEIER, *supra* note 58, at 96-97; Böckenförde, *supra* note 113, at 905; Tomuschat, *supra* note 96, at 100.

144. Compare, e.g., Bleckmann, *supra* note 114 and Quaritsch, *supra* note 58 with Bleckmann, *Anwartschaft auf die deutsche Staatsangehörigkeit?*, 43 NJW 1397, 1399 (1990) (deriving constitutional limitations on naturalization policy from his "National-State principle") and Helmut Quaritsch, *Einbürgerungspolitik als Ausländerpolitik?*, 1988 DER STAAT 481 (opposing naturalization of guestworkers).

145. See, e.g., 1 STERN, *supra* note 70, at 303-05; Robert Dilworth & Frank Montag, Note, *The Right to Vote of Non-Resident Citizens: A Comparative Study of the Federal Republic of Germany and the United States of America*, 12 GA. J. INT'L & COMP. L. 267, 275 (1982).

146. See, e.g., Heyen, *supra* note 58, at 193; Isensee, *supra* note 106, at 305-06; Karpen, *supra* note 89, at 1016; Quaritsch, *supra* note 58, at 9-10; Rupp, *supra* note 94, at 364.

147. See Isensee, *supra* note 106, at 305-06.

148. See, e.g., BIRKENHEIER, *supra* note 58, at 93-94; BREER, *supra* note 60, at 76-77; Doehring, *supra* note 89, at 120.

149. See, e.g., BIRKENHEIER, *supra* note 58, at 94-96 (Article 24 sufficient); Doehring, *supra* note 89, at 120 (new constitution necessary).



The vigor of the opposition to alien suffrage was strongest among those who argued that even an explicit amendment to the Basic Law authorizing alien suffrage would be unconstitutional. Some contended that any form of alien suffrage was barred, while others distinguished between local elections and state and federal elections.<sup>150</sup> Both groups argued that the exclusion of aliens from the electorate under the popular sovereignty clause of Article 20(2) involved a basic principle entrenched against amendment by Article 79(3).<sup>151</sup> The argument rested on more than mere literalism; it contended that limiting the franchise to citizens was so essential to the German conception of democracy that its entrenchment against amendment was justified. One prominent commentator appears to have gone further, arguing that alien suffrage, even at the local level, was antithetical to the very concept of democracy.<sup>152</sup>

In contrast, another opponent of alien suffrage disclaimed any inconsistency between alien suffrage and the idea of democracy in the abstract, but instead identified the fatal obstacle to alien suffrage as an implicit constitutional principle requiring the Federal Republic to be a "National-State" with a distinctively German cultural identity.<sup>153</sup> He derived this principle from a structural interpretation of the Basic Law, reinforced by the Preamble's reference to the desire of the German people to "preserve their *national* and political unity,"<sup>154</sup> the extension of political rights to displaced Germans regardless of their country of nationality, and even the constitutional specification of the colors of the federal flag.<sup>155</sup> The National-State principle was also reflected in the reservation of political rights to Germans, which contributed to the loyalty of public officials and representatives to the interests of the German people.<sup>156</sup> The author deduced from this prin-

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150. For those who support the view that the Basic Law cannot be amended to permit federal, state, or local alien suffrage, see, e.g., Bleckmann, *supra* note 114, at 442; Doehring, *supra* note 89, at 120; Huber, *supra* note 114, at 536; Kämper, *supra* note 142, at 89. For those who support the view that the Basic Law cannot be amended to permit federal or state alien suffrage, see, e.g., Schink, *supra* note 89, at 426; Sennewald, *supra* note 59, at 82; see also BIRKENHEIER, *supra* note 58, at 90-92, 131 (unless true European Union occurs); LAMERS, *supra* note 61, at 46-47, 54-55, 134-35; NIEDERMEYER-KRAUSS, *supra* note 89, at 139-40; Ruland, *supra* note 58, at 11-12; Schwerdtfeger, *supra* note 58.

151. See *supra* notes 69-70 and accompanying text.

152. See Isensee, *supra* note 113, at 92-93 ("Democracy loses its legitimation and ethos when the right to vote is uncoupled from nationality and conceded to nonmembers. The boundary between democratic autonomy of the political union and antidemocratic heteronomy by outsiders is transgressed.") (author's translation); see also Isensee, *supra* note 106, at 305.

153. Bleckmann, *supra* note 114, at 438.

154. GG pmbl. (emphasis added).

155. Bleckmann, *supra* note 114, at 440-41.

156. *Id.* at 439, 441.

ciple constitutional duties to promote national feeling, to preserve the meaningfulness of German citizenship,<sup>157</sup> and to frame an immigration policy that would not threaten Germany's cultural identity.<sup>158</sup> The author maintained that both this implicit National-State principle and the resulting prohibition against alien suffrage were unamendably anchored in the Basic Law.<sup>159</sup>

#### D. *Judicial Rejection*

After years of debate, two states took legislative action that made it possible for the Federal Constitutional Court to resolve the constitutionality of alien suffrage. The state of Schleswig-Holstein amended its statute governing municipal and county elections to confer the right to vote and to run for office on nationals of Denmark, Ireland, the Netherlands, Norway, Sweden, and Switzerland who resided in the locality.<sup>160</sup> To qualify for these rights, the alien had to be otherwise qualified as an elector, to have resided in Germany for at least five years, and either to possess a residence permit or be legally not obliged to possess one.<sup>161</sup> The second case involved an amendment to the statute governing the election of borough assemblies within the city-state of Hamburg.<sup>162</sup> This statute extended voting rights to aliens of all nationalities, but, as qualifications, required eight years of residence in the Federal Republic and a residence permit.<sup>163</sup>

A group of 224 members of the federal Parliament challenged both statutes in original proceedings before the Federal Constitutional Court.<sup>164</sup> In October 1989, the Court issued a preliminary order

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157. *Id.* at 443; cf. Isensee, *supra* note 106, at 302 (German citizenship would be discredited and its democratic substance undermined by alien suffrage).

158. Bleckmann, *supra* note 114, at 442-43.

159. *Id.* at 442.

160. Judgment of Oct. 31, 1990, Bundesverfassungsgericht, 2d Sen., *reprinted in* 17 *EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT [EUGRZ]* 438, 439 (1990) [hereinafter Schleswig-Holstein Case] (citing Act to Amend the Commune and County Election Act, Feb. 21, 1989). These six nations were said to be the nations extending similar rights to Germans. *Id.*; cf. Tung, *supra* note 32, at 453 (listing countries). Only a few cantons in Switzerland permit aliens to vote. The statute did not include New Zealand, conceivably because New Zealand permits resident aliens to vote but not to run for office. See Electoral Act 1956, §§ 25, 39, [1956] 2 Stat. N.Z. 1160, as amended by Electoral Amendments Act 1975, [1975] 1 Stat. N.Z. 205.

161. Schleswig-Holstein Case, *supra* note 160, at 439.

162. Judgment of Oct. 31, 1990, Bundesverfassungsgericht, 2d Sen., *reprinted in* 17 *EUGRZ* 445 (1990) [hereinafter Hamburg Case]. This case was complicated by the fact that Hamburg is both a state (*Land*) and a municipality (*Gemeinde*), and that its seven boroughs (*Bezirke*) are submunicipal entities in German local government law. See *infra* notes 189-95 and accompanying text.

163. Hamburg Case, *supra* note 162, at 446 (citing Act to Introduce Aliens' Right to Vote in Borough Assembly Elections, Feb. 20, 1989).

164. These members all belonged to the conservative CDU/CSU caucus. Schleswig-Holstein Case, *supra* note 160, at 439; Hamburg Case, *supra* note 162, at 447. German law authorizes

prohibiting the participation of aliens in the spring 1990 Schleswig-Holstein elections.<sup>165</sup> Slightly more than a year later, and four weeks after the unification of Germany on October 3, 1990, the Court issued its final decisions, unanimously invalidating both statutes.

In its first decision, the Court held the Schleswig-Holstein statute inconsistent with the second sentence of Article 28(1) of the Basic Law, which provides: "In each of the states, counties and communes, the people must be represented by a body chosen in general, direct, free, equal, and secret elections."<sup>166</sup> The second decision was more complicated because the Hamburg boroughs were not themselves counties or communes, but the Court held that, in light of the popular sovereignty principle of Article 20(2), the Hamburg statute violated the first sentence of Article 28(1), which provides: "The constitutional order in the states must conform to the principles of republican democratic and social government based on the rule of law, within the meaning of this Basic Law."<sup>167</sup> Fundamental to both decisions was the Court's interpretation of the term "people" (*Volk*) in the popular sovereignty clause of Article 20.

### 1. The Schleswig-Holstein Alien Suffrage Decision

The Court began its analysis of the popular sovereignty clause at the abstract level of political theory. As a democratic State, the Federal Republic

cannot be conceived of without a collection of persons that is the carrier and subject (*Träger und Subjekt*) of the State authority exercised in it and through its organs. This collection of persons forms the people of the State (*Staatsvolk*), from which all State authority emanates. The content of Article 20(2)(1) is therefore not that the decisions of State authority must receive their legitimation from those who are affected by them; rather State authority must have as its subject the people as a group of human beings bound into a unity.<sup>168</sup>

According to the Court, a systematic reading of the Basic Law made clear who the members of that collection were: German nationals and those assimilated to the status of a German national under

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certain governmental actors to seek "abstract" judicial review under circumstances that would be considered "advisory" under the U.S. Constitution. See KOMMERS, *supra* note 47, at 15. A group including one-third of the members of Parliament is so authorized, as is the administration of a state, *id.*, such as Bavaria, which also challenged the Schleswig-Holstein statute. Schleswig-Holstein Case, *supra* note 160, at 442.

165. Judgment of Oct. 11, 1989, Bundesverfassungsgericht, 2d Sen., reprinted in 42 NJW 3147 (1989). The Hamburg statute would have permitted aliens to participate in elections after January 1, 1991. Hamburg Case, *supra* note 162, at 446.

166. Schleswig-Holstein Case, *supra* note 160, at 439.

167. Hamburg Case, *supra* note 162, at 445.

168. Schleswig-Holstein Case, *supra* note 160, at 442 (author's translation).

Article 116(1).<sup>169</sup> Membership in the people, said the Court, is mediated by nationality, which forms the legal prerequisite for civic rights and duties.<sup>170</sup> This was confirmed by the designation of the German people in the Preamble and Article 146 as possessor of the constitution-giving power, the guarantee of citizens' rights to Germans in Article 33, and even the wording of the official oath by which executive officials dedicate themselves to the welfare of the German people.<sup>171</sup> Rather than considering the correspondence between traditional political theory and the Basic Law as undermined by inclusion of the status-Germans under Article 116, the Court maintained that an explicit exception to the principle linking popular sovereignty with nationality had been considered necessary in order to deal with the postwar situation.<sup>172</sup>

The Court denied that subsequent changes in circumstances through the invited migration of foreign labor had produced a change in the meaning of the popular sovereignty clause.<sup>173</sup> It agreed that democratic ideals favored political rights for those subject to State power in the long term, but concluded that under current constitutional law this could only be accomplished through naturalization.<sup>174</sup>

The Court went on to conclude that this interpretation of popular sovereignty applied not only at the federal level, but also at the state and local levels. Regarding the states, the Court quickly deduced this broad application from the "homogeneity principle" articulated in the first sentence of Article 28(1).<sup>175</sup> The controlling provision on the local level, however, was the more specific second sentence of Article 28(1), requiring representation of "the people" in the states, counties, and communes.<sup>176</sup> The Court explained at length its reasons for interpreting this latter provision as excluding aliens from the local franchise.

The textual juxtaposition of states, counties, and communes suggested, according to the Court, that a unified conception of the "people" applied to all three.<sup>177</sup> In implementing the principle of democracy in a federal system, this conception supplied a unified basis

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169. *Id.*

170. *Id.*

171. *Id.* at 442-43.

172. *Id.* at 443.

173. *Id.*

174. *Id.*

175. *Id.* The sentence is quoted in text accompanying note 167 *supra*.

176. The sentence is quoted in text accompanying note 166 *supra*.

177. *Id.*

for legitimation of State authority at all territorial levels.<sup>178</sup> The Court rejected as obsolete the vision of city government as a quasiprivate corporate enterprise.<sup>179</sup> Local government was a portion of the state structure, carrying out delegated tasks of administration and self-government within its assigned territory.<sup>180</sup> Article 28 served to legitimate this portion of the State through the participation of the local segment of the legitimating subject of all State authority.<sup>181</sup> The Court rejected the analogy with functionally defined self-governing bodies like universities and professional boards.<sup>182</sup>

The historical development leading up to the 1949 Basic Law, the Court continued, also confirmed the exclusion of aliens from the local franchise.<sup>183</sup> The primary counterexample was the Prussian municipal government scheme of 1808, but this scheme antedated the emergence of a unified concept of Prussian nationality.<sup>184</sup> The Weimar Constitution of 1919 and the individual state constitutions reinforced the modern restriction of the local franchise to nationals.<sup>185</sup> Against this background, the drafters of the Basic Law would surely have expressed themselves unambiguously — and would have excited more controversy — if they had intended to include alien residents among the “people” of the communes.<sup>186</sup>

Schleswig-Holstein’s grant of the local franchise to certain categories of aliens was therefore held to violate Article 28(1)(2).<sup>187</sup> The Court emphasized in closing that this did *not* mean that Article 79(3) prohibited a constitutional amendment to introduce local alien suffrage, as envisioned by current discussion in the European Community.<sup>188</sup>

## 2. The Hamburg Borough Assemblies Case

The companion case was complicated by the submunicipal character of the Hamburg boroughs. The Court concluded that the second sentence of Article 28(1) was inapplicable, but that the grant of the

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178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 443-44.

182. *Id.* at 444.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 445. The constitutionality of permitting aliens to run for office was not decided, since the two statutory grants did not appear severable. *Id.*

188. *Id.*

franchise to alien residents in the boroughs violated the homogeneity principle of the first sentence, because the borough assemblies did not "conform to the principles of . . . democratic . . . government . . . within the meaning of this Basic Law" as fashioned in the popular sovereignty clause of Article 20.<sup>189</sup>

Relying on the Schleswig-Holstein decision, the Court maintained that any exercise of State authority must be supported by a "chain of legitimation" reaching back to the sovereign people, which did not include aliens.<sup>190</sup> Democratic legitimation rested on the interaction of a combination of factors relating to the institutional source of the authority, external or immanent constraints on its exercise, and the mode of selection of its personnel.<sup>191</sup> The discretionary authority to make an official decision constituted a type of State authority requiring such legitimation, although the need for all the legitimating factors to contribute would vary with the degree of discretionary authority.<sup>192</sup>

Applying these principles to the Hamburg borough assemblies, the Court concluded that the assemblies exercised a broad range of governmental powers delegated to them by the city-state, and that their decisions were binding absent possible revision by the Hamburg executive council.<sup>193</sup> Hamburg had permissibly relied on direct elections as the means of providing the necessary legitimation for these government bodies.<sup>194</sup> But in that case,

the democratic principle within the meaning of the Basic Law is only satisfied if the election gives effect solely to the will of the geographically-limited portion of the people of the state, i.e., is conducted by the Germans residing in the boroughs. Elections in which aliens are also entitled to vote cannot convey democratic legitimation.<sup>195</sup>

### E. *First Thoughts*

The Federal Constitutional Court has thus held that popular sov-

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189. Hamburg Case, *supra* note 162, at 450 (author's translation).

190. *Id.* at 448-49.

191. At this point, the Court prominently cited an article by one of its members, in which these factors are more fully explained. *Id.* at 448-49 (citing Böckenförde, *supra* note 113, at 896). The analyses of alien suffrage in this article and the opinions, and even their wording, are similar in many respects, though there are also significant differences.

192. *Id.* at 449. The Court expressly distinguished advisory participation through auxiliary councils and bodies of "experts." *Id.* Many opponents of the alien franchise had maintained that these institutions were constitutionally permitted alternatives for the political participation of aliens.

193. *Id.* at 451. The Court was uncertain as to the precise contours of the reserved authority of the executive council (*Senat*) to revise the borough assemblies' actions, but perceived that the assemblies had very substantial effective freedom of action. *Id.*

194. *Id.*

195. *Id.* (author's translation).

ereignty means rule by citizens alone, and that even a borough election in which an alien could vote would not be "democratic" within the meaning of the current German Constitution. The Court's opinions were remarkable in several respects, as much for what they did not say as for what they said.

The first striking feature of the opinions was their highly abstract quality. Theory required that a State have a "subject" for its authority, and it followed from tradition and textual interpretation that this "subject" excluded aliens. Once the inquiry had been framed as an effort to identify "the People," the conclusion of homogeneity seemed natural. The people who voted in the towns and the people who voted in the states and the people who voted for the federal Parliament were the same as the people from whom State authority emanated, namely, the German people, as defined by the legal institution of nationality (supplemented by the status-Germans).<sup>196</sup>

The opinions seemed little concerned with *justifying* the exclusion of aliens from the electorate. The elaborate arguments of incapability and the indissoluble link between citizen and State recurred in the Court's brief summary of the parties' contentions, but they played no explicit role in the Court's own reasoning. The Court also left unaddressed the challengers' claim that alien suffrage would amount to inappropriately similar treatment of persons who were not similarly situated, thereby violating the rights of Germans to equality before the law.

Moreover, the Court's reasoning avoided any endorsement of alleged differences disqualifying aliens from voting, including ignorance of local conditions, vulnerability to pressures from abroad, irresponsibility in adopting policies they could escape, inattention to German national interests, and outright disloyalty. Such characteristics would call into doubt *any* political participation of aliens, including the traditionally accepted participation of aliens in vehicles of "functional self-determination" like universities, professional boards, and trade unions.<sup>197</sup>

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196. The Court's simple equation even treated as identical two avatars of "the People" that the scholarly literature had generally considered distinguishable, namely, the sovereign people of Article 20(2), clause 1 of the Basic Law, and the active-citizenry people of Article 20(2), clause 2. Compare, e.g., Schleswig-Holstein Case, *supra* note 160, at 442 with, e.g., 2 STERN, *supra* note 65, at 24-25.

197. See *supra* note 105 and accompanying text. On the contrary, the Court distinguished this arena, see Schleswig-Holstein Case, *supra* note 160, at 444, and a few months later the First Senate of the Federal Constitutional Court did not even blink at a statutory requirement that aliens be represented as a relevant social group on the governing boards of public and private broadcasting entities, for the purpose of ensuring diversity in programming. Judgment of Feb. 5, 1991, Bundesverfassungsgericht, 1st Sen., *reprinted in* 18 EUGRZ 49, 77-78 (1991).

As a result, the Court gave a persuasive reconstruction of the text's intended meaning, but did not make the text as interpreted persuasive. This silence may have proceeded not so much from formalism as from the limited purpose of the Court's holdings. The Court found local suffrage for aliens inconsistent with the principles of democracy as currently framed in the Basic Law, not with any "essence" of democracy. The Court defended this traditional conception, but not so strongly as to dismiss as misguided the enfranchisement of long-term resident aliens. The Court pointed out in the Schleswig-Holstein decision that it was not implying that Article 79(3) stood in the way of a constitutional amendment to permit local alien suffrage.<sup>198</sup> The Court mentioned only the European Community's proposal to enfranchise Community nationals, but probably was not intimating that a broader amendment — one including all resident aliens — would be inadmissible.<sup>199</sup>

The Court did not specifically address, even in passing, the admissibility of an amendment allowing aliens to vote at the state or federal levels, a purely academic question at present. One could read the Court's nod to the European Community narrowly, as implying only that an amendment could sacrifice homogeneity and remove local governments from the sphere of direct popular sovereignty by widening the local electorate. On the other hand, the Court's emphasis on the "State" character of local government authority would argue against this narrow interpretation. Moreover, the Court expressly recognized the status-Germans as a positive exception to the citizens' monopoly on the franchise, undermining the claim that the exclusion of all other resident aliens from "the people" is a fundamental principle entrenched against constitutional amendment by Article 79(3).

The opinions also made no allusion to the extraordinary constitutional event occurring between argument and decision — the accomplishment of unification. This may seem unremarkable, given the likelihood that the opinions were largely complete before October 3, but the text of some of the very provisions invoked by the Court was amended as part of the unification process,<sup>200</sup> and rather than quote them the Court paraphrased them in terms general enough to be accurate at either date.<sup>201</sup>

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198. Schleswig-Holstein Case, *supra* note 160, at 445.

199. Nowhere in the opinions did the Court mention Article 24 of the Basic Law and the "openness" of the legal order to Europe. *Cf. supra* note 86-91, 147-49, and accompanying text.

200. *See* Treaty on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., art. 4, 1990 Bundesgesetzblatt II 889, 30 I.L.M. 457, 465-66. The amended provisions invoked in the decisions were the Preamble and Article 146.

201. *See* Schleswig-Holstein Case, *supra* note 160, at 442-43.



Nonetheless, unification was relevant to the alien suffrage controversy in two respects. One is the relationship between nationality and the constitutional mandate for unification.<sup>202</sup> An important theme in the law of nationality under the Basic Law had been the care to preserve the claim that a common German nationality shared by West and East still existed despite the "temporary" division of Germany.<sup>203</sup> With the unexpectedly sudden achievement of unification and the definitive abandonment of claims to the lands beyond the Oder-Neisse line,<sup>204</sup> the legal fiction of a West Germany "partly identical" with the former German Empire<sup>205</sup> had served its purpose. Unification also neutralized one of the odder claims in the debates on immigrant policy (though not one that the Court might have been expected to affirm): that West Germany needed to be protected from the influence of non-German immigrants who would be indifferent to unification.<sup>206</sup> Yet it was probably too soon to expect the Court to accept the claim that nationality had lost its function in contemporary Europe,<sup>207</sup> especially while national identification was being called upon to serve an integrative function between "Ossis" and "Wessis."<sup>208</sup>

The second link between unification and the alien suffrage decisions concerned the European audience for the controversy. During the period of the Court's deliberations, the high priority given to unifi-

202. For discussion in English of the unification mandate, see generally Alona E. Evans, *Federal Republic of Germany Case Note*, 70 AM. J. INT'L L. 147 (1976) (summarizing Judgment of July 31, 1973, Bundesverfassungsgericht, 36 BVerfGE 1); Gregory v. S. McCurdy, Note, *German Reunification: Historical and Legal Roots of Germany's Rapid Progress Towards Unity*, 22 N.Y.U. J. INT'L L. & POL. 253, 258-71 (1990).

203. See, e.g., Hailbronner, *supra* note 11, at 72-73; Evans, *supra* note 202, at 153; cf. Bryde, *supra* note 71, at 258 ("A thoroughgoing reform of nationality law is, however, politically deadlocked for a variety of reasons. The most important has nothing to do with the aliens at all, but rather with the explosiveness of the topic of nationality in relation to the German question.") (author's translation).

204. Karl Kaiser, *Germany's Unification*, 70 FOREIGN AFF. 179, 200-02 (1991); Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 538-39, 599-605 (1991).

205. See, e.g., Evans, *supra* note 202, at 150; McCurdy, *supra* note 202, at 264-66; Quint, *supra* note 204, at 481-82.

206. See, e.g., Hailbronner, *supra* note 11, at 75 ("Nor would the massive naturalization, say, of one million Turks, contribute to the reunification of Germany, which — whether we like it or not — is a fundamental constitutional principle legally binding for every German government."); Quaritsch, *supra* note 144, at 496-97; Otto Uhlitz, *Deutsches Volk oder "Multikulturelle Gesellschaft"? Von den verfassungsrechtlichen Grenzen der Ausländer- und Einbürgerungspolitik*, 1986 RECHT UND POLITIK 143, 146. To the contrary, the Court noted the breadth of the legislature's discretion in framing the law of naturalization, and emphasized it as a means for restoring the congruence between the rulers and the ruled in light of the changed composition of the FRG's population. Schleswig-Holstein Case, *supra* note 160, at 443.

207. See *supra*; RITTSTIEG, *supra* note 25, at 55-59 (discussing the decreasing importance of nationality in modern Europe).

208. See generally Mare Fisher, *Germans Divided by 'Wall in the Head'*, WASH. POST, May 11, 1991, at A1.

cation and the increased strength expected to result from it had created insecurities in Germany's European neighbors.<sup>209</sup> The Court's analysis would inevitably form a part of Germany's self-presentation to Europe. It would have been an inopportune moment for the Court to endorse the claim that the citizenship qualification for voting was unamendable, thereby revealing that the FRG had joined the European Community with an implied reservation that other European citizens could never be permitted to exercise political rights. As we have seen, the Court went out of its way to disavow this claim (at least as regards local elections), although neither a constitutional amendment nor a statute directed to European Community voters was at issue. Similarly, the abstractness of the opinions, avoiding references to disloyalty, solidarity and "communities of fate," may have been as well-chosen for the European as for the domestic audience.

Thus, the alien suffrage debate illuminates the German legal culture's dominant understandings of German identity and of the current locally operative version of democracy. The "demos" includes only German citizens and the status-Germans. This conclusion derives in part from a political theory of the State as a collective actor. But it also reflects the particular historical development of nationhood in Germany, where the rise of a linguistic and cultural nationalism at the beginning of the nineteenth century led to an emphasis on nationality rather than residence as a crucial factor in defining a polity.<sup>210</sup> In the modern political culture of the FRG, *Nationalismus* is a pejorative term, and the Federal Constitutional Court's endorsement of measures to facilitate naturalization of resident aliens represents a distancing from the nationalist past. Nonetheless, relics of nineteenth century nationalism do persist in German law, such as the privileged position of ethnic German immigrants.<sup>211</sup> These relics also inform the interpretation of popular sovereignty that forbids the German people to share political power with their fellow residents.

## II. THE PRACTICE OF ALIEN SUFFRAGE IN THE UNITED STATES

The U.S. Constitution is, notoriously, even more oblique about voting rights than the FRG's Basic Law.<sup>212</sup> Article I provides, however, that the members of the House of Representatives shall be "cho-

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209. *E.g.*, Kaiser, *supra* note 204, at 192-94; McCurdy, *supra* note 202, at 298-300, 304-07.

210. *See, e.g.*, PETER ALTER, NATIONALISM 58-61 (Stuart McKinnon-Evans trans., 1989); Grawert, *supra* note 66, at 665-67; Hailbronner, *supra* note 11, at 73-74; Quaritsch, *supra* note 58, at 7-8.

211. *See* Hailbronner, *supra* note 11, at 73-74.

212. *See, e.g.*, Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982).

sen every second Year by the People of the several States.”<sup>213</sup> This reference to “the People” could have been read as prohibiting alien suffrage, as could the indirect statements of the popular sovereignty principle in the Preamble and the Tenth Amendment. Nonetheless, it appears to be settled doctrine that, so far as the federal Constitution is concerned, alien suffrage is entirely discretionary — neither constitutionally compelled nor constitutionally forbidden.

How did it come to be this way? Partly by long-settled practice. But though the story involves pragmatism, it has not been uncomplicated by arguments of principle. The transformation from an early system with a marginal role for alien suffrage to a system with very substantial electoral participation of “declarant aliens” reflected contention over the proper approach to suffrage in a country that deliberately invited immigration.

#### A. *The Progress of Alien Suffrage*<sup>214</sup>

In order to appreciate the complex history of alien suffrage in the United States, it is first necessary to confront the difficult history of the law of citizenship. In the colonial period, the practices of British nationality law had coexisted with a practice of local naturalization valid only within a particular colony.<sup>215</sup> Citizenship in the individual states was the dominant concept in the immediate post-revolutionary period, though given extraterritorial consequences by the privileges and immunities clause of the Articles of Confederation.<sup>216</sup> The 1787 Constitution added a concept of national citizenship, reinforced by a congressional power over naturalization,<sup>217</sup> but did not specify the intended relationship between citizenship in a state and in the nation. It took three decades to settle the exclusivity of the federal power to naturalize to national citizenship,<sup>218</sup> and even thereafter the possibility of

213. U.S. CONST. art. I, § 2, cl. 1.

214. In a well-known article in 1977, Gerald Rosberg called for a return to the tradition of alien suffrage in the United States. Gerald A. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977). In sketching some of the precedents for alien suffrage, Rosberg lamented the absence of an adequate history of the subject. *Id.* at 1093-94. This article cannot hope to fill that gap, though it adds some further elements to the story. I would be delighted to be superseded by a comprehensive treatment of this important subject.

215. See, e.g., JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 74-77, 93-97, 103-05 (1978); JOHN P. ROCHE, *THE EARLY DEVELOPMENT OF UNITED STATES CITIZENSHIP 2* (1949).

216. KETTNER, *supra* note 215, at 219-24; see ARTICLES OF CONFEDERATION art. IV.

217. See U.S. CONST. art. I, § 2, cl. 2 (Representatives must have been citizens of the United States for 7 years); *id.* § 3, cl. 3 (Senators must have been citizens of the United States for 9 years); *id.* § 8, cl. 4 (power to adopt uniform rule of naturalization); *id.* art. II, § 5 (President must be a natural born citizen of the United States).

218. Compare *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (Marshall, C.J.) (power to

state conferral of state citizenship seemingly remained.<sup>219</sup> The relationship of national citizenship to state citizenship was only partially clarified by the adoption of the Fourteenth Amendment, which limited the power of the states to withhold state citizenship from national citizens.<sup>220</sup> The Fourteenth Amendment also continued the tradition of denying national citizenship to many Native Americans, who were clearly U.S. nationals in the international sense.<sup>221</sup> The divergence between "citizenship" and "nationality" only increased with the acquisition of overseas territories.<sup>222</sup>

Some early examples of alien suffrage were linked with the confusion over the relationship between state and federal citizenship. The would-be state of Vermont had included in its Constitution of 1777 a provision admitting foreigners to the rights of natural born subjects after one year's residence and an oath of allegiance.<sup>223</sup> Vermont re-

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naturalize exclusive) *with* *Collet v. Collet*, 2 U.S. (2 Dall.) 294 (C.C.D. Pa. 1792) (Wilson, Blair and Peters, JJ.) (power to naturalize concurrent).

219. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1857).

220. Section 1 of the Fourteenth Amendment provides 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." U.S. CONST. amend. XIV, § 1 (emphasis added). It does not clarify the status of persons who are not "born or naturalized in the United States, and subject to the jurisdiction thereof," *Rogers v. Bellei*, 401 U.S. 815 (1971), nor does it necessarily forbid the conferral of a local, state citizenship. The *Dred Scott* decision had emphasized the proposition that a state could legally recognize as its "citizens" persons who were not "citizens of the state" within the meaning of the federal Constitution because they were not citizens of the United States. See *Scott v. Sandford*, 60 U.S. (19 How.) at 405. The Fourteenth Amendment could have been read as overturning this proposition, but the Court seems to have assumed its continuing validity in *Boyd v. Neb. ex rel. Thayer*, 143 U.S. 135, 175 (1892), and it has occasionally been reasserted in modern times. See, e.g., *Crosse v. Board of Supervisors of Elections*, 221 A.2d 431 (Md. 1966); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 525-27 n.162 (1981). Distinguishing between local state citizenship and constitutional state citizenship may seem obscurantist because the distinction may have no practical significance at present, particularly since aliens no longer vote in state elections and the federal government no longer withholds citizenship from Native Americans.

221. *Elk v. Wilkins*, 112 U.S. 94 (1884); EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* §§ 12, 216 (1915); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 520-523 (1st ed. 1942). Congress finally extended citizenship to all Native Americans in 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

222. See 8 U.S.C. §§ 1101(a)(3), (21), (22), 1401, 1408 (1988); ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 28 (1989).

223. See VT. CONST. of 1777, ch. II, § 38. This provision, like much of the Vermont Constitution, was copied from the Pennsylvania Constitution of 1776. See PA. CONST. of 1776 § 42 ("Every foreigner of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer, land or other real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this State, except that he shall not be capable of being elected a representative until after two years residence."); see also KETTNER, *supra* note 215, at 214 (noting the dependence of Vermont's Constitution on Pennsylvania's); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 339 (1972) (same). Pennsylvania omitted that provision, however, from its superseding Constitu-

tained the provision with only slight modification in its statehood Constitution of 1793.<sup>224</sup> Aliens appear to have voted freely in some parts of Vermont, raising the concern that local practice conflicted with the federal naturalization power.<sup>225</sup> The Constitution was amended in 1828 to redress this perceived conflict, although aliens who were already freemen were not deprived of their status.<sup>226</sup> (Such transition rules grandfathering in existing alien voters proved to be a frequent feature of later suffrage "reforms.") The state of Virginia naturalized and enfranchised aliens into the 1840s,<sup>227</sup> a practice that was briefly debated by Congress in a contested election case.<sup>228</sup>

Voter qualifications for both state and federal elections were in the hands of the states. The federal constitutional convention had decided against imposing uniform federal voting qualifications,<sup>229</sup> and had instead specified that in the people's choice of Representatives "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."<sup>230</sup> The Senators

tion of 1790, on the assumption that naturalization conflicted with the conferral of the naturalization power on Congress in the federal Constitution of 1787. See *United States v. Villato*, 28 F. Cas. 377 (C.C.D. Pa. 1797) (No. 16,622); cf. PA. CONST. of 1790, art. III, § 1 ("In elections by the citizens, every freeman . . .")

224. VT. CONST. of 1793, ch. II, § 39; see also VT. CONST. of 1786, ch. 2, § 36. Vermont finally became a state in 1791, after New York, from which it had effectively seceded, ceased to oppose admission. See Gary A. Aichele, *Making the Vermont Constitution: 1777-1824*, 56 VT. HIST. 166, 181-85 (1988).

225. See *Journal of the Council of Censors, at their Sessions at Montpelier and Burlington in June, October, and November 1827*, at 5-6, 21-22, 31-32, 45-46 (1828) (explaining need for amendment). The Council of Censors was a body elected every seven years to recommend revisions in the state constitution. See VT. CONST. of 1793, ch. II, § 43; *id.* amend. 25 (1870) (abolishing Council of Censors); WOOD, *supra* note 223, at 339; cf. THE FEDERALIST NO. 50 (James Madison) (criticizing the Pennsylvania Council of Censors, from which it was copied). The Vermont Council of Censors had also recommended denying aliens the right to vote for state officials in 1814. See *Journal of the Council of Censors, at their Sessions in June and October 1813 and January 1814*, at 28, 48-49 (1814).

226. See VT. CONST. of 1793 amend. I (1828) ("No person, who is not already a freeman of this State, shall be entitled to exercise the privilege of a freeman, unless he be a natural-born citizen of this or some one of the United States, or until he shall have been naturalized agreeably to the acts of Congress.") The 1828 amendment appears not, however, to have precluded aliens who were not freemen from voting in town and school district elections. See *Woodcock v. Bolster*, 35 Vt. 632, 637-41 (1863).

227. See Va. Act of Dec. 23, 1792, ch. 110, § 2; cf. Va. Code of 1849, tit. 2, ch. 3, § 1 (recognizing as citizens of the state "all persons who have obtained a right to citizenship under former laws," but omitting provision for further naturalizations).

228. See H.R. REP. NO. 520, 28th Cong., 1st Sess. (1844); 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1049-50 (1907).

229. See THE FEDERALIST NO. 52 (James Madison). Similarly, in the drafting of the Fifteenth Amendment, proposals for comprehensive regulation of voter qualifications were rejected in favor of a ban on discrimination "on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV; see WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 59, 71, 77 (1969).

230. U.S. CONST. art. I, § 2, cl. 1.

were originally selected by the state legislatures, and therefore indirectly by the state electors, and Article II left it to the states to decide how Presidential electors would be chosen.<sup>231</sup> Because Congress was empowered to propose constitutional amendments to be ratified by the state legislatures, state electoral laws also conferred an indirect voice in the amending process.<sup>232</sup>

Alien suffrage was not, however, solely a policy of individual states. The Northwest Ordinance of 1787 expressed an initial federal hospitality toward alien suffrage in the territorial governments. Although the Ordinance was originally enacted by the Congress of the Confederation, it was immediately reaffirmed by the first Congress under the Constitution, without relevant change,<sup>233</sup> and its suffrage provisions were incorporated into the organic acts of several later territories.<sup>234</sup> The Ordinance provided for elected representatives in the territory once there were five thousand "free male inhabitants," and it contemplated voting by both former citizens of the states and other such "inhabitants."<sup>235</sup> Given the constitutional structure, this alien suffrage was localized; territorial residents might elect officials with territorial jurisdiction and nonvoting delegates to Congress, but the territories did not participate in electing the federal legislature or executive. The tradition of alien suffrage in the territories gained wider effect when two of the first states admitted from the Northwest Territory, Ohio and Illinois, conferred the franchise on "white male inhabitants" rather than "citizens."<sup>236</sup>

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231. U.S. CONST. art. I, § 3, cl. 1; *id.* art. II, § 1, cl. 2. The Seventeenth Amendment, substituting direct popular election of Senators, made the qualifications for House and Senate electors identical. *Id.* amend. XVII.

232. U.S. CONST. art. V. Article V also envisions other means, such as proposal by "a convention," and ratification "by Conventions." It does not say who is eligible to elect delegates to the conventions; no proposing convention has yet been held, and the only historical instance of ratification by conventions involves the Twenty-First Amendment, which was proposed after the last state had abandoned alien suffrage. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 64 n.9 (2d ed. 1988).

233. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

234. See Orleans Territorial Government Act, ch. 23, 2 Stat. 322 (1805); Michigan Territorial Government Act, ch. 5, 2 Stat. 309 (1805); Mississippi Territorial Government Act (1798). *But see, e.g.,* Missouri Territorial Government Act, ch. 95, § 9, 2 Stat. 743, 745 (1812) (enfranchising white male citizens of United States and other white male persons already resident at the time of the Louisiana Purchase).

235. The Northwest Ordinance, ch. 8, 1 Stat. 50 (1789) ("provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years residence in the district shall be necessary to qualify a man as an elector of a representative."). It should be recognized that "inhabitant," like "resident," can have a technical legal meaning.

236. See ILL. CONST. of 1818, art. II, § 27; OHIO CONST. of 1802, art. IV, § 1; Spragins v. Houghton, 3 Ill. (2 Scam.) 377 (1840). It appears that Ohio later reinterpreted the term to exclude alien residents. See *id.* at 410-13; Rosberg, *supra* note 214, at 1096-98 & n.32.

With increasing levels of immigration from a variety of source countries, the political rights of "foreigners" became more controversial. Nativist movements, culminating in the Know Nothing Party of the 1850s, favored restrictive immigration and naturalization policies, and sometimes even the denial of political rights to naturalized citizens.<sup>237</sup> During the first wave of nativist agitation in the 1830s, objections were raised in Congress to the admission of Michigan as a state under a Constitution that enfranchised alien inhabitants.<sup>238</sup> Actually, the enfranchisement of aliens by the original Michigan constitution was rather modest, including only white male inhabitants who were resident in the state at its effective date.<sup>239</sup> Although Michigan did gain admission, during the succeeding decade the organic act of every new territory, and the constitution of every new state formed from the territories, limited the franchise to citizens of the United States.<sup>240</sup>

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237. See DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* 39-155 (1988); FRANK G. FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* 184-300 (1906); MALDWYN A. JONES, *AMERICAN IMMIGRATION* 147-61 (1960); cf. R.I. CONST. of 1842, art. II, § 1, 2 (setting separate property qualifications for native and nonnative citizens); MASS. CONST. of 1780, amend. XX (1857) (adopting English literacy test).

238. See, e.g., 12 CONG. DEB. 1007 (1836) (remarks of Sen. Clayton); *id.* at 4251 (remarks of Rep. Russell); see also 13 *THE PAPERS OF JOHN C. CALHOUN* 126-36 (C. Wilson ed., 1980) (version, of uncertain provenance, of Calhoun's speech on the issue). Alien suffrage was not the only objection to Michigan statehood; the territory was engaged in a border dispute with Ohio and Indiana, and had sought statehood without the prior blessing of Congress. See 12 CONG. DEB. 1008-10 (remarks of Sen. Tipton); *id.* at 1015 (remarks of Sen. Ewing). In the absence of a congressional enabling act, the territory had made its own definition of the voter qualifications for the constitutional convention, and had included alien residents, thus further irritating the nativists. See *id.* at 4252-53 (remarks of Rep. Russell). To avoid misunderstanding, perhaps I should emphasize that I am not equating opposition to alien suffrage with nativism; Russell's polemics against the Irish and call for a change in the naturalization law go beyond mere opposition to aliens' voting. See *id.* at 4253-59. A lengthy discussion of alien suffrage in Michigan as a partisan dispute between Whigs and Democrats may be found in RONALD P. FORMISANO, *THE BIRTH OF MASS POLITICAL PARTIES: MICHIGAN, 1827-1861*, at 81-101 (1971).

239. See MICH. CONST. of 1835, art. II, § 1; 12 CONG. DEB. 1008, 1014 (1836) (remarks of Sen. Buchanan). These inhabitants would arguably be naturalized by the admission of Michigan to statehood. See *Boyd v. Neb. ex rel. Thayer*, 143 U.S. 135, 167-68 (1892); 12 CONG. DEB. 4214, 4227-30 (remarks of Rep. Everett); see also *infra* notes 295-97 and accompanying text. Not everyone in Congress viewed the issue in this light. See 12 CONG. DEB. 1032, 1043-45 (remarks of Sen. Buchanan); *id.* at 4246-47 (remarks of Rep. Hamer); *id.* at 4253-57 (remarks of Rep. Russell). A later, superseding constitution of 1850 expanded the electorate to include persons who were unquestionably aliens, but had declared their intention to become citizens. See MICH. CONST. of 1850, art. VII, § 1.

240. Iowa Territorial Government Act, ch. 96, 5 Stat. 235 (1838); Wisconsin Territorial Government Act, ch. 54, 5 Stat. 10 (1836); IOWA CONST. of 1846, art. II, § 1; FLA CONST. of 1838, art. VI, § 1 (admitted 1845); ARK. CONST. of 1836, art. IV, § 2. Texas may present a special case. Annexed from foreign territory, its statehood constitution enfranchised persons who had been resident long enough for naturalization but had not taken the required oath of allegiance to the Republic at the time of annexation. Compare TEX. CONST. of 1845, art. III, §§ 1, 2 (qualifications of electors) with TEX. CONST. of 1836, § 6 (naturalization). It is unclear whether annexation made these persons citizens of the United States. See 13 Op. Att'y Gen. 397 (1871).

An innovation in Wisconsin opened up new ground for compromise between the proponents and opponents of alien suffrage. In the Wisconsin Territory of the 1840s, the Democratic Party sought the support of the large immigrant population by emphasizing the links between the Whigs and the nativist movement.<sup>241</sup> This polarization strategy resulted in an effort to revive alien suffrage. The statehood Constitution ultimately adopted the compromise formula of permitting white male aliens to vote if they had made a declaration of intent to be naturalized under the federal naturalization laws.<sup>242</sup> Since 1795, federal naturalization procedure had provided that aliens must first declare under oath to a competent court their intention to apply subsequently for citizenship (known colloquially as "taking out first papers"), and had postponed eligibility for actual naturalization ("second" or "final papers") until three years after the declaration.<sup>243</sup> The declaration could be made at any time after arrival, did not divest aliens of their prior nationality, and did not legally oblige them to complete the naturalization process.<sup>244</sup> In fact, the declaration did not even include an oath of present allegiance to the United States.<sup>245</sup> Nonetheless, the declaration could be portrayed as some evidence of attachment to the country, in order to broaden the base of support for enfranchising noncitizens.<sup>246</sup>

The declarant alien qualification for suffrage became increasingly

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241. Louise P. Kellogg, *The Alien Suffrage Provision in the Constitution of Wisconsin*, 1 WIS. MAG. HIST. 422 (1918). The politics of the issue were further complicated by the concentration of immigrants in the eastern part of the future state. *Id.* at 425.

242. See WIS. CONST. of 1848, art. III, § 1; Kellogg, *supra* note 241, at 425.

243. See Act of January 29, 1795, ch. 20, § 1, 1 Stat. 414; FREDERICK VAN DYNE, *CITIZENSHIP OF THE UNITED STATES* 62 (1904). The delay between declaration and naturalization was lengthened to five years by the Naturalization Act of 1798, part of the infamous Alien and Sedition Acts package, but cut back to three years in 1802. Act of June 18, 1798, ch. 54, § 1, 1 Stat. 566; Act of April 14, 1802, ch. 28, § 1, 2 Stat. 153. The 1906 Naturalization Act modified the procedure so that an alien who did not petition for naturalization within seven years after filing the declaration would have to start the process all over again. Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596. Prior to that time, the declarant could wait indefinitely. Some states dealt with the problem by limiting the declarants' suffrage rights to a period of years sufficient for naturalization. See MO. CONST. of 1865, art. II, § 18 (five years); N.D. CONST. of 1889, art. 5, § 121 (six years).

244. VAN DYNE, *supra* note 243, at 62, 66; Rosberg, *supra* note 214, at 1098. This fact was emphasized by opponents of alien suffrage. See, e.g., *THE ATTAINMENT OF STATEHOOD* 359, 365 (Wisconsin Historical Publications Vol. XXIX, Milo M. Quaife ed., 1928) (reprinting debates of second constitutional convention).

245. An additional oath from aliens to support the state and federal constitutions had been included in the first proposed Wisconsin constitution, but was regarded by many aliens as insulting. This proposed constitution was rejected by the voters, apparently on other grounds. See Kellogg, *supra* note 241, at 424; Frederic L. Paxson, *Wisconsin — A Constitution of Democracy, in THE MOVEMENT FOR STATEHOOD 1845-46*, at 30, 42-43, 48 (Wisconsin Historical Publications Vol. XXVI, Milo M. Quaife ed., 1918).

246. See, e.g., "Letters of 'Jefferson' — No. 3," reprinted in *THE MOVEMENT FOR STATEHOOD*, *supra* note 245, at 194-95.



common in the nineteenth century. Shortly after the admission of Wisconsin, Congress adopted it in the organic act for the Oregon Territory, and the next year for the Minnesota Territory.<sup>247</sup> Alien suffrage was not initially afforded, however, in the new lands acquired in the Mexican War.<sup>248</sup> Thereafter, Congress enfranchised declarant aliens in the Washington, Kansas, Nebraska, Nevada, Dakota, Wyoming, and Oklahoma Territories.<sup>249</sup> In all nine of these territories, Congress imposed the additional requirement of an oath to support the U.S. Constitution.<sup>250</sup>

During the mid-1850s, the brief springtime of Know-Nothingism, the Senate debated declarant alien suffrage in terms of both principle and policy, and found itself closely divided. The Senate initially adopted the Clayton amendment to the Kansas-Nebraska bill, excluding aliens from the electorate for the crucial first territorial legislatures.<sup>251</sup> The sectional voting alignment, however, indicates that support for the Clayton amendment actually turned on the expected antipathy of immigrant electors to slavery, and when the Northern-dominated House of Representatives rejected the amendment, all but seven of its supporters in the Senate settled for the bill's other advantages.<sup>252</sup> The debate was repeated in somewhat purer form in 1857,

247. Act of May 29, 1848, ch. 50, 9 Stat. 233 (admitting Wisconsin); Oregon Territorial Government Act, ch. 177, § 5, 9 Stat. 323, 325 (1848); Minnesota Territorial Government Act, ch. 121, § 5, 9 Stat. 403, 405 (1849).

248. See Utah Territorial Government Act, ch. 51, § 5, 9 Stat. 453, 454 (1850); New Mexico Territorial Government Act, ch. 49, § 6, 9 Stat. 446, 449 (1850); see also CAL. CONST. of 1849, art. II, § 1. I am not sure whether these restrictions have something to do with the fact that Article VIII of the Treaty of Guadalupe Hidalgo gave Mexican citizens in these territories one year to declare their election to retain Mexican citizenship, failing which they became United States citizens.

249. 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). Congress initially enfranchised the free white male inhabitants of the Idaho Territory, see Idaho Territorial Government Act, ch. 117, § 5, 12 Stat. 808 (1863), but the Revised Statutes restricted the franchise in all territories to citizens and declarant aliens. Rev. Stat. § 1860 (1874).

250. See sources cited *supra* notes 247 and 249.

251. See CONG. GLOBE, 33d Cong., 1st Sess. 520 (1854).

252. See *id.* at 1321; Robert R. Russell, *The Issues in the Congressional Struggle Over the Kansas-Nebraska Bill, 1854*, 29 J. SO. HIST. 187, 208 (1963); cf. CONG. GLOBE, 33rd Cong., 1st Sess. App. 301-02 (1854) (remarks of Sen. Atchison of Missouri) (explicit denial of this motive, followed by offer to permit alien voting if postponed).

For some further realism on the subject of declarant alien suffrage, see *id.* at 780 (remarks of Sen. Jones of Iowa) (emphasis deleted) ("I have had much experience in territorial elections . . . I can assure gentlemen that whether the Clayton alias Pearce amendment be adopted or not, every white male inhabitant of Nebraska and Kansas, above the age of twenty-one years, will not only be permitted to vote at their first elections, but will be expected, as good citizens, to exercise the privileges always awarded to the sovereign squatter.").

when alien suffrage provisions of the Minnesota statehood enabling act were first struck, and then reinstated amid charges of foreign influence.<sup>253</sup>

Some, though not all, of the territories that permitted alien suffrage retained it when they achieved statehood.<sup>254</sup> Older states also joined the trend.<sup>255</sup> When Indiana and Michigan adopted new Constitutions in the early 1850s, they enfranchised declarant aliens.<sup>256</sup> Reportedly, this change reflected competition for immigrants among the midwestern states.<sup>257</sup> Numerous former Confederate states adopted the same tactic, at least temporarily, after the Civil War.<sup>258</sup>

As the desire for new immigrants faded, so did the acceptance of alien suffrage. In the 1890s, the closing of the frontier and increases in immigration from Eastern and Southern Europe gave rise to a movement for restriction of European immigration. The reaction against these "new immigrants" ultimately led to the enactment of a literacy requirement for immigrants in 1917, and the imposition of immigration quotas based on national origin in the 1920s.<sup>259</sup> Meanwhile, the changing attitude toward immigration also led to the repeal of alien suffrage provisions.<sup>260</sup> The First World War unleashed pervasive hostility against Germans and German culture in the United States.<sup>261</sup>

253. See CONG. GLOBE, 34th Cong., 3rd Sess. 808-14, 849-65, 872-77 (1857). *But cf.* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 256 (1970) ("The vote indicated that most northern anti-Democratic Congressmen were willing to forego nativism to secure the admission of another free state . . .").

254. See KAN. CONST. of 1859, art. V, § 1; MINN. CONST. of 1857, art. VII, § 1; NEB. CONST. of 1867, art. II, § 2; N.D. CONST. of 1889, art. 5, § 121; OR. CONST. of 1857, art. II, § 2; S.D. CONST. of 1889, art. VII, § 1; *cf.* OKLA. CONST. of 1907, art. III, § 1 ("male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States"). Montana and Washington limited their prospective enfranchisement to citizens while grandfathering in declarant aliens. MONT. CONST. of 1889, art. IX, § 2 (with five-year transition); WASH. CONST. of 1889, art. VI, § 1. *But see* NEV. CONST. of 1864, art. II, § 1 (citizens only); WYO. CONST. of 1889, art. VI, § 5 (same).

255. Illinois, in contrast, imposed a citizenship requirement in 1848, while grandfathering in present voters. ILL. CONST. of 1848, art. VI, § 1.

256. IND. CONST. of 1851, art. II, § 2; MICH. CONST. of 1850, art. VII, § 1.

257. See, e.g., Rosberg, *supra* note 214, at 1098.

258. See, e.g., ALA. CONST. of 1867, art. VII, § 2; ARK. CONST. of 1868, art. VIII, § 2; FLA. CONST. of 1868, art. XIV, § 1; GA. CONST. of 1868, art. II, § 2; LA. CONST. of 1879, art. 185; S.C. CONST. of 1865, art. IV ("an emigrant from Europe, who has declared his intention . . ."); TEX. CONST. of 1876, art. VI, § 2; *cf.* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 213-14, 419-20 (1989) (discussing Southern efforts to encourage immigration). Missouri, also a former slave state, did likewise. MO. CONST. of 1865, art. II, § 18.

259. See, e.g., JONES, *supra* note 237, at 256-60, 269-270, 276-77.

260. See, e.g., 2 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st 1901, to September 3rd, 1901, at 2721-23 (1940); 3 *id.* at 3217, 3221-23; Rosberg, *supra* note 214, at 1099-1100.

261. See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 207-12 (2d ed. 1988); JONES, *supra* note 237, at 271.

This hostility, along with shock at the idea of voting by enemy aliens, prompted several more states to abolish alien suffrage at that time.<sup>262</sup> By 1928, no state afforded alien suffrage in statewide or federal elections.<sup>263</sup> This situation persists in the United States today.<sup>264</sup>

It is more difficult to assess the current status of alien suffrage at the local level. Alien residents are reportedly eligible to vote in municipal elections in several Maryland towns.<sup>265</sup> Aliens also qualify as electors and candidates in the decentralized school board of elections of New York City and Chicago.<sup>266</sup> A referendum this past November in Takoma Park, Maryland attracted media attention when voters narrowly approved enfranchising alien residents.<sup>267</sup> The victory has inspired discussion of undertaking similar efforts elsewhere, and we may be beginning a new cycle of controversy over alien suffrage in the United States.<sup>268</sup>

### B. *The Ideology of Alien Suffrage*

It would be pleasant to be able to say that the inclusion of aliens in the electorate reflected U.S. ideals of universal democracy. To some extent, this was true. The early nineteenth century saw a strong movement toward abolition of property qualifications for the franchise in the name of "universal manhood suffrage,"<sup>269</sup> and the supporters of alien suffrage invoked this ideal.<sup>270</sup> The Illinois Supreme Court con-

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262. See HIGHAM, *supra* note 261, at 214, 376 n.50; KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 252 (reprint 1969) (1918).

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

264. Rosberg, *supra* note 214, at 1100.

265. See, e.g., SOMERSET, MD., CHARTER § 83-21 (1990); Beth Kaiman, *Deciding Ballot Rights: Takoma Park to Rule on Non-Citizen Vote*, WASH. POST, Oct. 31, 1991, at M1 (listing Somerset, Barnesville, Chevy Chase Sections 3 and 5, and Martin's Additions). I am indebted to Jamin Raskin and Howard Lesnick for enlightenment on this subject.

266. See ILL. REV. STAT. ch. 122, paras. 34-1-1, 34-2-1 (1989) (parents and community residents, without citizenship qualification, eligible to vote and to run for local school councils); *Ambach v. Norwick*, 441 U.S. 68, 81 n.15 (1979) (alien parents eligible as voters and candidates in New York City community school board elections); N.Y.C. BOARD OF EDUCATION, COMMUNITY SCHOOL BOARD ELECTIONS 1989: AN ELECTION WHERE YOU CAN FEEL THE IMPACT OF YOUR VOTE! 8 (n.d.) (on file with author).

267. See Beth Kaiman & Lynne K. Varner, *Takoma Park Residents Favor Vote For Non-Citizens in City Elections*, WASH. POST, Nov. 6, 1991, at A30.

268. See 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 D6; Melanie Howard, *Vote to extend voting rights seen as likely to start a trend*, WASH. TIMES, Nov. 7, 1991, at B3 (noting both expressions of interest from Texas and California, and opposition of Federation for American Immigration Reform).

269. See generally CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760-1860 (1960).

270. See, e.g., CONG. GLOBE, 33rd Cong., 1st Sess., App. 769 (1854) (remarks of Sen. Seward) ("[T]he right of suffrage is not a mere conventional right, but an inherent natural right,

cluded that its constitution extended

the right of suffrage to those who, having by habitation and residence identified their interests and feelings with the citizen, are upon the just principles of reciprocity between the governed and governing, entitled to a voice in the choice of the officers of the government, although they may be neither native nor adopted citizens.<sup>271</sup>

Some members of the Democratic Party, which traditionally relied on the immigrant vote, emphasized their party's name and ideals, seeking to strengthen the immigrants' partisan identification in the face of the threatening countertrend of nativism.<sup>272</sup> The fact that the Democratic Party particularly opposed voting rights for black citizens, and that women's suffrage enjoyed little support in any party, may indicate the limits of this "universality."<sup>273</sup>

Alien suffrage was also urged for instrumental reasons, as an encouragement to immigration.<sup>274</sup> The argument was sometimes made in competitive terms — that immigrants' choices of destination could be influenced by the early grant of political rights, and that states which insisted on naturalization as a prerequisite for voting were saddling themselves with a competitive disadvantage.<sup>275</sup>

To others, alien suffrage ruptured the fundamental connection between citizenship and voting, and threatened the ideal of popular sovereignty.<sup>276</sup> A striking parallel to the German decisions on alien suffrage may be seen in an 1811 opinion of the Supreme Judicial Court of Massachusetts, analyzing the principles of apportionment for the state house of representatives.<sup>277</sup> The court began with the "unques-

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of which no Government can rightly deprive any adult man who is subject to its authority, and obligated to its support.")

271. *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 408 (1840).

272. See, e.g., Henry A. Chaney, *Alien Suffrage*, 2 PUBLICATIONS MICH. POL. SCI. ASS'N 130, 132-33 (1894) (quoting from debate at 1850 Michigan constitutional convention); *To Persons of Foreign Birth*, in THE MOVEMENT FOR STATEHOOD, *supra* note 245, at 439-41.

273. See, e.g., WILLIAMSON, *supra* note 269, at 278; ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869, at 40-47 (1978).

274. See, e.g., *Spragins*, 3 Ill. (2 Scam.) at 398; PORTER, *supra* note 262, at 130-31 (citing Minnesota constitutional convention); *The Constitution — No. 8*, in THE STRUGGLE OVER RATIFICATION 1846-1847, at 488-489 (Wisconsin Historical Publications Vol. XXVII, Milo. M. Quaipe ed., 1920).

275. See CONG. GLOBE, 33rd Cong., 1st Sess. App. 297 (1854) (remarks of Sen. Pettit) (discussing 1851 Indiana constitution); Chaney, *supra* note 272, at 134 (discussing 1850 Michigan constitutional convention).

276. See, e.g., H.R. REP. NO. 371, 35th Cong., 1st Sess. (recommending bill to bar aliens from voting in the territories); CONG. GLOBE, 34th Cong., 3d Sess. 864-65 (1857) (remarks of Sen. Crittenden); *id.* at 874-76 (remarks of Sen. Bell); CONG. GLOBE, 33rd Cong., 1st Sess. App. 775-79 (remarks of Sen. Bayard).

277. Opinion of the Justices, 7 Mass. 523 (1811). The occasion for the analysis was a request from the House of Representatives for an advisory opinion on the constitutionality of a proposed

tioned principle" that

as the supreme power rests wholly in the citizens, so the exercise of it, or any branch of it, ought not to be delegated by any but citizens, and only to citizens. . . . And if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions, which are not to be misunderstood.<sup>278</sup>

The court therefore concluded that the provisions authorizing "inhabitants" or "residents" to vote must be construed as referring solely to citizens. But so long as aliens gained no political rights thereby, poll taxes paid by aliens could be taken into account in apportioning representatives to the towns.<sup>279</sup>

Many Southern politicians, however, coupled opposition to alien suffrage with a states' rights insistence that sovereignty entailed the state's power to enfranchise whomever it pleased.<sup>280</sup> They asserted instead, as a matter of policy, that a newly arrived immigrant had no attachment to U.S. political institutions.<sup>281</sup> As their principal concern was presumably the institution of slavery, the overwhelming preference of immigrants to live in the free states suggests that, in a sense, they were correct.<sup>282</sup>

States that excluded aliens from the electorate did not necessarily pursue citizen sovereignty to the logical extreme of denying aliens all opportunity for political participation. Sometimes aliens were eligible voters in municipal elections, though not in statewide elections.<sup>283</sup> A Vermont court deemed it "a wise policy in the Legislature to allow [aliens] to participate in the affairs of these minor municipal corporations, as in some degree a preparatory fitting and training for the exercise of the more important and extensive rights and duties of citizens."<sup>284</sup> Aliens also performed a unique role in self-government

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method of apportionment; the Supreme Judicial Court has jurisdiction to render advisory opinions at the request of the legislature. See MASS. CONST. of 1780, pt. II, ch. III, art. II.

278. 7 Mass. at 525; see also *id.* at 529 ("that we might not unnecessarily fix on the people an intention of imparting any of their sovereignty to aliens").

279. *Id.* at 529; see MASS. CONST. of 1780, pt. 2, ch. I, § III, art. II (allocating representatives according to number of "rateable polls" in the town).

280. See, e.g., CONG. GLOBE, 34th Cong., 3d Sess. 809 (1857) (remarks of Sen. Brown); *id.* at 811-12 (remarks of Sen. Mason); *id.* at 813 (remarks of Sen. Butler).

281. See, e.g., CONG. GLOBE, 34th Cong., 3d Sess. 811-12 (1857) (remarks of Sen. Mason); CONG. GLOBE, 33rd Cong., 1st Sess. 1307 (1854) (remarks of Sen. Butler); *id.* at 765 (remarks of Sen. Brown).

282. See, e.g., FONER, *supra* note 253, at 236. At the same time, many immigrants to free states were indifferent or hostile to abolitionism. *Id.* at 230-31; JONES, *supra* note 237, at 159-69.

283. See *Stewart v. Foster*, 2 Binn. 110 (Pa. 1809) (borough elections); *Woodcock v. Bolster*, 35 Vt. 632 (1863) (school district). On local alien suffrage today, see *supra* notes 265-68 and accompanying text.

284. *Woodcock v. Bolster*, 35 Vt. at 640-41. The court also noted that alien parents would

through jury service<sup>285</sup> in those states that preserved the English practice of permitting an alien defendant to be tried by a jury *de medietate linguae*, or mixed jury, composed half of citizens and half of aliens.<sup>286</sup>

The states that gave aliens full voting rights were not necessarily indifferent to the concept of popular sovereignty. Most of their constitutions included express popular sovereignty clauses, typically stating that all (political) power was "inherent in the people."<sup>287</sup> Some states merely accepted the fact that aliens as well as citizens could vote. But others sought to reconcile popular sovereignty with alien suffrage by concluding that alien voters were citizens of the state, though not of the United States. The Wisconsin Supreme Court confronted this problem in a series of cases in the 1860s.<sup>288</sup> The court explained at length in *In re Wehlitz* that, as far as state law was concerned, declarant aliens were citizens of Wisconsin:

[A]lthough it may be possible for the state to confer the right of voting on certain persons without making them citizens, yet I should think it would require very strong evidence of a contrary intention to overcome the inference of an intention to create a citizenship when the right of suffrage is conferred. . . . the rights of voting and holding office are al-

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be more likely to be supportive of the public education of their children if they were permitted to participate in the management of the schools. *Id.* at 641.

285. For a recent reiteration of the character of jury service as a political right, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187-99 (1991).

286. *See, e.g.*, United States v. Cartacho, 25 F. Cas. 312 (C.C.D. Va. 1823) (No. 14,738); *People v. M'Lean*, 2 Johns. 381 (N.Y. Sup. Ct. 1807); *Richards v. Commonwealth*, 38 Va. (11 Leigh) 690 (Va. Gen. Ct. 1841); 4 WILLIAM BLACKSTONE, COMMENTARIES \*346. The institution of the mixed jury, with its deliberate focus on the juror's alienage, must be distinguished from the practice of simply including aliens among those eligible as jurors. *See, e.g.*, *People v. Scott*, 56 Mich. 154 (1885) (declarant aliens, being electors, are eligible as jurors).

Interestingly, the majority in *Richards* criticized the mixed jury practice and construed it as discretionary in the trial court, but not on the grounds that alienage was incompatible with the powers of a juror. Rather, the majority contended that the mixed jury was less appropriate to U.S. circumstances because aliens were welcomed and did not face prejudice, and because a mandatory rule would supersede property qualifications and might place "fugitives and vagabonds" on the jury. 38 Va. (11 Leigh) at 695-97.

287. *E.g.*, ALA. CONST. of 1867, art. I, § 3; ARK. CONST. of 1868, art. I, § 1; FLA. CONST. of 1868, Declaration of Rights, § 2; ILL. CONST. of 1818, art. VIII, § 2; IND. CONST. of 1851, art. I, § 1; KAN. CONST. of 1859, Bill of Rights, § 2; MINN. CONST. of 1857, art. I, § 1; N.D. CONST. of 1889, art. I, § 2; OR. CONST. of 1857, art. I, § 1; S.D. CONST. of 1889, art. VI, § 26; TEX. CONST. of 1876, art. I, § 2. Other states declared that all power was "vested in and derived from the people," *e.g.*, COLO. CONST. of 1876, art. II, § 1; MO. CONST. of 1865, art. I, § 4, or tracked the Declaration of Independence by characterizing governments as "deriving their just powers from the consent of the governed," *e.g.*, NEB. CONST. of 1867, art. I, § 1; WIS. CONST. of 1848, art. I, § 1.

288. *In re Conway*, 17 Wis. 543 (1863); *In re Wehlitz*, 16 Wis. 468 (1863); *State ex rel. Off v. Smith*, 14 Wis. 539 (1861). In the latter case, the court agreed with the Massachusetts court's analysis of popular sovereignty, and concluded that the state Constitution impliedly barred nondeclarant aliens from holding elective office, while conferring "the right of suffrage and privileges of citizenship" on declarant aliens. 14 Wis. at 542-43 (citing Opinion of the Justices, 7 Mass. 523 (1811)).

ways given as the most complete and perfect attributes of citizenship.<sup>289</sup>

The court described the independence of state citizenship from U.S. citizenship as an acceptable consequence of the dual-sovereign system of federalism.<sup>290</sup> A few other state courts similarly construed declarant alien voters as citizens of the state,<sup>291</sup> and Alabama expressly declared their citizenship in its reconstructed Constitution.<sup>292</sup>

Whatever Alabama may have thought, the Supreme Court was certain that aliens were not citizens of the state within the meaning of the federal Constitution. While rejecting the claims of women's suffrage in *Minor v. Happersett*, the Court denied any necessary connection between citizenship of the state and the right to vote, and observed that

citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.<sup>293</sup>

The federal courts were equally sure that unnaturalized alien voters were not "citizens of a State" for diversity purposes.<sup>294</sup>

Even the federal courts, however, relied on the intuition that voters, being members of the political community, must surely be citizens, in developing a doctrine of collective naturalization upon the admission of a territory to statehood. The issue appears to have arisen first in Louisiana, where both the state and federal courts held that the congressional enabling act, by authorizing the noncitizen inhabitants to participate in the formation of a state constitution, had recognized

289. 16 Wis. at 473.

290. 16 Wis. at 470-71 (citing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

291. See *State ex rel. Lêche v. Fowler*, 6 So. 602 (La. 1889) ("It is, however, difficult to conceive how a person can be an elector and not a citizen of the community in which he exercises the right to vote."); *Abrigo v. State*, 29 Tex. Crim. 143 (1890). There are also ambiguous decisions from Indiana. See *McCarthy v. Froelke*, 63 Ind. 507, 511 (1878); *Thomasson v. State*, 15 Ind. 449 (1860).

292. See ALA. CONST. of 1867, art. III, § 2 ("That all persons resident in this State, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges."); see also ALA. CONST. of 1875, art. I, § 2 (similar). Alabama phased out declarant alien suffrage in 1901. See ALA. CONST. of 1901, art. VIII, § 177.

293. 88 U.S. (21 Wall.) 162, 177 (1874). The case arose in Missouri. *Id.* at 163. The Court's list was, of course, incomplete.

294. See, e.g., *City of Minneapolis v. Reum*, 56 F. 576 (8th Cir. 1893); *Lanz v. Randall*, 14 F. Cas. 1131, 1133 (C.C.D. Minn. 1876) (No. 8,080) (Miller, Cir. J.) ("The error has arisen from the same confusion of ideas which induced the advocates of female suffrage to assert, in the supreme court, the right of women to vote.").

them as citizens of the future state.<sup>295</sup> The Supreme Court eventually confirmed a version of this doctrine in *Boyd v. Nebraska ex rel. Thayer*, maintaining that the admission of a state naturalizes “those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress.”<sup>296</sup> Since only citizens and declarant aliens had been permitted to vote on the Nebraska Constitution, however, the Court concluded that only declarant aliens and their families were naturalized by the admission of Nebraska.<sup>297</sup>

Where voting was restricted to declarant aliens, it could be argued that the modification of citizen sovereignty was modest. As early as 1803, St. George Tucker had maintained in his edition of Blackstone that declarant aliens stood in an intermediate status between aliens and citizens, having “disclaimed” their former allegiance, and that the United States had a duty to complete their naturalization.<sup>298</sup> Although the federal government did not adopt Tucker’s view of the limitations on its power to deny naturalization, it did treat declarant aliens in some respects as inchoate citizens,<sup>299</sup> and responded to their anomalous situation. At various periods, the federal government is-

295. *Desbois’s Case*, 2 Mart. 185, 192-93 (La. Super. Ct. 1812); see also *United States v. Laverty*, 26 F. Cas. 875 (D. La. 1812) (No. 15,569a) (British and Irish immigrants to the territory cannot be arrested as alien enemies in War of 1812, following *Desbois*). The Alabama Supreme Court held otherwise in *State v. Primrose*, 3 Ala. 546 (1842), but the theory of that opinion is not inconsistent with the Louisiana cases (which the Alabama court had heard of but had not read). Rather, the Alabama court incorrectly believed that only United States citizens had been permitted to vote on the statehood constitution.

296. *Boyd v. Neb. ex rel. Thayer*, 143 U.S. 135, 170 (1892). The doctrine of collective naturalization also entails that grandfather clauses for alien inhabitants of new states may sometimes have been redundant.

297. *Id.* at 175-77. James Boyd did not fit precisely into this category, but the Court held that he was a constructive declarant by virtue of a declaration made by his father in Ohio when James was a minor. *Id.* at 178-79.

298. BLACKSTONE’S COMMENTARIES Appendix, Note L at 100 (St. George Tucker ed., 1803) (emphasis deleted).

[W]hen he has, in compliance with the laws, made the requisite declarations of his intention to become a citizen, and to renounce for ever all allegiance and fidelity to any foreign prince, or state, and particularly that prince or state whereof he was last a citizen or subject, he seems to have acquired a right, of which no subsequent event can divest him, without violating the principles of political justice, as well as of moral obligation. For the government, in requiring this declaration of renunciation on the part of the alien, previous to his admission to the rights of citizenship, and that at a very considerable period before his right can, by the rule prescribed, be consummated, tacitly engages not to withdraw its protection from him; and much more, not to betray him, by sending him back to that sovereign, whose allegiance he had, in the most solemn manner, disclaimed, and whose subject and adherent he could no longer be considered to be . . . .

*Id.* Tucker seems to have overstated the effect of declaring a present intent to renounce one’s allegiance at a future date, but he proved to be right that declarants were risking a loss of the former sovereign’s protection. See BORCHARD, *supra* note 221, at 567-68.

299. See, e.g., *Boyd*, 143 U.S. at 178-79; Act of Mar. 26, 1804, ch. 47, § 2, 2 Stat. 292 (when declarant dies before naturalization, widow and children immediately eligible for naturalization).



sued passports to declarant aliens, and it intermittently asserted the authority to protect domiciled declarant aliens when they traveled outside the United States.<sup>300</sup> One famous instance involved the forcible rescue of the Hungarian emigré Martin Koszta from Austrian agents in Turkey.<sup>301</sup>

The federal government has also viewed declarant aliens as particularly fair game for military conscription. The history and theory of drafting aliens in the United States has been quite complex.<sup>302</sup> The inclusion of declarant aliens in the first federal draft, during the Civil War, appears to have reflected both the large pool of immigrant manpower and an insistence that prospective citizens who were already voting should share the burden of military service.<sup>303</sup> This conscription provoked a flurry of diplomatic correspondence,<sup>304</sup> which was resolved by permitting a declarant alien to avoid the draft if he abandoned his intention to naturalize and left the country, but only if he had not yet voted.<sup>305</sup> It deserves to be emphasized that alien soldiers fought for the North in the Civil War, and that alien voters were among the People who adopted — by hook or by crook<sup>306</sup> — the Civil War Amendments. Declarant aliens were also designated for conscription in the Spanish-American War and the First World War.<sup>307</sup>

300. See Act of Mar. 2, 1907, ch. 2534, § 1, 34 Stat. 1228; Act of Mar. 3, 1863, ch. 79, § 23, 12 Stat. 754; BORCHARD, *supra* note 221, at 500-02, 567-70; VAN DYNE, *supra* note 243, at 68-76.

301. See BORCHARD, *supra* note 221, at 570-74; *cf. In re Neagle*, 135 U.S. 1, 64 (1890) (describing Koszta affair as instance of inherent executive power). For a popularized account, see ANDOR KLAY, *DARING DIPLOMACY: THE CASE OF THE FIRST AMERICAN ULTIMATUM* (1957).

302. See, e.g., William W. Fitzhugh, Jr. & Charles C. Hyde, *The Drafting of Neutral Aliens by the United States*, 36 AM. J. INT'L L. 369 (1942); Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972).

303. See Act of Mar. 3, 1863, ch. 75, § 1, 12 Stat. 731. The drafting of declarant aliens was added as a floor amendment in the Senate. It was originally proposed by Sen. Doolittle of Wisconsin (a state where declarants could vote), in a form that limited conscription to declarants who had actually voted. CONG. GLOBE, 37th Cong., 3d Sess. 991-92 (1863) (remarks of Sen. Doolittle). The amendment was voted down, *id.* at 993, but the proposal was successfully reintroduced by Sen. McDougal of California (a state where only citizens could vote) in a form that conscripted all declarants, regardless of whether they had ever voted, *id.* at 1001 (remarks of Sen. McDougal).

304. See Compulsory Service, 4 MOORE DIGEST § 548, at 53-56; Passports, 3 MOORE DIGEST § 495 AT 871-72; Fitzhugh & Hyde, *supra* note 302, at 372-73. The problem had already arisen in 1862 with regard to the state militias. See *id.* at 372.

305. See *Presidential Proclamation of May 8, 1863*, 6 MESSAGES AND PAPERS OF THE PRESIDENT 168 (James D. Richardson ed., 1899); Act of Feb. 24, 1864, ch. 13, § 18, 13 Stat. 9 ("no person of foreign birth . . . who has at any time assumed the rights of a citizen by voting . . ."); Fitzhugh & Hyde, *supra* note 302, at 373.

306. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1065-69 (1984).

307. Act of May 18, 1917, ch. 15, § 2, 40 Stat. 77; Act of Apr. 22, 1898, ch. 187, § 1, 30 Stat.

Thus, the ideology of declarant alien suffrage in particular may have reflected a broad concept of democracy, but it also rested on an empirical view of European immigrants as future U.S. citizens. The latter aspect becomes especially salient when one recalls the racial implications of declarant alien suffrage. Prior to 1870, only "free white persons" could be naturalized under the general naturalization laws, and so only whites could participate in the declaration of intent process.<sup>308</sup> In 1870, "aliens of African nativity and persons of African descent" were made eligible for naturalization, but the ineligibility of other immigrants, most prominently the Chinese, was deliberately maintained.<sup>309</sup> The Fifteenth Amendment addresses the question of racial discrimination in voting, and prohibits disenfranchisement only of citizens of the United States.<sup>310</sup> Far from implying the impropriety of alien suffrage, this limitation resulted from a clear recognition that aliens did vote, and a fear that a broadly written amendment would force Pacific coast states to permit Chinese immigrants to vote.<sup>311</sup> The practical operation of declarant alien suffrage after the Civil War included exclusion of Chinese and other Asian immigrants from the franchise. Chinese immigrants finally became eligible for naturalization in 1943,<sup>312</sup> but by then the period of declarant alien suffrage was over.

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361; Fitzhugh & Hyde, *supra* note 302, at 372-75; see also Selective Training and Service Act of 1940, ch. 720, § 3(a), 54 Stat. 885 (making citizens and declarant aliens liable for service). *But see* Act of December 20, 1941, ch. 602, § 2, 55 Stat. 845 (extending liability for service to nondeclarant resident aliens); Universal Military Training and Service Act of 1951, ch. 144, § 1(d), 65 Stat. 75 (making aliens admitted to permanent residence and other aliens remaining in the U.S. more than a year liable for service). I omit here the later history of provisions by which aliens who were willing to renounce the possibility of American citizenship could seek exemption from service.

The declaration of intent was dropped from the naturalization procedure in 1952, see 8 U.S.C. § 1445(f) (1988), and is no longer relevant to selective service law, see 50 U.S.C. App. § 453(a), 454(a), 456(a)(1) (1988).

308. See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

309. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256; see CONG. GLOBE, 41st Cong., 2d Sess. 5121-25, 5148-77 (1870).

310. U.S. CONST. amend. XV.

311. GILLETTE, *supra* note 229, at 56, 90. Senators William Stewart of Nevada (the proponent of the Fifteenth Amendment in the Senate, see *id.* at 54-61, 70-75), John Conness of California, and Henry Corbett and George Williams of Oregon successfully opposed Charles Sumner's attempt to have the limitation to citizens struck from the amendment. See CONG. GLOBE, 40th Cong., 3d Sess. 1030-35 (1869). The Oregon state constitution both permitted declarant aliens to vote and expressly prohibited voting by any "negro, Chinaman, or mulatto." OR. CONST. of 1857, art. II, § 2, 6. Opposition to ratification of the Fifteenth Amendment in Oregon was based on the view that it might still lead to suffrage for the Chinese, and Oregon gratuitously voted to reject the amendment after it had already been adopted. GILLETTE, *supra* note 229, at 153-57. Of course, the Fifteenth Amendment *did* lead to such suffrage in one respect, once it was confirmed that children born to Chinese immigrants in the United States were American citizens. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

312. See Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 601.

It might not be too much of an exaggeration to regard declarant alien suffrage in the latter half of the nineteenth century as a compromise with locally undesired effects of the "uniform rule of naturalization" clause. The Constitution had assigned an exclusive power of naturalization to Congress, and those states that wished to assimilate immigrants more quickly than the national majority could only confer nonconstitutional state citizenship or grant particular rights of citizenship notwithstanding alienage.<sup>313</sup> Congress, in turn, was hampered by the uniformity requirement in differentiating among the territories. Declarant alien suffrage served as a *de facto* acceleration of the process, targeted at those whose naturalization was welcome.

### C. *Second Thoughts*

The foregoing narrative account of alien suffrage in the United States provides only a limited basis for contrast with the German approach. At this stage of the analysis, the principal contribution of the American experience is the *fact* of alien voting. Unquestionably a commitment to popular sovereignty coexisted with widespread enfranchisement of persons who were not yet nationals of the United States. In some instances, a democratic ideal of resident suffrage justified this policy. In other instances, the instrumental goals of an intentional "country of immigration" with a federal division of powers determined the outcome. Few in the United States saw an inherent contradiction in the popular sovereign's sharing political power with aliens, but history does not indicate a uniform theoretical basis for the practice. Later, in Part III, an attempt to determine the place of alien voters within the framework of current constitutional conceptions of voting rights in the United States will provide a more informative basis for comparison.

Turning from a comparison of theories to a comparison of effects, it must be admitted that the predominant form of alien suffrage in the states, enfranchisement of declarant aliens, deserves mixed reviews as a response to the American "immigrant problem." In the face of the antebellum nativist movement, swift enfranchisement of immigrants may have afforded some local protection and decreased the incentives of the major national parties to adopt antforeign policies. On the other hand, European immigrants were entitled to naturalization after five years anyway. Asian immigrants — not only "Chinese laborers,"

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313. It may be worth mentioning that before 1900, federal immigration law had not yet developed to the point where the risk of being deported gave European immigrants an incentive to naturalize.

whose further immigration was barred after 1882,<sup>314</sup> but also those not yet barred — could neither naturalize nor vote. The denial of voting rights to persons racially ineligible for citizenship, circumscribed by the wording of the Fifteenth Amendment, leaves the United States little standing to criticize the FRG's failure to enfranchise immigrants from Turkey.

We may congratulate ourselves, however, on bringing the disenfranchisement to an end after one generation, by means of the *jus soli* principle of citizenship. As regards whites, this principle was originally taken for granted as part of the common law inheritance, and it comported well with the United States's original Enlightenment self-image as an ideological republic open to like-minded immigrants.<sup>315</sup> A primary purpose of the Fourteenth Amendment was to extend this principle to African-Americans.<sup>316</sup> In the 1890s, amid the heyday of an American nationalism identified with racial Anglo-Saxonism,<sup>317</sup> the Supreme Court affirmed that the Fourteenth Amendment also guaranteed the citizenship of children born to Chinese parents in the United States, notwithstanding Congress's anti-Chinese immigration and naturalization policies.<sup>318</sup>

More recently, the Fourteenth Amendment's guarantee of citizenship to children born in the United States, regardless of ancestry, has evolved into a disavowal of an ethnically restrictive national identity.<sup>319</sup> The United States has largely repudiated the tradition of romantic nationalism that influenced the German constitutional conception of a Nation State.<sup>320</sup> As a consequence, discrimination by race or nationality in naturalization has been repealed.<sup>321</sup> In the

314. See Act of May 6, 1882, 22 Stat. 58.

315. See HANS KOHN, *AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY* 135-41 (1957). But see PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 52-53, 90-91 (1985) (finding *jus soli* principle expressive of liberal society's openness to immigration, but in tension with liberal theory's emphasis on consent).

316. See, e.g., SCHUCK & SMITH, *supra* note 315, at 74-75.

317. See, e.g., KOHN, *supra* note 315, at 157-60; RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 170-84 (1955 ed.); Rogers M. Smith, *The "American Creed" and American Identity: The Limits of Liberal Citizenship in the United States*, 41 W. POL. Q. 225, 233-36 (1988).

318. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

319. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 196-97 (1989); Smith, *supra* note 317, at 245-46.

320. See *supra* notes 113-16 and accompanying text.

321. See 8 U.S.C. § 1422 (1988). Ironically, racial neutrality was not achieved until the much-criticized McCarran-Walter Act of 1952, ch. 477, § 311, 66 Stat. 239. The English language requirement, however, first adopted in 1906, still persists. See 8 U.S.C. § 1423 (1988); Ricardo Gonzalez Cedillo, *A Constitutional Analysis of the English Literacy Requirement of the Naturalization Act*, 14 ST. MARY'S L.J. 899 (1983) (finding invidious effect on Hispanic citizens).

United States, unlike the FRG, naturalization is available as of right,<sup>322</sup> and naturalization rates for resident aliens are generally high, with significant exceptions among immigrants from Latin American countries.<sup>323</sup> These factors, rather than theoretical objections, probably explain why so little effort has been made in recent years to revive alien suffrage in the United States.

### III. PERSONS AND PEOPLES

In this Part, I will employ insights gained from the discussion of the German alien suffrage debate to serve two discrete goals. The first and lengthier effort (subpart A) will be to determine how a revival of alien suffrage would fare under the currently operative constitutional understanding of democracy in the United States. Does the American conception of government by the people determine a single definition of the electorate that necessarily excludes alien residents? Because alien suffrage has rarely been debated here in the modern period, it will be necessary to approach this question indirectly, by considering other constraints on the construction of the political community. Ultimately, this examination will suggest that, in the United States, a liberal interpretation of democracy as facilitating individual self-determination supports the conclusion that enfranchisement of alien residents is a permissible option.<sup>324</sup>

The second, briefer inquiry (subpart B) will focus on alienage as a legal status category that submerges individuals in a fictive shared identity. The German discussion vividly illustrates how this status discourse can be used to promote negative generalizations about noncitizens, a phenomenon that has also occurred in U.S. debates.

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322. The principal qualifications for naturalization are five years' residence, good moral character, the ability to write and speak simple English, a basic knowledge of United States history and government, and being attached to constitutional principles and well disposed to the good order and happiness of the United States. 8 U.S.C. §§ 1423, 1427 (1988). At the time of naturalization, the applicant must renounce prior allegiances and take an oath of allegiance to the United States. *Id.* at § 1448.

323. See, e.g., Louis DeSipio, *Social Science Literature and the Naturalization Process*, 21 INT'L MIGRATION REV. 390 (1987); Harry P. Pachon, *An Overview of Citizenship in the Hispanic Community*, 21 INT'L MIGRATION REV. 299, 299-301 (1987) (1980 census figures indicate that 66% of all eligible residents had naturalized, but only 35% from Mexico, and an average of 43% for South America). After ten years in the United States, 44% of all Latino residents were naturalized, *id.* at 301; by comparison, a German author reports that as of 1985, only 0.5% of aliens with 10 or more years' residence in the FRG were naturalized. Hailbronner, *supra* note 11, at 70. The lower rate of Hispanic naturalization could lead to greater interest in alien suffrage among Hispanic rights organizations. See Griffith, note *supra* note 268.

324. I will not revisit here the argument that the United States Constitution itself requires alien suffrage, for which see Rosberg, *supra* note 214. I believe that the constitutional text, custom, political theory, and the inclusiveness of the naturalization laws, taken together, preclude the conclusion that limiting the franchise to citizens denies resident aliens the equal protection of the laws.

## A. "Defining the Political Community"

The conditions that made declarant alien suffrage politically attractive in the United States have receded into history, and the very existence of the practice is widely forgotten. It is therefore reasonable to ask whether contemporary constitutional understandings in the United States differ from those expressed by the Federal Constitutional Court. That Court rejected an interpretation of "*das Volk*" as referring unspecifically to the mass of the governed. In light of traditional German political theory, the Court found it normatively attractive to say that the "subject" of popular sovereignty has a determinate referent, defined by citizenship. The peculiar constitutional history of the United States has rendered the identity of "the People" far more contestable,<sup>325</sup> but the Supreme Court has spelled out the rudiments of political theory in language that suggests substantial agreement with the German conception of democracy:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community. Judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it.<sup>326</sup>

This passage appears to be intended not as a mere description of a particular state's law, but rather as a statement of correct democratic principle. It bears some resemblance to a judicial incursion, dictating that the states *should* exclude aliens from the political community.

The Supreme Court has employed similar locutions in other modern cases addressing the "political" rights of aliens.<sup>327</sup> In justifying deferential review of a state's exclusion of its alien residents from various forms of government employment, Justices have oscillated be-

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325. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159 (1899); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 917, 949-51, 972-74 (1991).

326. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982) (White, J.). Justice Marshall quoted from this passage without reservation in *Bernal v. Fainter*, 467 U.S. 216, 221 (1984).

327. The modern Supreme Court has never had occasion to reconsider the constitutional permissibility of alien suffrage; rather, it has faced a series of cases alleging unconstitutional discrimination against aliens in the reservation of certain jobs, benefits, and activities to citizens. A much-discussed series of cases between 1973 and 1984 evolved an equal protection approach under which the states, though usually forbidden to discriminate against their alien residents, are free to exclude them from a fairly broad category of public employment viewed as closely related to the process of self-government. See, e.g., Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLIN L. REV. 51 (1985). The Court summarily rejected a claim that denial of the franchise to aliens violates equal protection in *Skafta v. Rorex*, 430 U.S. 961 (1977), *dismissing appeal from* 553 P.2d 830 (Colo. 1976).

tween a description of the exclusion as reflecting the state's "broad power to define its political community"<sup>328</sup> and an invocation of the state's "obligation 'to preserve the basic conception of a political community.'"<sup>329</sup> One does not need to be a Hohfeldian to recognize that there is a critical difference between a power and an obligation, and the hint that even "the basic conception" is at risk only heightens the contrast.<sup>330</sup> Not surprisingly, in 1979 a German comparativist who opposed political rights for aliens in the FRG seized on this "obligation" argument as evidence that granting aliens political rights would also be unconstitutional in the United States.<sup>331</sup>

In doctrinal terms, it is easy to dismiss these intimations as dicta, since the cases themselves clearly hold only that the various disqualifications of aliens are permissible, and most of their language stresses the state's discretion. One of the cases upheld a statute excluding voluntarily nondeclarant aliens from employment as public school teachers, while admitting declarant aliens and even "excusable" nondeclarants.<sup>332</sup> Indeed, in that case the Court noted without objection that in New York City alien parents are permitted both to vote for and to be elected to local school boards.<sup>333</sup> It is hard to believe, in view of the long history of alien suffrage in the United States, that the Supreme Court would interfere with a state's attempt to restore it. Nonetheless, one may wonder whether the Court's acceptance would reflect a triumph of history over principle. Or does principle support a power of community self-definition broad enough to include a state's discretion to enfranchise alien residents?

It is first necessary to clarify what "defining the political community" should mean. Unless the Court was referring solely to events in the distant past, it cannot mean constituting a new political community from a state of nature. Rather, the Court was invoking the ongoing process of community self-definition through the maintenance or

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328. *Cabell v. Chavez-Salido*, 454 U.S. at 440; *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973) (Blackmun, J.); see also *Nyquist v. Mauclet*, 432 U.S. 1, 11 (1977) (Blackmun, J.)

329. *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (Burger, C.J.); *Sugarman v. Dougall*, 413 U.S. at 647; see also *Ambach v. Norwick*, 441 U.S. 68, 74 (1979) (Powell, J., quoting *Sugarman*). James O'Fallon has trenchantly criticized this "obligation" rationale for deference, although he too seemed to arrive at a right answer thesis. See James M. O'Fallon, "To Preserve the Conception of a Political Community," 57 U. DET. J. URB. L. 777 (1980).

330. See also *Foley v. Connelie*, 435 U.S. 291, 299 (1978) (Burger, C.J.) (it would be "anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers"). *Query*: should the exclusionary rule apply?

331. VON KATTE, *supra* note 57, at 151.

332. *Ambach v. Norwick*, 441 U.S. at 68.

333. *Id.* at 81 n.15; see also *id.* at 86-87 (Blackmun, J., dissenting); *supra* note 266 and accompanying text.

restructuring of an already organized community or a portion thereof. The rules for distribution of the electoral franchise represent one method for marking off the boundaries of the political community, though not the only one. The rules determining qualification for office often differ from the rules for voting, and persons who are not entitled to vote still have other opportunities to make persuasive contributions to the political process. There are "passive" members of the community whose interests are entitled to the special consideration owed to members, but who receive only "virtual representation." For example, the children of "active" members, or formerly "active" members who have lost the competence to act for themselves,<sup>334</sup> are surely within "the community of the governed," unless that term is twisted into a synonym for the electorate. The disenfranchisement of felons could be viewed as reducing them to passive status, or alternatively as a thinly veiled equivalent of banishment from the community.<sup>335</sup>

The ideal type of the republic may be a small unitary State with no crime, no physical or mental illness, and no children. The United States and Germany, however, are both large federal States, with crime, illness, children — and resident aliens. The political communities actually engaged in "basic governmental processes" in such States are narrower than the entirety of the community. I will focus here on the rules of electoral qualification, though without forgetting that they define a community within a community.

### 1. On the Correctness of a Polity

The move toward universal citizen suffrage, in the sense of overturning restrictions of class, property, race, religion, and gender, has been a great achievement. But it could mislead us into concluding that questions of electoral qualification always have unique right answers. Modern legal doctrine on voting rights could have a similar tendency. In the United States, restrictive voting qualifications, with a few traditional exceptions, are now subject to "strict scrutiny" under the Equal Protection Clause. When the permissible qualifications are cumulated they define a constitutionally privileged category of citizens (nonfelonious residents over the age of eighteen, etc.), which I will call the "core electorate." The breadth of this core electorate in the

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334. The Supreme Court has not recently reexamined the traditional exclusion from the electorate of "insane persons," see *Oregon v. Mitchell*, 400 U.S. 112, 214 (1971) (Harlan, J.), and it is often omitted from summaries of voting rights law. *But see* *Manhattan State Citizens' Group v. Bass*, 524 F.Supp. 1270 (S.D.N.Y. 1981) (disenfranchisement of all involuntarily committed persons overbroad; adjudication of incompetence required).

335. The alternative is argued in Note, *The Disenfranchisement of Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989).



United States is a measure of the success of egalitarian reforms. Members of the core electorate have not infrequently succumbed to the temptation to identify the core electorate with the political community, and to regard any enfranchisement of others as a dilution of their votes and a violation of their rights.

For example, in *Katzenbach v. Morgan*,<sup>336</sup> New York City voters sought an injunction against enforcement of the Voting Rights Act of 1965, to the extent that it exempted persons who had been educated in Spanish in Puerto Rico from New York State's English literacy qualification. The Supreme Court had upheld literacy requirements only seven years earlier,<sup>337</sup> and it avoided overruling that decision.<sup>338</sup> Instead, it responded that the extension of voting rights could be upheld as within Congress's power on either of two grounds: because Congress had concluded that the English literacy test itself operated as an invidious discrimination against Puerto Rican residents,<sup>339</sup> or "as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government . . . [in] the provision or administration of governmental services, such as public schools, public housing and law enforcement."<sup>340</sup> In other words, even if persons literate only in Spanish were not within the core electorate, Congress could extend the franchise to them as a means of protecting their rights.

Expansion of a political community beyond its core electorate also occurs in connection with residence requirements. The contours of the law are less settled here, but the issues deserve close attention, since this is the context where the Supreme Court first employed the rhetoric of "preserv[ing] the basic conception of a political community." In *Dunn v. Blumstein*, the Court set narrow limits on states' durational residency requirements, but indicated in dictum that a "requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."<sup>341</sup>

How necessary? From the positivist perspective, it should be recognized that the text of the federal Constitution repeatedly expresses an assumption that residence or inhabitancy indicates political mem-

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336. 384 U.S. 641 (1966).

337. *Lassister v. Northampton Election Bd.*, 360 U.S. 45 (1959).

338. 384 U.S. at 649; see also *Cardona v. Power*, 384 U.S. 672, 674 (1966) (remanding case to determine whether ruling on constitutionality of literacy requirement as applied to persons not covered by Voting Rights Act can be avoided).

339. 384 U.S. at 656.

340. *Id.* at 652.

341. 405 U.S. 330, 343-44 (1972).

bership in a state, though without specifying it as a *sine qua non*.<sup>342</sup> The constitutional text is silent on the subject of membership in a political subdivision, as it is on all other matters of local government.

Residence is clearly one reasonable basis for inclusion in a political community.<sup>343</sup> Empirically, residence provides a useful predictor of the frequency with which an individual will be affected by the actions of a territorially restricted governmental unit. (Residence also serves legally as a basis of government jurisdiction, but this is as much a consequence as a justification of the ascription of residents to the political community.) Within limits, residence is voluntary and each person has only one place of residence at a given time,<sup>344</sup> so that residing may be viewed as a consensual undertaking of political allegiance. Common residence supplies some of the preconditions for ideal politics, by intertwining the interests of the residents in a multiplicity of issues that affect them jointly, and by creating opportunities for continuing face-to-face interaction within which dialogic politics can occur. On the other hand, the importance of residence may be exaggerated by reliance on the mental image of the small unitary republic in which people live, work, and carry on all their other important activities.<sup>345</sup>

Despite these advantages of residence as a qualification for membership, Congress has twice overridden requirements of residence within a state for federal election purposes. Less than two years before *Dunn v. Blumstein*, the Supreme Court validated a provision of the 1970 Voting Rights Act Amendments that gave *former* residents of a state the right to cast their votes in the state in presidential elections, if they made an interstate move too close to the date of the election to vote in their state of actual residence.<sup>346</sup> Six Justices upheld this grant as part of an amelioration of the conflict between durational residence

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342. See U.S. CONST. art. I, § 2, cl. 2 (Representatives must be inhabitants of states from which they are elected); *id.* § 3, cl. 3 (same for Senators); *id.* art. II, § 1, cl. 3 (members of electoral college must cast one of their two votes for an inhabitant of a state other than their own); *id.* amend. XII (same); *id.* amend. XIV, § 1 (persons born or naturalized in United States are citizens of state wherein they reside); *id.* § 2 (decreasing representation in House for states disenfranchising inhabitants on certain grounds).

343. See C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491, 498-501 (1989).

344. Efforts to specify residence uniquely are important to districting schemes *within* a political community, where double-counting must be avoided.

345. See Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 413-14 (1990).

346. *Oregon v. Mitchell*, 400 U.S. 112 (1970). It is fair to say that the Justices' opinions conferred very little of their attention on this aspect of the statute. The government's brief provided a more explicit defense. See Brief for the United States, at 53, 57.

requirements and the right to interstate travel,<sup>347</sup> they thus permitted facilitation of other constitutional rights to prevail over a residential definition of the constituencies for the electoral college.<sup>348</sup> Building on this decision, Congress has granted U.S. citizens who reside abroad, and who have no intention of returning, the right to vote in their states of most recent former domicile in both presidential and congressional elections.<sup>349</sup> The legislative history includes findings that this grant was necessary to protect the interests of citizens who had exercised the right of international travel.<sup>350</sup> The constitutionality of this statute has not been resolved, but it seems only incrementally more dubious than the provision the Court upheld.<sup>351</sup> The statute clearly rejects the view that current residence is an indispensable element for membership in a political community.<sup>352</sup>

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347. See 400 U.S. at 236-39 (Brennan, White and Marshall, JJ.); *id.* at 292 (Stewart and Blackmun, JJ. and Burger, C.J.). Justices Black and Douglas had idiosyncratic reasons for upholding the statute, and Justice Harlan considered it unconstitutional as an interference with state prerogatives. *Id.* at 134 (Black, J.); *id.* at 147-50 (Douglas, J.); *id.* at 213-16 (Harlan, J.).

348. It may be customary to speak of the President as responding to a single national constituency, but the national political community is not so easily defined. A constitutional amendment was considered necessary to include the citizens of the District of Columbia in the presidential electorate, see U.S. CONST. amend. XXIII, and the citizens of the other territories are still excluded. The problem of citizens residing in other countries is addressed in text immediately following this note.

349. See Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (current version codified at 42 U.S.C. §§ 1973ff-1973ff-6 (1988)); Dilworth & Montag, *supra* note 145, at 271. Citizens who have *never* resided in the United States, however, are not enfranchised by the statute. See 42 U.S.C. § 1973ff-6(5) (1988).

350. H.R. REP. 649, 94th Cong., 1st Sess. 5-7 (1975) ("American citizens outside the United States do have their own Federal stake — their own U.S. legislative and administrative interests — which may be protected only through representation in Congress and in the executive branch."). Citizens residing abroad may more plausibly be said to constitute a discrete group with interests in need of protection than may citizens who moved interstate thirty days before an election. It should be observed, however, that Congress has not extended similar rights to citizens of the states who relocate to the territories. *Cf.* Attorney Gen. of Guam v. United States, 738 F.2d 1017, 1018 (9th Cir. 1984) (rejecting claim that enfranchising overseas voters but not citizens of the territories violates equal protection, and noting that rights of former state citizens residing in Guam had not been specifically raised).

351. See Dilworth & Montag, *supra* note 145, at 32; *cf.* H.R. REP. No. 649, 94th Cong., 1st Sess. 13-19 (1975) (minority views doubting constitutionality). The fact that Congress has not required the states to enfranchise these extra federal voters in state elections might have caused trouble, in view of the clauses in Article I and the Seventeenth Amendment linking the qualifications for congressional elections with those for the most numerous branch of the state legislature, but this seems unlikely after the Supreme Court's loose interpretation of those clauses in *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225-29 (1986) (qualifications for congressional elections may be no stricter than qualifications for state legislature elections, but may be less strict). Overseas voters are not double-counted in United States elections, although they may also enjoy voting rights in the countries where they reside, either as enfranchised aliens or as dual nationals.

352. In this connection, it is interesting to observe that German constitutional law has afforded the legislature considerable discretion with respect to the voting rights of overseas citizens. Residence in the federal territory is one of the traditional qualifications that the Federal Constitutional Court has regarded as consistent with the requirement that elections be "general." See, e.g., Judgment of Oct. 7, 1981, Bundesverfassungsgericht, 58 BVerfGE 202. This rule was obviously necessary in the period before unification; given the common nationality of East and

The requirement of residence for inclusion in the political community has also been relaxed in the context of local government. The courts have usually been quite accepting of enfranchisement of nonresidents who have identifiable interests to defend. In 1962, at the outset of the Warren Court's engagement with voting rights issues, the Court summarily upheld a voting scheme for a seaside resort town that extended the franchise to residents of the surrounding county who owned property in the town.<sup>353</sup> As the district court had noted, this voting scheme represented a compromise solution to the conflict between summer residents and year-round residents for control of a municipality in which the nondomiciled minority owned a majority of the taxable property.<sup>354</sup> This dispute might be viewed as a struggle over the definition of a community that included permanent part-time members whose primary identification was with another community, although it should be observed that county residents who owned property solely for investment purposes were also enfranchised.<sup>355</sup> In other respects, the hybrid qualification of residence or property ownership reflects a melding of an earlier republican system in which traditional property qualifications defined the core electorate with the class-egalitarian conception of democracy that the Court would soon be championing.<sup>356</sup> It thus raises the question whether criteria that cannot be

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West Germans, the entire citizenry of East Germany would otherwise have been entitled to vote in West German elections. The Court has repeatedly upheld the limitation of extraterritorial voting rights in federal elections to soldiers and government employees stationed abroad and their households, although in 1981 it suggested that the legislature would eventually have to extend this right to German citizens residing abroad as officials of the European Community. *Id.*; see Dilworth & Montag, *supra* note 145, at 32. The current statute extends voting rights to all Germans who had maintained residence in the federal territory within the ten years preceding the election, and to all Germans who formerly resided in the FRG but now reside in the territory of a member state of the Council of Europe. See Bundeswahlgesetz (Federal Election Act) § 12(2)(1)(2,3); Judgment of Nov. 2, 1990, Bundesverfassungsgericht (Kammer), 41 NJW 689 (1991) (rejecting discrimination complaint of German who had never resided in FRG).

353. Spahos v. Mayor of Savannah Beach, 371 U.S. 206 (1962), *aff'g mem.*, 207 F.Supp. 688 (S.D. Ga. 1962); Glisson v. Mayor of Savannah Beach, 346 F.2d 135 (5th Cir. 1965) (following Spahos). The lower courts have not regarded these holdings as outdated. See, e.g., Collins v. Town of Goshen, 635 F.2d 954, 958 (2d Cir. 1980) (Friendly, J.); Brown v. Board of Comm'rs, 722 F.Supp. 380, 398 (E.D. Tenn. 1989); Ortiz v. Hernandez Colon, 385 F.Supp. 111, 115 (D.P.R. 1974), *vacated and remanded for consideration of mootness*, 429 U.S. 1031 (1977).

354. Spahos v. Mayor of Savannah Beach, 207 F.Supp. at 690.

355. Only a "substantial majority" of the nonresident property owners were summer residents. *Id.* Moreover, non-county-residents and non-property-owning summer residents were not enfranchised; the district court observed that the discrimination against property owners residing outside the county was not before it. *Id.* at 692; see also Oliver v. Mayor of Savannah Beach, 346 F.2d 133 (5th Cir. 1965) (procedurally defective effort to challenge this discrimination).

356. Since the mid-1960s, the Supreme Court has displayed great hostility to property qualifications that exclude local residents from voting, and has denied the superiority of property voters. See, e.g., Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Quinn v. Millsap, 109 S. Ct. 2324 (1989) (rejecting as irrational a requirement of freehold as qualification for election to local government reorganization board).

used to disenfranchise members of the core electorate on the basis of insufficient interest in the political process can be used to identify interested persons outside the core electorate for inclusion in the political community.<sup>357</sup>

Economic discrimination among nonresident members of the political community of a summer resort provided the focus for a more recent circuit decision involving qualifications for candidacy.<sup>358</sup> There the court struck down the requirement that nonresident freeholders running for city commission not be delinquent in their local taxes.<sup>359</sup> One judge concluded that "[t]he City's commendable effort to enfranchise nonresidents and to insure nonresidents' participation in the leadership of the City does not ipso facto permit conditioning nonresident candidacy on tax non-delinquency."<sup>360</sup> She added:

I believe that a community that opens participation in its political process to nonresidents can limit that participation to persons with some attachment to the community. This may present one of those rare "other circumstances" referred to in *Turner v. Fouche* "in which a property qualification for office-holding could survive constitutional scrutiny," . . . as long as the City provided a comparable opportunity to nonresident candidates without the economic means to be freeholders, such as one based on a record of consistent seasonal renting or employment.<sup>361</sup>

Other courts, however, have afforded the states considerable discretion for enfranchisement of nonresidents of a city who own property within its limits and are therefore subject to its taxing authority.<sup>362</sup>

357. See Robert C. Ellickson, *Cities and Homeowners' Associations*, 130 U. PA. L. REV. 1519, 1542 (1982) (doubting whether current doctrine would permit this).

358. See *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986). The qualifications for candidacy define a slightly different segment of the political community than the qualifications for voting, but they are closely related, and it may be recalled that the Supreme Court's recent dicta concerning exclusion of aliens from the political community occurred in cases involving public employment.

359. 790 F.2d at 337. The constitutionality of the freeholder qualification itself was not before the court. *Id.* at 330.

360. *Id.* at 339 (Sloviter, J., concurring). A dissenting judge argued that because nonresidents had no constitutional entitlement to run, the city should be freer to define their qualifications for candidacy. *Id.* at 340-41 (Weis, J., dissenting). The third judge rejected the non-delinquency qualification, but noted in passing his doubt that enfranchising nonresidents was permissible at all. *Id.* at 331, 336 (Ziegler, J.).

361. *Id.* at 340 (citing *Turner v. Fouche*, 396 U.S. 346, 364 (1970) (invalidating freehold qualification for candidacy to school board)).

362. See *Snead v. City of Albuquerque*, 663 F.Supp. 1084 (D.N.M. 1987), *aff'd mem.*, 841 F.2d 1131, *cert. denied*, 485 U.S. 1009 (1988) (upholding extension of right to vote on city indebtedness referendum to county residents only if they own property in city and paid property tax in preceding year); *Brown v. Board of Comm'rs*, 722 F.Supp. 380, 397-400 (E.D. Tenn. 1989) (extension of municipal franchise to nonresident freeholders not unconstitutional on its face, but irrational and thus unconstitutional if multiple owners of parcel of trivial value all can vote).

Different considerations control the Supreme Court's approval of property-based voting in the "special-purpose district" elections that it has considered immune from the usual franchise

The interests of "nonresident" taxpayers have been accommodated without economic discrimination in a series of lower court cases typified by the efforts of county residents to exclude from county school board elections the residents of a city within the county that has a separate school system.<sup>363</sup> The challenged voters were, cartographically speaking, residents of the county, but they could be regarded as nonresidents of the county's district in a substantive sense; this characterization is reinforced by the fact that several decisions have found unconstitutional vote dilution.<sup>364</sup> With one early exception,<sup>365</sup> the decisions look only for a "substantial interest" of the city residents in the county board's operations to justify their votes. The courts have found a "substantial interest" in *either* a significant financial contribution to the county budget *or* the use of county services by a significant number of city residents;<sup>366</sup> the threshold of substantiality may depend on the degree of "dilution" produced by including the city voters.<sup>367</sup>

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rules. *See, e.g.,* Ball v. James, 451 U.S. 355 (1981). On the other hand, if these districts were not "political communities" in any sense, denying voting rights to citizens of other states might be constitutionally questionable. *Cf. Millis v. Board of County Comm'rs*, 439 U.S. 802 (1978), *aff'g mem.*, *Millis v. High Drive Water District*, No. 75-M-1021 (D. Colo. Jan. 18, 1978) (limiting water district elections to state residents consistent with federal Constitution); *Porterfield v. Boeing*, 744 P.2d 468 (Ariz. 1987) (voters in irrigation districts need not be residents of state).

363. *See, e.g.,* Sutton v. Escambia County Bd. of Educ., 809 F.2d 770 (11th Cir. 1987); Creel v. Freeman, 531 F.2d 286 (5th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1976); *see also* Collins v. Town of Goshen, 635 F.2d 954 (2d Cir. 1980) (water service district); Cantwell v. Hudnut, 566 F.2d 30 (7th Cir. 1977), *cert. denied*, 439 U.S. 1114 (1978) (police and fire service districts). For simplicity, I refer to a city within a county and school systems; the types of units involved in these cases vary, although the relation of geographic inclusion is always present.

These cases all involve ongoing relationships; there is a separate body of cases dealing with annexation and secession referenda. *See, e.g.,* Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168 (Cal. 1982).

364. *See* Hogencamp v. Lee County Bd. of Educ., 722 F.2d 720 (11th Cir. 1984); Phillips v. Andress, 634 F.2d 947 (5th Cir. 1981) (school board); Locklear v. North Carolina Bd. of Elections, 514 F.2d 1152 (4th Cir. 1975); *cf.* Cantwell v. Hudnut, 566 F.2d 30 (7th Cir. 1977) (reversing district court's finding of unconstitutionality).

365. *Locklear v. North Carolina Bd. of Elections*, 514 F.2d at 1154-56 (applying strict scrutiny, and finding city residents' interests in county's transportation, special education and resource center services fail to create compelling interest justifying "dilution" of county residents' votes).

366. *See* Sutton, 809 F.2d at 774 (attendance in county schools and interaction in provision of services); Hogencamp, 722 F.2d at 722 (insufficient contribution of students and dollars to amount to substantial interest); Collins v. Town of Goshen, 635 F.2d at 959 (taxes); Phillips, 634 F.2d at 950-51 (insufficient contribution of students and dollars to amount to substantial interest); Cantwell, 566 F.2d at 35 (taxes and provision of police and fire services at work places of many nonresidents); Creel, 531 F.2d at 289 (attendance in county schools and tax revenues); Clark v. Town of Greenburgh, 436 F.2d 770 (2d Cir. 1971) (taxes and a few municipal services).

367. *See, e.g.,* Phillips, 634 F.2d at 951 ("We conclude that this measure of support is insufficient to justify the inclusion of so many otherwise disinterested electors as to reduce by over one-half the weight of the votes cast by those who actually reside in the county system's jurisdiction"); Creel, 531 F.2d at 289 ("particularly when there is no evidence of invidious discrimination which might arise from domination of elections by Jasper and Carbon Hill voters.").

These cases do not discuss the possibility of enfranchising only the city residents who use the services or pay the taxes. The latter alternative, of course, would bring back into prominence the issue of economic discrimination that the overinclusive residence qualification avoids.

The Supreme Court has not yet spoken to this type of city-county district dispute. It might pursue the same analysis as the lower courts. Alternatively, it might avoid more than cursory inquiry into the non-residents' interests, by giving the state's formal definition of the borders of a political subdivision the same deference in considering claims of overinclusiveness that it gave in considering claims of underinclusiveness in *Holt Civic Club v. City of Tuscaloosa*.<sup>368</sup> That decision upheld the denial of voting rights in city elections to county residents who were subject to the city's "police jurisdiction" but not to the full measure of governing powers the city enjoyed within its borders. Justice Rehnquist conceded that their claim had some appeal in light of "this country's tradition of popular sovereignty," but responded that if they were constitutionally entitled to vote in the city, then so was everyone else who was affected by the city's actions;<sup>369</sup> the constitutional entitlement had to stop somewhere, and the city's geographical boundary was the line suggested by prior cases.<sup>370</sup> The majority opinion expressed no hostility to enfranchisement of interested nonresidents, but denied their *right* to the franchise.<sup>371</sup>

These examples suggest that the Constitution does not provide a single "conception of a political community" that uniquely determines the electorate of each governmental unit, resulting in a neatly nested hierarchy of political communities, towns within counties within states within a nation. Rather, it affords government some discretion to supplement the core electorate with a variety of noninvidiously defined optional electorates, consisting of categories of persons who have interests implicated in the community's political process. Some of these examples involve extensions of the franchise expressly justified by the

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368. 439 U.S. 60 (1978).

369. *Id.* at 69-70. This is the same caricaturing argument against a "democracy of the affected" that we have seen employed by German opponents of alien suffrage. See *supra* note 125 and accompanying text.

Interestingly, Justice Rehnquist had symmetrically employed this argument against residents and in favor of landowners in an earlier case involving a special-purpose district. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730-31 (1973). The special-purpose district cases form a different line. See sources cited *supra* note 362.

370. 439 U.S. at 69-70.

371. I do not consider it likely that the present Court would be so squeamish about selective enfranchisement of nonresidents that it would go even further and hold that *only* an extension of the region within which voters must reside is permissible. If this were to happen, much of my discussion of optional electorates in American constitutional law would be wrong.

optional voters' need to protect their interests; in other instances, the courts have more ambiguously asserted that the interests provide a sufficient justification for enfranchising the optional voters.

The resulting variation in electorates necessitates a fragmented and fluid account of the People as a political agent. This should not be surprising, given the complex federal and territorial structure of the United States. The presidential electorate is not the same as the congressional electorate; the congressional electorate is not the sum of the state electorates; and a state's electorate need not be the sum of the electorates of its political subdivisions. The definitions of the individual electorates will also vary over time, in response to perceptions of a particular extension's necessity and drawbacks. In some instances, such as a state's amendment of its own electoral laws, supplementation takes the form of a self-extension by the prior electorate, and the added members would be entitled to a vote (direct or indirect) on a future proposal for its repeal; in other instances, such as a state's adoption of local government laws, the extension may be imposed on the community from above, and the added members may have no electoral influence on its continuation.

Although the political activity of the core may be seen as the self-determination of a previously identified collectivity, the participation of optional electors appears to have a more individualist basis. This latter characterization contrasts with the conclusions reached by Frank Michelman in a recent study of Supreme Court opinions involving claims of unconstitutional exclusion from the core electorate; Michelman found in these cases evidence that U.S. constitutional law conceives of politics as a dialogic process having constitutive significance for the identity of its participants, rather than being instrumentally valued as a means for protecting prepolitical interests.<sup>372</sup> My purpose here is not to criticize his analyses,<sup>373</sup> but to emphasize the contrary impression created by cases involving claims of dilution of the core electorate by enfranchisement of optional voters. A system that treats a particular individual's inclusion in the electorate as optional, subject to the largely unfettered discretion of a majority to withdraw the franchise later,<sup>374</sup> would seem not to be basing that individual's enfranchisement on a view of her right to vote in that commu-

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372. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989).

373. *But see* Baker, *supra* note 343, for alternative analyses.

374. This discretion is still subject to the constitutional rules that govern distribution of nonfundamental goods. *See* Hunter v. Underwood, 471 U.S. 222 (1985) (Rehnquist, J.) (convicted felon disqualification scheme invidiously motivated by desire to disenfranchise black voters violates equal protection).



nity as constitutive of personal identity. Similarly, permitting peripheral groups to be provisionally enfranchised in order to protect identifiable interests suggests an instrumental valuation of their members' political participation.

## 2. Aliens as Optional Electors

We are now ready to inquire into the consistency of alien suffrage, apart from its historical pedigree, with generally operative principles of U.S. constitutional law. The preceding discussion shows that the fact that resident aliens<sup>375</sup> are not constitutionally guaranteed the right to vote does not in itself mean that enfranchising them would be constitutionally impermissible. Resident aliens certainly have the types of interests that have justified inclusion of other groups in optional electorates. An individual has a strong interest in having a say in the adoption of rules that will govern her conduct, regardless of whether she is a member in the fullest sense of the political community. When the rules of community governance are being worked out in the context of an adjudicatory proceeding directed at an individual, including a nonresident or an alien, the individual even has a constitutional right to participate under the Due Process Clause, which serves dignitary interests in self-determination as well as instrumental interests in assuring accuracy.<sup>376</sup> If a property owner who resides in another state has an interest sufficient to support optional enfranchisement, then the same must be true of an alien who resides in the jurisdiction. More compellingly, the enfranchisement may be intended to protect alien residents against hostile government action;<sup>377</sup> U.S. history offers ample reason for concern that their interests may be systematically disfavored in a political process that excludes them. The question, then, is whether something peculiar about their status disqualifies resident aliens from becoming an optional electorate.

Three interrelated concerns need to be addressed. First, the U.S.

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375. I will limit the discussion to aliens lawfully admitted for permanent residence, whose lawful domicile in the United States corresponds nicely to the tradition that citizens must reside in a community to be in its core electorate. The U.S. system of admission for permanent residence, with some exceptions, largely avoids the embarrassment that the German system of requiring repeated renewal of a residence permit causes for proponents of alien suffrage trying to identify the class of aliens to be enfranchised.

376. See, e.g., TRIBE, *supra* note 232, at 666; Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976). Resident aliens have also routinely been afforded the opportunity to participate in administrative rulemaking procedures, both at the agency and the judicial review levels.

377. Cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (identifying protection against discrimination as one rationale for upholding congressional enfranchisement of citizens not literate in English).

conception of popular sovereignty may make citizenship in the nation an essential precondition to voting at all levels. Second, state enfranchisement of aliens may represent a trespass against federal powers. Third, some feature of alienage may unavoidably disqualify a person from participation in the political community. I will argue here that the U.S. constitutional tradition has drawn on more than one vision of democracy, and is not committed to a version that would forbid alien suffrage.

As far as the U.S. conception of popular sovereignty is concerned, the preceding discussion of the ideology of alien suffrage indicates a broad spectrum of opinions. The German debate should alert us to the distinction between a liberal interpretation of popular sovereignty as a vehicle for personal self-determination founded on the individual and communitarian interpretations of popular sovereignty as a vehicle for collective self-determination, which may be founded in nationalism or in some other theory of the right collectivity. Although popular sovereignty is largely a theory of the ultimate source of political power, rather than a recipe for the structuring of individual government institutions, a nationalist interpretation of popular sovereignty could justify the conclusion that the people should never share their political power with nonnationals.<sup>378</sup> Both the nationalist-communitarian and liberal-individualist perspectives have been represented in the United States, outside the alien suffrage debate as well as inside it.<sup>379</sup> *Downes v. Bidwell*<sup>380</sup> could be cited as an apotheosis of an Anglo-American nationalist popular sovereignty. *Scott v. Sandford* did much the same for a white nationalist popular sovereignty, although its dicta simultaneously accept alien suffrage.<sup>381</sup> The optional enfranchisement of citizens with interests to protect, however, in accord-

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378. A nonnationalist communitarian interpretation should also be possible, and appears to inform Prof. Zuleeg's argument that resident aliens are part of the same *Lebens- und Schicksalsgemeinschaft* (that is, community living together and sharing a common fate) as citizens, and therefore are included in the *Volk*. See *supra* note 120 and accompanying text. I imagine different formulations of such an interpretation would imply different criteria for becoming a member of the community. I will concentrate here, however, on the implications of the individualist interpretation, which has played a significant role in the enfranchisement of optional electorates.

379. For examples inside the alien suffrage debate, see *supra* notes 269-72, 276-79, and accompanying text.

380. 182 U.S. 244 (1901). *Downes* was the most important of the so-called Insular Cases, which held that constitutional limitations on federal power do not always apply to territories acquired by the United States. One major purpose of the doctrine was to enable the nation to acquire an overseas empire without admitting its new subjects to citizenship; this was explicitly justified on racial grounds. See, e.g., Neuman, *supra* note 325, at 957-64. A similar example, decided several years earlier by a similarly divided Court, is *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), upholding a sweeping federal power to deport resident aliens. See also Smith, *supra* note 312, at 242-44 & n.13.

381. 60 U.S. (19 How.) 393 (1856). Chief Justice Taney contrasted white women and children, who were members of the sovereign political community without being entitled to vote,

ance with the characterization of the right to vote as "a fundamental political right, because preservative of all rights,"<sup>382</sup> illustrates the influence of the individualist interpretation of popular sovereignty. So does the historic rallying cry against "taxation without representation."

The history of federalism supports the view that the Constitution does not make *national* citizenship a prerequisite for voting in the states. The Constitution directly addresses suffrage in the states only by means of the antidiscrimination amendments and the republican form of government clause. The doctrine that states may have "citizens" defined as such solely for internal purposes, employed in *Scott v. Sandford* to explain away voting by free blacks, has survived despite its association with that tainted decision. The citizenship clause of the Fourteenth Amendment does not even exhaustively specify the persons who may be considered citizens of the nation, let alone of a state. Though I am trying not to rely on the historical fact of alien voting, I think it is fair to point out the parallel fact that different states adopted different policies on the enfranchisement of Native Americans who lacked national citizenship.<sup>383</sup> In short, popular sovereignty in the United States has been a flexible notion, which has not restricted political power by a rigid definition of the "People," and certainly not by the legal category of national citizenship.

With this in mind, it also cannot be said that enfranchisement of lawful resident aliens infringes the express federal power over naturalization or the implied federal power over immigration. National citizenship involves more than the right to vote in a state, and a state that enfranchises one of its alien residents has not purported to naturalize that resident. It is probably true, however, that modern constitutional law would uphold an explicit congressional prohibition on alien voting. Although the infringement of state sovereignty would have troubled earlier generations, the states have shrunk sufficiently to enable the Supreme Court to view the prohibition as within the "plenary" federal power to set the conditions on which aliens will be admitted to U.S. territory. The entering wedge for the prohibition might well be the need to restrict the political activities of enemy aliens in time of war, and the usual deferential review of federal alien policy for "for-

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with aliens and free blacks, who in some states were entitled to vote without being (in his view) members of the sovereign political community.

382. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

383. See, e.g., MICH. CONST. of 1850, art. VII, § 1; MINN. CONST. of 1857, art. VII, § 1; N.D. CONST. of 1889, art. 5, § 121(3); WIS. CONST. of 1848, art. III, § 1.

eign relations" reasons would accomplish the rest.<sup>384</sup>

An examination of declarant alien suffrage illustrates the absence of an inherent barrier to an alien's participation in the political community. Regardless of whether the state adopted declarant aliens as local state citizens, full enfranchisement of declarant aliens represented an admission to the active political community of the state on the basis of mutual consent and residence. Declarant aliens had not yet been admitted to the overarching national political community, and therefore lacked rights of interstate mobility as well as rights of constitutional protection against deportation by the federal government.<sup>385</sup> But declarant aliens were "on a citizenship track";<sup>386</sup> they had expressed their desire for national citizenship, and, given the broad eligibility for naturalization as of right, it was largely a matter of time before they attained it.<sup>387</sup> As between the state and the voter, both a subjective and an objective political bond existed. It was not an "inescapable" political bond, but neither was the bond between a state and its other citizens.

In this regard, even some communitarians could consider unenfranchised declarant aliens (and their contemporary equivalents<sup>388</sup>) as passive members of the political community, like adolescents, rather than as outsiders. U.S. immigration policy has imposed the residence period preceding naturalization for educational as well as probationary purposes.<sup>389</sup> Thus, unenfranchised declarant aliens residing in the community already looked more like prospectively active members

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384. See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255. David Martin has suggested to me a different route; if the naturalization clause supports some implied Congressional power to regulate the consequences of naturalization, regulation of voting by unnaturalized aliens could be within Congress's authority.

385. The republican-style objection, which claims that aliens' reliance on the federal government for continuation of their status demonstrates that they lack independence and therefore cannot be trusted with the franchise, seems perverse by modern American standards.

386. Cf. Rosberg, *supra* note 214, at 1110 (referring to all resident aliens).

387. I do not mean to ignore the racial qualifications imposed for most of United States history. The point is that naturalization generally followed as a matter of course for those who were not openly disqualified from the outset, then as it does now.

388. As previously mentioned, the declaration of intent was eliminated as an element of naturalization procedure in 1952. The 1952 Act retained a procedure for filing declarations of intent, apparently because some states extended favorable treatment to declarant aliens. See 8 U.S.C. § 1445(f) (1988). The Immigration Reform and Control Act of 1986 gave new federal relevance to the declaration in connection with protection against employment discrimination on grounds of alienage, which was extended only to "intending citizens" who had completed a declaration of intent. See Pub. L. No. 99-603, § 102(a), 100 Stat. 3374 (1986) (provision formerly codified at 8 U.S.C. § 1324b(a)(3)). The documentation requirement was repealed in 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 533, 104 Stat. 4978.

389. Immigrants were thought by the national majority to lack exposure not only to the local language and customs, but to the local political institutions, whether the American style of democracy or democracy itself. See, e.g., KETTNER, *supra* note 215, at 237-42.

than like prospective members. Unlike citizen-members,<sup>390</sup> they could be expelled from membership and territory,<sup>391</sup> but revocable membership is not a contradiction in terms.

Looking beyond declarant aliens, some resident aliens are ineligible or unwilling to naturalize. The moral status of naturalization criteria — whether a country should regard itself as free to adopt whatever naturalization policy it pleases, or whether a country that invites long-term settlement of resident aliens may be morally obliged to offer them citizenship<sup>392</sup> — could be debated, but for present purposes it may be better to assume *arguendo* that the U.S. criteria, including the demand for renunciation of prior nationality,<sup>393</sup> are morally defensible. While other categories could be considered, the most significant question would seem to be whether a state may 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>394</sup> (I will call such a person a “nondeclarant alien,” although it is not simply the opposite of being a declarant alien.)

The political bond between a nondeclarant alien and the state is less strong than in the case of the declarant alien. The alien has voluntarily chosen to reside in the state, and (under current law)<sup>395</sup> has been

390. This is an overconcession, since it is modern constitutional law that places severe limits on the government's ability to denationalize its citizens. See Afroyim v. Rusk, 387 U.S. 253 (1967), *overruling* Perez v. Brownell, 356 U.S. 44 (1958). But see Fedorenko v. United States, 449 U.S. 490 (1981) (withdrawal of defectively acquired naturalization); Rogers v. Bellei, 401 U.S. 815 (1971) (permitting “condition subsequent” on citizenship of child born to citizen parents abroad). See generally T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1986). The German Basic Law expressly forbids involuntary denationalization, GG art. 16(1), but denationalization resulting from naturalization in another country is regarded as voluntary. See Judgment of June 22, 1990, Bundersverfassungsgericht (Kammer), 43 NJW 2193 (1990).

391. Under U.S. law, resident aliens are statutorily subject to deportation for a variety of forms of misconduct, see 8 U.S.C. § 1251(a)(1)(E), (2), (3), (4) (1988), or even misfortune, see 8 U.S.C. § 1251(a)(1)(D), (5) (1988).

392. See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 60-61 (1983); Herman R. van Gunsteren, *Admission to Citizenship*, 98 ETHICS 731, 737-38 (1988).

393. Some critics of German naturalization policy, however, have maintained that its demand that aliens divest themselves of their former nationality as a precondition to naturalization is unduly harsh. See, e.g., Groth, *Doppelstaatsangehörigkeit mit aktivem und ruhendem Teil — eine Perspektive?*, in AUFENTHALT - NIEDERLASSUNG - EINBÜRGERUNG: HOHENHEIMER TAGE ZUM AUSLÄNDERRECHT 1986, at 245 (1986); Hailbronner, *supra* note 11, at 78-79 (rejecting this criticism). Germany even extends this requirement to children born within its territory to alien parents, unlike the United States, where such children are usually dual nationals at birth.

394. It should be recognized, however, that some immigrants who would otherwise naturalize may be deterred by the process itself or by the institutions that administer it. See, e.g., David S. North, *The Long Gray Welcome: A Study of the American Naturalization Program*, 21 INT'L MIGRATION REV. 311 (1985).

395. A crucial turning point in United States immigration policy was reached with the imposition of numerical limits on permanent immigration in the 1920s. I do not want to place too much argumentative weight on the selectivity of the government's process for admitting immigrants, especially because it varies with the category of immigration and over time. Compare T.

admitted for the express purpose of living in the country indefinitely, after going through a complex administrative process. Opinions may differ as to whether the alien has “disappointed” the country by deciding not to naturalize; certainly nothing in the immigration laws makes desire for naturalization a criterion of admission or failure to naturalize a ground of deportation.<sup>396</sup> The alien has voluntarily submitted to the state’s governance for the duration of her residence in most respects as if she were a citizen.<sup>397</sup> Under U.S. law, all aliens owe allegiance to the United States during their residence here.<sup>398</sup> U.S. law has always recognized resident aliens as at least passive members of the community to the extent of including them — in contrast to “Indians not taxed” — in the basis of apportionment.<sup>399</sup>

Both declarant and nondeclarant aliens are normally also members of a foreign political community — and not merely another political community, like a sister state. But even national political communities need not have mutually exclusive memberships. A state could confer its local citizenship on a declarant alien without demanding the immediate renunciation of her prior citizenship. U.S. nationality law itself is much more tolerant of multiple nationality than the German legal system, which displays an obsessive concern with the “evils” of dual nationality.<sup>400</sup> U.S. naturalization practice developed at a period when most of the relevant countries of emigration did not recognize a right of expatriation,<sup>401</sup> and the constitutional principle of *jus soli* citi-

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Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 15 n. 31 (1990) with Immigration Act of 1990, Pub. L. No. 101-649, §§ 131, 132, 162(a), 104 Stat. 4978 (nonselective lottery systems for “diversity immigrants”).

396. See Aleinikoff, *supra* note 395, at 16 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 585 (1952)).

397. These are among the standard arguments for considering resident aliens members of the national community. See Aleinikoff, *supra* note 395, at 23; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 201-03 (1983). Rosberg, *supra* note 214, at 1129-36, uses similar arguments to support the stronger conclusion that aliens are constitutionally entitled to vote.

398. See, e.g., *Carlisle v. United States*, 83 U.S. 147 (1873).

399. U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2; see also Aleinikoff, *supra* note 395, at 21; T. Alexander Aleinikoff, *The Census and Undocumented Aliens: A Constitutional Account*, 33 LAW QUADRANGLE NOTES 26 (Winter 1989). In the debates leading up to the Fourteenth Amendment, Roscoe Conkling opposed a proposal to change the basis of apportionment to voters, on the grounds that it would give states an undue incentive to enfranchise aliens. CONG. GLOBE, 39th Cong., 1st Sess. 356-57 (1866).

400. See, e.g., Hailbronner, *supra* note 11, at 77-78; Helmut Rittstieg, *Doppelte Staatsangehörigkeit im Völkerrecht*, 43 NJW 1401 (1990) (critical of this concern). A valuable window into German conceptions of nationality is provided by the Federal Constitutional Court’s opinion invalidating on sex discrimination grounds the statute denying German nationality to children born to German mothers and their alien husbands. See Judgment of May 21, 1974, *Bunderversfassungsgericht*, 37 BVerfGE 217.

401. After the Civil War, the United States was able to negotiate a series of treaties to assure recognition of the changed nationality of naturalized citizens. See BORCHARD, *supra* note 221, at

zanship provides further opportunity for overlap. Today, constitutional principles can even require the government to permit a U.S. citizen to acquire a foreign nationality by naturalization without relinquishing her U.S. citizenship.<sup>402</sup>

Nonetheless, a nondeclarant alien has decided not to undertake the full commitment entailed in a change of citizenship. Unwillingness to renounce a prior citizenship may reflect a wide variety of factors.<sup>403</sup> Sometimes unfavorable economic consequences under the former country's law, such as forfeiture of accrued pension rights or ineligibility to inherit from relatives, may be dominant. Political exiles may wish to preserve the option of return in case of an unlikely change in the character of the regime. Some business immigrants use the United States as a base for international activities, while maintaining close ties with their homelands. Some immigrants expect ultimately to retire to the land of their childhood. Others may have no intention to make practical use of their prior citizenship, but view it as a part of their psychological identity that they are reluctant to renounce. Still others may find a U.S. identity repugnant, and perhaps would not take it on even if they could maintain both nationalities.

Various communitarian theories may treat some or all of these reasons for failing to naturalize as fatal barriers to political participation. Communitarians may, however, be reluctant to require lifelong commitment to a community as a minimum condition for political participation. An immigrant's decision to maintain Italian nationality in order to preserve the right to live in Tuscany if she survives to retirement age may be no more disqualifying than a New Yorker's intention to retire someday to Arizona, or to emigrate. U.S. constitutional law does not treat the latter types of mobility as valid reasons for disenfranchising citizens. In the liberal tradition, participation and emigration are continuing choices.

From an individualist perspective, the nondeclarant alien's desire to maintain exclusive permanent allegiance to another nation is not inherently disqualifying, but rather creates instrumental reasons for withholding the franchise.<sup>404</sup> It may be more or less probable that the

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548-49. Even today, United States naturalization law requires only renunciation of other allegiances, see 8 U.S.C. § 1448(a)(2) (1988), unlike German naturalization law, which demands legally effective abandonment of a former nationality absent exceptional circumstances. See HAILBRONNER, *supra* note 53, at 1055-57.

402. See Vance v. Terrazas, 444 U.S. 252 (1980) (elaborating standard of voluntary relinquishment of citizenship); Parness v. Shultz, 669 F. Supp. 7 (D.D.C. 1987) (applying standard in naturalization context); 8 U.S.C. § 1481(a) (1988) (codifying standard).

403. See, e.g., William S. Bernard, *Cultural Determinants of Naturalization*, 1 AM. SOC. REV. 943 (1936); DeSipio, *supra* note 323.

404. One instrumental reason sometimes mentioned is the creation of incentives for naturali-

alien's political participation would be guided by an identification with the other nation's interests, rather than concern for the welfare of the community in which she resides. Undoubtedly this perception has formed an important part of the reason why states have chosen to deny aliens voting rights.<sup>405</sup> This choice may reflect an understandable reliance on objective rather than subjective indicia.<sup>406</sup> But as an empirical matter, it must be admitted that using nondeclarant alien status as a proxy for insufficient concern is extremely overinclusive and underinclusive. American tradition does not demand of citizens a chauvinistic identification with the national interest to the exclusion of all other considerations, nor does the Constitution permit disenfranchisement of dual nationals, citizens with strong ethnic identifications, or former Peace Corps workers.<sup>407</sup>

A state may nonetheless conclude that under currently prevailing conditions,<sup>408</sup> enfranchising both declarant and nondeclarant aliens would not create a risk of harm that outweighs the benefits to be achieved by including them in the state or local electorate. The state might base this judgment on a variety of factors, including what it knows regarding the commitment of its alien residents, their relative number, the disparateness of their national allegiances, and the relative absence of opportunities for a conflict of national interests.<sup>409</sup> Be-

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zation. *But cf.* Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 *GEO. IMMIGR. L.J.* 1, 6 (1989) (criticizing this argument). It could hardly be argued, however, that the Constitution compels this or any other strategy for inducing otherwise reluctant individuals to naturalize.

405. I owe thanks to Louis Henkin for driving home the point that this argument would not justify withholding the vote from *stateless* alien residents who declined on grounds of conscience to take on United States citizenship. Conceivably the government would assert its inability to distinguish such residents from stateless aliens who identified with their former country, though not its current regime.

406. There are serious dangers in delegating to election officials the power to hold periodic individualized hearings on a voter's commitment to the welfare of the local community. Even if officials could be trusted not to make partisan or other invidious use of their authority, it would be difficult to specify what evidence of concern for another nation's interests could rebut a voter's profession of local commitment. Thus, broad classifications turning on status or oaths, which would be impermissible as applied to members of the core electorate, may be the state's only option.

407. *Cf.* *Dunn v. Blumstein*, 405 U.S. 330, 354-56 (1972) (" '[D]ifferences of opinion' may not be the basis for excluding any group or person from the franchise.")

408. If the circumstances change, the decision can be reconsidered. Of course, any political issue is subject to reconsideration at some level. Calling aliens an optional electorate means that the federal Constitution in its current form neither compels nor prohibits their enfranchisement. State constitutions, as we have seen, often specify voter qualifications, so that extension or withdrawal of alien suffrage could require a constitutional amendment at the state level. Alternatively, a state constitution might leave the issue to be decided by ordinary legislation.

409. Such opportunities may arise particularly rarely in local elections. Once a state has made resident aliens eligible to vote in state legislative elections, the Constitution entitles them to vote for Senators and Representatives, but it also bars them from running for Congress or the Presidency themselves.



cause the withholding of the franchise is instrumentally rather than intrinsically justified, nothing in the Constitution prevents the citizenry from deciding that its goals would be better met by inclusion rather than exclusion of alien voters, just as nothing in the Constitution prevents them from deciding to accept the "risks" involved in enfranchising persons convicted of crime, nonresident property owners, and citizens not literate in English.

Thus a state's power to include declarant aliens within its political community is not simply an archaic survival. It is consistent with broad themes of U.S. constitutional law, particularly the inclusive and rights-oriented themes of constitutional modernism. I have addressed this question primarily as it relates to full enfranchisement in the state electorate, which carries with it federal voting rights. A more restricted grant of voting rights at the municipal level or in special-purpose elections (where even corporations sometimes vote<sup>410</sup>) should be permissible *a fortiori*. Unlike the German Basic Law, the U.S. Constitution does not expressly address the structure of local government, and local units are not considered "sovereign" in the same sense as the states.<sup>411</sup>

### B. *Alienage as a Legal Status*

With its thorough ventilation of reasons why exclusion of aliens from voting could be regarded as essential, the juristic debate on alien suffrage also affords a rich collection of data for examining the legal image of the alien. Before concluding this article, I will discuss two examples of the ways that the legal discourse of alienage can conceal realities. The first example concerns alienage as a base for erecting legal fictions. The second concerns the ability of status discourse to serve as a screen for more narrowly directed prejudice.

The argument about "inescapability" made against alien suffrage in the FRG is a good starting point.<sup>412</sup> To recapitulate, aliens were widely considered disqualified from political participation because their international mobility took away their incentive to vote responsibly and prevented them from feeling implicated in the fate of the polity. Aliens could flee the consequences of improvident political decisions by returning to their homelands, but Germans had no such

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410. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973) (observing, but not adjudicating, this circumstance).

411. See Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85-99 (1990); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 303-05 (1987).

412. See *supra* notes 117-21 and accompanying text.

guaranteed refuge.<sup>413</sup> Therefore, it was argued, no alien may vote.

As the proponents of alien suffrage were quick to point out, the description of reality on which this argument rests is a gross simplification. Germans have a constitutional right to leave the country.<sup>414</sup> Many Germans have more than one nationality, and the number of dual nationals was increased in 1974 by the Federal Constitutional Court's holding that German mothers with alien husbands must have the same capacity to confer German nationality on their children as German fathers with alien wives.<sup>415</sup> Status-Germans may have only a foreign nationality. The argument of mobility rings particularly hollow in the context of the European Community, since Germans have broad rights to settle within the territory of any Member State. Additionally, unlike non-Community nationals, they can reside outside Germany without abandoning the right to return.

Conversely, alien residents may have no option of returning to their homeland, in theory or in practice. Some resident aliens are stateless. Others are recognized refugees. Civil disorders and economic collapse may make the country of nationality inhospitable to the alien resident. Aliens who were born and educated in Germany may have no acquaintance with the language, culture and customs of their country of nationality.

Confronted with these counterarguments, opponents of alien suffrage responded implicitly or explicitly that these factual complexities were irrelevant. One expert stated with exemplary clarity the methodological reason why exceptions could not undermine the rule:

A discussion of status cannot be contested with atypical instances. A status is a typifying regulatory complex, which is focused on the conceptual form of the normal case. If the assignment of status does not correspond to this conceptual form *in concreto* (as in the case of an alien who was born in Germany and is professionally and familiarly integrated exclusively into German society), then this gives no grounds for calling into question the legal position of aliens, but rather only grounds for the assumption that in the particular case the status of alien does not do justice to the facts and naturalization is called for.<sup>416</sup>

In other words, alienage is a legal status category, for which stereo-

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413. One author, without apparent irony, invoked "the difficulties that Germans had in finding a refuge in the years 1933-1945" as evidence of the inescapability factor that contributes to making constitutionally unalterable the principle that only Germans can vote in state and federal elections. Ruland, *supra* note 58, at 11 (author's translation).

414. This is not explicitly stated in the Basic Law, but is included in the general liberty protected by Article 2. Judgment of Jan. 16, 1957, Bundesverfassungsgericht, 6 BVerfGE 32.

415. Judgment of May 21, 1974, Bundesverfassungsgericht, 37 BVerfGE 217.

416. *Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland (Aussprache und Schlussworte)*, 32 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 113-14 (1974) (remarks of Prof. Isensee) (author's translation); see also

typed analysis is appropriate. How else could one account for the argument that young women, born to Turkish parents in Germany, who have grown up and assimilated in German society, cannot be permitted to vote because (1) these young women are still Turks; (2) as Turks, they have the right to return to their ancestral villages, and therefore lack the incentive to vote responsibly in German elections;<sup>417</sup> and (3) Turks do not have the same compensating civic duties as Germans, because Germany does not draft Turkish men?<sup>418</sup>

Some generalizations about differences between citizens and resident aliens may have a moderate degree of statistical validity. A country's immigration system may, for example, operate in a manner that produces a resident alien population less fluent on average in the dominant local language than the citizen population, or less committed to certain dominant local values. If a court were doing nothing more than seeking a rational basis to support a legislature's reservation of preferential access to positions of public authority to citizens, such generalizations might suffice.

As arguments for constitutionally prohibiting the legislature from *ever* permitting an alien to exercise public authority, however, these generalizations take on the character of disabling legal fictions. Legal fictions are no novelty to U.S. immigration law, where they have traditionally been employed to enhance the flexibility of national sovereignty.<sup>419</sup> The particular usage made of legal fictions in the German alien suffrage debate nonetheless seems distinctive. Some opponents sought to elevate legal fictions to unalterable higher truths that would deprive both the legislature and the process of constitutional amendment of the power to improve the situation of immigrants. This degree of attachment to a concededly inaccurate mental picture, to the extent that it resulted solely from legal habits of mind, is a phenomenon to wonder over.

A similarly powerful legal fiction, though less of an object for won-

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Ruland, *supra* note 58, at 11 ("It is in the nature of a typification to be refutable in individual cases.") (author's translation).

417. See *supra* notes 117-21 and accompanying text.

418. See *supra* notes 121-24 and accompanying text.

419. See, e.g., Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 24-27 (1984) (discussing fiction that deportation is not punishment); Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 89-92, 104-06 (1989) (discussing entry fiction and fiction that deportation is not punishment). In Anglo-American law, naturalization, as its name implies, was originally a fiction. See, e.g., KETTNER, *supra* note 215, at 32-33 (naturalized aliens deemed to have been born as subjects); *State v. Commissioners of Roads*, 3 S.C.L. (2 Brev.) 667 (Const. Ct. 1809) (even if only citizens could hold office, officer naturalized during term of office would be eligible because naturalization operates retrospectively to time of birth).

der, arose in the argument that aliens could not vote because they owe an all-purpose "duty of loyalty" to their countries of nationality. Although this duty went beyond concrete legal commands and carried no concrete legal sanction, it facilitated the argument that aliens differed decisively from Germans because their status entailed an inability to place the German national interest foremost. The authors could even phrase this argument in a wording that connoted sympathy for the conflicted position in which aliens would inevitably be placed by the conferral of suffrage. The institutionalized assumption of disloyalty to Germany could also be distinguished from the empirically observable concern for the interests of another country that frequently influences the voting choices of naturalized immigrants (and other citizens).

Ascribing inherent disloyalty to aliens may be more than just poor legal reasoning. The divided loyalty of foreigners is a standard figure of xenophobic rhetoric, and it naturally raises the concern whether the dividing line between realism about the Nation-State and a generalized antiforeign animus has been crossed. That some arguments against immigrants' rights, in Germany as well as in the United States, reflect overactive national feeling is, however, too obvious to require much discussion. It is perhaps more useful to recall a different parallel, the accusations of divided loyalty specifically directed at Catholic immigrants (naturalized as well as unnaturalized) in nineteenth century America.<sup>420</sup> When a German author asserts that admitting unintended immigrants to participation in government would amount to a "conquest,"<sup>421</sup> one may suspect that it is not the Danes he has in mind; when the same author expressly doubts that Islamic voters can be persuaded that a party identified as Christian would represent their interests,<sup>422</sup> one may suspect that more than just excessive party zeal has affected his analysis.

As the U.S. experience confirms, the discourse of legal status permits coded discussions whose true referents may be not only the native and the foreign, but, worse, the particular foreign group that is the principal focus of current hostility. Earlier in this century, U.S. law refined this technique with the legal category of "alien ineligible to citizenship," interpreted as alien *racially* ineligible to citizenship, and

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420. See, e.g., BENNETT, *supra* note 237, at 39-41.

421. See Quaritsch, *supra* note 58, at 15 (*Landnahme*).

422. *Id.* at 13. The reference is to one or both of the conservative parties, Chancellor Kohl's Christian Democratic Union and its Bavarian partner, the Christian Social Union.

meaning Japanese.<sup>423</sup>

Theorizing about the characteristics of noncitizens is more acceptable in polite society today than disparaging particular nationalities. Indeed, we are all aliens when we travel outside our own country. As a result, it is easier to say that aliens cannot vote responsibly on municipal housing policies because they can "escape" the financial burden resulting from improvident expenditures than to say that one does not place much value on making decent housing available to Turks, who should really go home anyway. It is easier to attribute to European intellectual history the notion that children born to alien parents in the FRG are nonetheless by definition outside the "community of fate" than to claim that Turks are unassimilable due to their un-German religion, diet, and customs. If the result of phrasing the argument in this euphemistic manner is that Swiss technicians in Bavaria are barred from voting while children of mixed German and Turkish parentage are not, the approximation may be an acceptable substitute.

I do not want to claim that the juristic analyses cited in this article usually, or even frequently, can be translated in this manner. But some of them do illustrate the fact that, under the right social circumstances, the technical distinction between citizen and alien lends itself to roughly targeted discussion, and can facilitate the implementation of roughly targeted policies. Discrimination against aliens as a class occurs not only because upswellings of nationalist sentiment can produce hostility to noncitizens per se, but also because, lacking the right to vote, they may be more easily sacrificed to confer a kind of respectability on measures aimed at a particular foreign group.

### CONCLUSION

The debates on alien suffrage within the United States and Germany illustrate the contrast between a liberal interpretation of popular sovereignty as reconciling individual self-determination with the need for collective action and a nationalist-communitarian interpretation of popular sovereignty as a form of collective self-determination. Although some dicta of the U.S. Supreme Court may suggest acceptance of the nationalist-communitarian perspective, in practice the federal Constitution has permitted Congress and the states to act in accordance with the liberal aspect of their political heritage. The right to have the right to vote is reserved to citizens, but the right to vote can be shared with others.

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423. Compare *Porterfield v. Webb*, 263 U.S. 225 (1923) with *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

The Federal Constitutional Court, in contrast, has recently confirmed the prevailing opinion that the FRG's Basic Law impliedly adopted a nationalist-communitarian version reflecting the historical development of German Statehood. Alien suffrage is not compatible with democracy within the meaning of the Basic Law. The German People have forbidden themselves to share their political power, although the Court has fortunately rejected the claim that the People lack the power to repeal this prohibition. Given the population structure of the FRG, and especially the inheritability of alien status, this resolution of the debate is regrettable. In the short run, the dislocations of German unification will only increase resident aliens' need for protection, and it remains to be seen what alternative steps will be taken to provide it.