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ALIENS AND EQUAL PROTECTION: WHY NOT THE RIGHT TO VOTE?

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Alienage, the Supreme Court has recently insisted, is a suspect classification.[1] Thus, statutes disadvantaging aliens as a class are subject to strict judicial scrutiny and are held invalid unless justified by some compelling state interest. The extension of this special judicial solicitude to aliens is remarkable enough in view of the thinness of the precedential support and the imperfections of the analogy between alienage and race, the paradigm suspect classification. But it is all the more puzzling in that it has come at a time when the Supreme Court, in no expansionist mood, has resisted the demand of virtually every other group for this same judicial protection.

Still, if one concedes the premise that alienage is a suspect classification, one can fairly easily explain why a state may not deny aliens welfare benefits[2] or civil service employment[3] or access to the bar.[4] But how can one explain why a state is permitted to deny aliens the opportunity to vote, which every state in fact does?[5] Is it simply that the case has not yet arisen and restrictions on aliens' voting will sooner or later fall? I doubt that, since the Supreme Court has just brushed aside a case that raised the issue squarely, declaring that the case did not even present a substantial federal question.[6] Alternatively, is the states' need to deny aliens the vote so obviously compelling that articulation of the reasons for that conclusion could serve no useful purpose? I doubt that too, since the effect of raising the issue is more often to provoke a reexamination of the premise that alienage is a garden-variety suspect classification than it is to produce a reasoned discussion of the supposed need to deny aliens the vote.

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1. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

2. 403 U.S. 365.

3. Sugarman v. Dougall, 413 U.S. 634 (1973).

4. *In re* Griffiths, 413 U.S. 717 (1973). *See* Nyquist v. Mauclet, 97 S. Ct. 2120 (1977) (financial assistance for higher education); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (license to practice as civil engineer).

5. A. REITMAN & R. DAVIDSON, THE ELECTION PROCESS: VOTING LAWS AND PROCEDURES 8-9 (1972).

6. Skafte v. Rorex, — Colo. —, 553 P.2d 830 (1976); *appeal dismissed*, 97 S. Ct. 1638 (1977).

A constitutional right of at least some aliens to vote does not seem to me at all unthinkable.[7] Throughout much of the nineteenth century and part of the twentieth, aliens enjoyed the right to vote in a great many states.[8] The states that extended the franchise to aliens plainly did not believe that they were acting under constitutional compulsion. But given our present understanding of the mission of the equal protection clause, much can now be said in defense of such a constitutional right. My purpose here is to outline the case that might be made for the right of aliens to vote. I should make clear at the outset, however, that this is an area where one must proceed with caution, for the Supreme Court, despite its now numerous incursions into the thicket of politics and voting, has barely begun to construct a framework for analyzing questions concerning the nature of political representation and the definition of a political community.[9] Indeed, the inscrutability of these questions and the sense of unease produced by discussion of them may account for the general reluctance to face squarely the issues raised by alien suffrage.

I. Historical Background

As background it may be useful to begin with a brief survey of the historical practice concerning aliens' voting. My purpose is not just to demonstrate that allowing aliens to vote was thought acceptable throughout a substantial part of American history, including periods characterized by much more xenophobia than we are familiar with today. More important, the historical experience rebuts the argument that the terms "citizen" and "voter" are synonymous and that one cannot, therefore, speak coherently of a right of aliens to vote. In this country aliens have often enjoyed the right of suffrage. And, by the same token, a great many citizens have not.

Surprisingly little has been written on the history of suffrage in the United States, and the few apparently reliable sources are so preoccupied with the demise of property, sex, and race qualifications

7. The Commission of the Common Market has under study a proposal to extend voting rights in each of the member countries to residents who are nationals of one of the other member countries. *See* Commission of the European Communities, *Report on the Implementation of Point 11 of the Final Communique Issued at the European Summit Held in Paris on 9 and 10 December 1974*, in BULL. OF THE EUROPEAN COMMUNITIES 26 (Supp. 7, 1975). *See also* COMMISSION FOR THE EUROPEAN COMMUNITIES, PROGRAM FOR 1977, at 41 (1977).

8. *See* text at notes 31-36 *infra*.

9. Casper, *Apportionment and the Right To Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 2.

that it is hard to obtain a clear picture of how aliens were treated. Most obscure, predictably, is the experience in the colonial period. Generalizations are difficult not only because of the problem of determining how the formal rules of suffrage were translated into practice,[10] but also because the concept of citizenship did not have the same meaning as it has today. Until the Constitution centralized the power to naturalize aliens in the national government, no single definition of citizenship was applicable throughout the American states.[11] The question that must be asked, therefore, is what, if any, voting rights were extended to persons that we would now consider aliens—that is, persons neither born nor naturalized in the United States nor born to American parents overseas.

The key to the early suffrage qualifications was property. In the early colonial period, one commentator has pointed out, "the underlying idea was that a man's property entitled him to vote—not his character, his nationality, beliefs, or residence, but his property."[12] Even after other qualifications were added, the property requirement remained central. Chilton Williamson maintains that the number of potential voters excluded under the property tests may well have been much smaller than is generally supposed, and it was almost certainly smaller than the number so excluded in England during the comparable period.[13] But the property qualifications still cut deeply and a significant percentage of the male citizenry was not permitted to vote. Women were completely excluded even though their capacity to hold citizenship was not questioned. No one had to argue that a man without property or a woman or an infant was not a citizen and therefore not entitled to vote, since no one supposed that a citizen was by definition a voter.[14]

At the same time that many persons we would now consider citizens were barred from voting, evidently at least some that we would now call aliens were allowed to vote. In the first place, requirements for naturalization of non-English subjects, at least if they were Protestants, were apparently so relaxed at times in some of the

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10. *See* C. WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760-1860, at 49 (1960).

11. *See* THE FEDERALIST No. 42, at 264-65 (J. Madison) (H. Lodge ed. 1892).

12. K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 3 (2d ed. 1971). Porter's examination of suffrage was written in 1918. That it was reprinted more than 50 years later is less a tribute to the quality of the study than an indication of the sparsity of more recent scholarly work in this area.

13. C. WILLIAMSON, *supra* note 10, at 22-39.

14. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); 10 OP. ATTY. GEN. 385-87 (1863) (citizenship).

colonies that many of the persons who voted as naturalized citizens would not be considered naturalized under anything like the standards we now enforce.[15] Moreover, the colonial laws and charters seldom imposed explicit political qualifications, in the sense of allegiance or citizenship. A number of the colonies did require that electors be freemen, but outside of New England, where the term had a technical meaning, the requirement was apparently read as "not slave." In New England the term denoted formal enrollment in the political community through a process that involved a residence requirement, the taking of an oath of allegiance, and in some cases even a vote of the other electors.[16]

The term most often used to define the electors in the colonial charters and the early state constitutions was "inhabitants." A good deal of doubt exists as to the manner in which that term was applied.[17] The author of one survey of colonial election laws concluded that as a general principle voting rights were not extended to persons considered foreigners.[18] Another author identified several colonies that did require voters to be English subjects.[19] In 1811 the Justices of the Massachusetts Supreme Judicial Court declared that "inhabitant" was synonymous with "citizen" and thus under the state constitution only citizens could vote.[20] Similarly, a

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15. *See* THE FEDERALIST No. 42, *supra* note 11, at 265; F. VAN DYNE, A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES 6 (1907); *cf.* C. WILLIAMSON, *supra* note 10, at 87.

16. Bishop, *History of Elections in the American Colonies*, in 3 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 92-96 (1893).

17. The term "inhabitants" was used in the Articles of Confederation in a manner that illustrates this confusion. Article IV declared that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall, in every other, enjoy all the privileges of trade and commerce." Madison noted that "[t]here is a confusion of language here, which is remarkable. Why the terms *free inhabitants* are used in one part of the article, *free citizens* in another, and *people* in another . . . cannot easily be determined." THE FEDERALIST No. 42, *supra* note 11, at 265 (emphasis original). "Citizens" and "inhabitants" could be read as describing different but overlapping categories of persons or as being synonymous. Madison evidently thought the first reading more plausible, but he strongly disapproved of the article under either interpretation. *Id.*

18. A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 474-75 (1905). *See also* S. MACCLINTOCK, ALIENS UNDER THE FEDERAL LAWS OF THE UNITED STATES 24 (1909).

19. *See* Bishop, *supra* note 16, at 52-53.

20. Opinion of the Justices, 7 Mass. 523, 525 (1811). *See also* Opinion of the Justices, 122 Mass. 594 (1877). *Cf.* 5 G. BANCROFT, HISTORY OF THE UNITED STATES OF AMERICA 201 (1888) ("for twelve years, free inhabitants and citizens were in American state papers convertible terms, sometimes used one for the other, and sometimes, for the sake of perspicuity, redundantly joined together").

New Jersey judge writing in 1855 maintained that when the state's first constitution was adopted the term "citizen" was not yet in common use, but the term "inhabitants" described those persons who would subsequently be called citizens.[21]

Still, there is evidence indicating that some aliens were allowed to vote as "inhabitants" of the states in which they lived. Unnaturalized French Huguenots voted in South Carolina in the late seventeenth and early eighteenth centuries.[22] Unnaturalized German immigrants voted in Pennsylvania in the middle years of the eighteenth century,[23] and an early Pennsylvania decision upheld the right of an alien "inhabitant" to vote in a borough election in Pittsburgh,[24] just as a Vermont decision upheld the right of an alien resident to vote in a school election.[25] In 1840, a justice of the Illinois Supreme Court emphatically denied that the terms "citizen" and "inhabitant" were interchangeable[26] and cited evidence of aliens voting as "inhabitants" of the Northwest Territory pursuant to the Ordinance of 1787 and subsequent congressional legislation.[27] And it has been conceded by one historian who strongly disapproved of alien suffrage that "the rather vague qualification of citizenship existing in less than half a dozen colonies" during the pre-Revolutionary period disappeared temporarily late in the eighteenth century.[28] Yet it is precisely this period that marks the emergence of a national concept

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21. State v. Deshler, 25 N.J.L. 177, 186 (1855) (separate opinion of Haines, J.).

22. A. McKINLEY, *supra* note 18, at 131-42; Bishop, *supra* note 16, at 53.

23. C. WILLIAMSON, *supra* note 10, at 52.

24. Stewart v. Foster, 2 Binn. 110 (Pa. 1809).

25. Woodcock v. Bolster, 35 Vt. 632 (1863).

26. Spragins v. Houghton, 3 Ill. (2 Scam.) 377 (1840). As counsel for appellant, Stephen A. Douglas argued that an otherwise qualified alien was entitled under the state constitution to vote as an "inhabitant" of the state. Justice Smith's opinion (two other Justices concurred in the result) cited Michigan, Ohio, and Indiana as states (and, in an earlier period, territories) in which aliens had been allowed to vote. He acknowledged cases in other states, apparently New York and Massachusetts, where "inhabitant" and "citizen" were read as synonymous, but he dismissed these precedents out of hand.

27. 3 Ill. (2 Scam.) at 403. The Ordinance of 1787 provided 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." 2 FEDERAL AND STATE CONSTITUTIONS 959 (Thorpe ed. 1909).

28. A. McCULLOCH, SUFFRAGE AND ITS PROBLEMS 36 (1929). *See also* K. PORTER, *supra* note 12, at 20. On June 7, 1776, the Continental Congress declared "that all persons abiding within any of the United Colonies and deriving protection from the laws of the same owe allegiance to the said laws, and are members of such colony." *Quoted in* F. FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES 2 (1906).

of citizenship. The Constitution itself declares that the President, representatives, and senators (though not judges) must be citizens of the United States, and in 1790 Congress passed a statute implementing its power to provide for the naturalization of aliens and at the same time conferring United States citizenship on the foreign-born children of American parents.[29] The passage of and controversy over the Alien and Sedition Acts hardly suggests a lack of sensitivity to the difference between citizen and alien.[30] Nevertheless, there was little effort in the latter part of the eighteenth century to declare specifically that only citizens could vote, and voting by unnaturalized aliens may well have been common during this period.

Early in the nineteenth century the situation began to change. Whereas Ohio was admitted as a state in 1803 with a constitution that defined the electors as the inhabitants of the state, Louisiana's constitution at the time of its admission in 1812 spoke of the citizens as voters, as did the constitutions of Indiana (1816), Mississippi (1817), Alabama (1819), Maine (1820), and Missouri (1821). Illinois, admitted in 1818 with a constitution that identified the inhabitants of the state as the electors, was the only exception to this pattern. It apparently allowed aliens to vote until a constitutional change in 1848.[31] At the same time as the new states were defining the electors as citizens, the states previously admitted were moving in the same direction. Maryland changed its constitutional definition of voters from "inhabitants" to "citizens" in 1810, as did Connecticut in 1818, New York and Massachusetts in 1821, Vermont in 1828, and Virginia in 1830. The explanation for this increasing tendency to equate voting with citizenship may lie in the "rise of national consciousness" engendered by the War of 1812[32] or in the increasing

29. Act of March 26, 1790, 1 Stat. 103. For naturalization the Act required two years of residence, proof of good moral character, and an oath to support the Constitution.

30. *But cf.* A. McCULLOCH, *supra* note 28, at 36 ("The absence of a test of citizenship for the franchise would indicate also that the American people were not yet politically conscious of being a new nation").

31. *See* Spragins v. Houghton, 3 Ill. (2 Scam.) 377 (1840) (settled interpretation of state constitution from its inception that alien inhabitants could vote). Article VI of the state constitution of 1848 declared that the electors were to be the citizens of the state and those persons who were inhabitants of the state at the time of the adoption of the constitution. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 27, at 1002.

32. *See* A. McCULLOCH, *supra* note 28, at 41. Justice Smith's opinion in Spragins v. Houghton, 3 Ill. (2 Scam.) 377 (1840), *see* note 26 *supra*, refers to an unreported Ohio decision of 1817 upholding the denial of the vote in 1814 to a citizen of Great Britain named Johnston, even though, the opinion maintained, aliens were generally

public dismay at the arrival of large numbers of new immigrants who were not of English stock and who were thought incapable of ready assimilation.

Ironically, at the same time that hostility to the foreignborn was producing strenuous demands in some states for literacy tests and other devices that would effectively exclude even naturalized immigrants from the polls, a significant movement was developing in other states to give aliens the vote. In 1848 Wisconsin was admitted as a state with a constitution that expressly extended the right of suffrage to aliens who had declared their intention of becoming citizens. The declaration that Wisconsin had in mind was to be made pursuant to the federal naturalization laws, which required for naturalization five-years' residence in the United States and a declaration of intent to become a citizen made two years before naturalization. The declaration was not in any sense binding, and an alien who had made it could remain in the United States as an alien indefinitely. It has been suggested, however, that many of the supporters of the Wisconsin scheme simply did not understand it, in that they assumed the declaration was somehow tantamount to naturalization or that it could only be made after two-years' residence,[33] when in fact the declaration could be made at any time after arrival, but naturalization could not follow within a two-year period. In any case, the Wisconsin formula proved attractive to other states, in part because they feared that failure to adopt the same rule would give Wisconsin a competitive advantage in attracting immigrants.[34] By the outbreak of the Civil War an alien declarant could vote in state and federal elections in Indiana, Kansas, Michigan, Oregon, and Wisconsin.

The extension of the franchise to aliens was a source of much unhappiness to those who feared that the new immigrants would have an adverse impact on American institutions. At a convention in February 1856, the Know-Nothing Party denounced Wisconsin and other states that had allowed aliens to vote. But their real concern was not so much with aliens as with "foreigners," and their goal was to restrict the political power of all persons of foreign birth. The party's platform included a demand for a 21-year residence require-

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allowed to vote in Ohio during this period. Although he did not have access to a written opinion disclosing the reasoning of the Ohio court, Justice Smith suggested that perhaps Johnston was denied the vote as an enemy alien, rather than as an alien *simpliciter*. 3 Ill. (2 Scam.) at 412-13.

33. K. PORTER, *supra* note 12, at 120.

34. *See* Chaney, *Alien Suffrage*, in 2 PUBLICATIONS OF THE MICH. POL. SCI. A. 130, 134 (1894).

ment for naturalization.[35] But the practice of alien voting survived the attacks, and after the Civil War it spread to at least thirteen more states, all of them in the South or West and all of them evidently anxious to lure new settlers.[36] In each case the state adopted the Wisconsin formula and allowed alien declarants to vote, although some imposed a requirement of residence in the state for a certain period before or after the declaration. In addition, alien declarants were permitted to vote under the congressional legislation establishing the territorial governments of Idaho, New Mexico, Oklahoma, Washington, and Wyoming. By the end of the nineteenth century nearly one-half of the states and territories had had some experience with voting by aliens, and for some the experience lasted more than half a century.

The movement away from alien suffrage began late in the nineteenth century and continued into the twentieth, as the nation's hostility to foreigners increased. The assassination of President McKinley has been cited as a factor that moved some states away from alien suffrage,[37] and it was doubtless no accident that four of the last states to permit voting by aliens moved during the First World War to bar them from the polls.[38] Indiana and Texas abolished alien suffrage

35. *See* K. PORTER, *supra* note 12, at 128-29; F. FRANKLIN, *supra* note 28, at 278-300.

36. Determining precisely which states allowed aliens to vote is a difficult task. Thorpe's compilation of federal and state constitutions, *supra* note 27, is a convenient source of constitutional provisions bearing on the right to vote. It reveals that at one time or another the constitutions of Alabama, Arkansas, Colorado, Florida, Georgia, Missouri, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, and Texas extended the right of suffrage to aliens. In some cases, however, Thorpe provides only an amended version of a state constitution, and there is no way to tell on the face of it whether alien suffrage was at one time permitted. For example, Minnesota's first constitution included an alien suffrage provision, MINN. CONST. of 1857, art. III, § 1; *see* City of Minneapolis v. Reum, 56 F. 576 (8th Cir. 1893), but Thorpe offers only an 1896 version of the article on elective franchise, and in that year alien declarants lost the right to vote. 4 STATE AND FEDERAL CONSTITUTIONS, *supra* note 27, at 2007. Other states may have granted aliens a statutory right to vote even though the constitution of the state did not itself require alien suffrage. Few of the commentators make an effort to identify the particular states that allowed aliens to vote. *See, e.g.*, Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931) (noting that at least 22 states and territories at one time allowed aliens to vote, but not identifying more than a few of them). And some of those who have made the effort are in at least some instances simply wrong. Porter, for example, describes the Michigan constitutional convention of 1850 as narrowly defeating an alien suffrage provision. K. PORTER, *supra* note 12, at 124-25. In fact, alien suffrage was established in the state constitution of 1850, and it persisted until a constitutional amendment ended the practice in 1894, subject to a grandfather clause. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 27, at 1956.

37. *See* A. MCCULLOCH, *supra* note 28, at 53.

38. By constitutional amendment alien suffrage was eliminated in Kansas, Ne-

in 1921, Missouri followed in 1924, and Arkansas brought the era to a close by ending alien suffrage in 1926. One commentator has pointed out that the election of 1928 was the first in more than a century in which no alien had the right to vote for any national, state or local office.[39] The irony of it all is that the disappearance of alien suffrage corresponded almost perfectly with the end of the era of open and unlimited immigration. At the same time that the national government was making it increasingly difficult to get into the United States, the states were taking political privileges away from the aliens who had managed to demonstrate the necessary qualifications and gain admission.

II. The Supreme Court's Position on Alien Suffrage

To my knowledge no state has seriously considered extending the franchise to aliens during the past half century, and I very much doubt that any state would now make the move except at the insistence of the Supreme Court. And the Supreme Court's inclination on the issue is not at all in doubt. The Court has not been very helpful, however, in explaining why aliens have no right to vote. The issue was raised squarely in a recent Colorado case, *Skafte v. Rorex*,[40] and the Supreme Court refused to entertain an appeal from the state court's decision that no such right exists. The order dismissing the appeal for want of a substantial federal question offered no explanation beyond a citation to two recent cases, *Sugarman v. Dougall*[41] and *Kramer v. Union Free School District*.[42] In *Sugarman*, which held unconstitutional a blanket exclusion of aliens from New York's competitive civil service, Justice Blackmun's opinion for the Court had gone out of its way to address the question of alien voting:

> This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.[43]

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braska, and South Dakota in 1918. A Texas statute of that same year barred aliens from voting in primary elections. *See* Aylsworth, *supra* note 36, at 115.

39. Aylsworth, *supra* note 36, at 114.

40. — Colo. —, 553 P.2d 830 (1976), *appeal dismissed*, 97 S. Ct. 1638 (1977).

41. 413 U.S. 634 (1973).

42. 395 U.S. 621 (1969).

43. 413 U.S. at 648-49.

The issue of alien suffrage was not squarely presented in any of the cases cited by the Court. And while it is true that the Court has several times suggested that citizenship might be a permissible voter qualification, it has never made any significant effort to explain the basis for that suggestion. The only explanation offered in *Sugarman* is the rather puzzling remark that, even though state voter qualifications are subject to scrutiny under the equal protection clause, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[44] I would have thought that the definition of a state's constitutional prerogatives in this regard was the question and not the answer. Justice Blackmun's opinion offers no further guidance.[45]

Kramer, the second of the cases cited in support of the dismissal of the Colorado appeal, had also been cited in *Sugarman* as one of the many cases in which it was "implicit . . . that citizenship is a permissible criterion" for limiting voting rights. The relevant text in *Kramer* is no help at all:

> At the outset, it is important to note what is *not* at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot.[46]

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44. 413 U.S. at 648.

45. Justice Blackmun did go on to say, in apparent explanation of the quoted sentence concerning a state's constitutional prerogatives, that "[t]his is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions." 413 U.S. at 648 (citing Pope v. Williams, 193 U.S. 621, 632-34 (1904), and Boyd v. Thayer, 143 U.S. 135, 161 (1892)). *Pope*, however, did not concern the right of aliens to vote. At issue was the right of a United States citizen who had recently moved from the District of Columbia to Maryland to vote in a Maryland election. Maryland had refused to register him because he had not, as required by state law, made a declaration at least one year before the attempted registration of his intent to become a citizen and resident of Maryland. The Supreme Court upheld the statute on the ground that state power to legislate "upon the subject of the elective franchise" was "unassailable." 193 U.S. at 633-34. The Court went so far as to say that a state could constitutionally limit the right to vote to native-born (as opposed to naturalized) citizens. This view of limitless state power over the franchise is plainly repudiated in later cases, in particular Kramer v. Union Free School Dist., 395 U.S. 621 (1969), and Dunn v. Blumstein, 405 U.S. 330 (1972).

Boyd v. Thayer, like *Pope*, did not address the question of alien suffrage. An attempt had been made to disqualify Boyd, the newly elected governor of Nebraska, from taking office. It was said that he was not a citizen of the United States and was therefore ineligible for the office under state law. By a tortuous process of reasoning the Court concluded that Boyd was, in fact, a citizen of the United States, and therefore it upheld his right to assume the office.

46. 395 U.S. 621, 625 (1969) (emphasis original).

To disparage the *Sugarman* and *Kramer* discussions of the issue as dictum rather than holding is, if anything, to exaggerate their significance. In neither case did the Court state flatly that aliens have no constitutional right to vote, much less offer a rationale for that conclusion. What *Sugarman* did say clearly was that classifications on the basis of alienage are suspect, while *Kramer* declared that voting is a fundamental right. These two propositions are crucial to the alien's argument for a right to vote. By citing the discussion of alien voting in *Sugarman* and *Kramer*, the Supreme Court evidently wanted to show that even at the time it was formulating these propositions it did not believe that they could be carried to the point of establishing a right to vote for aliens. But that still leaves us in need of some explanation of the reasons why they cannot be carried that far.[47]

The Court could perhaps have provided an answer in *Skafte v. Rorex* by citing its 1974 decision in *Richardson v. Ramirez*.[48] In that case, the Court rejected an equal protection challenge to state laws denying felons the right to vote, viewing section 2 of the fourteenth amendment as dispositive of the issue. Section 2 declares that when a state denies the right to vote to male citizens of the United States who are at least twenty-one years old and who have not been convicted of a crime, the state's representation in Congress will be reduced in proportion to the number of such persons who have been denied the right to vote. Clearly, the section does not say that convicted felons have no right to vote. It provides only that a particular sanction for state interference with the right to vote—reduction of congressional representation—will not be imposed where those who are denied the vote are former felons. Of course, the withholding of a sanction under section 2 is strong evidence that at the time the amendment was adopted the denial of the vote to felons was considered a legitimate exercise of state power. But standing alone, that evidence should not have proved fatal to the

47. Another signal of the Supreme Court's views on the question of the alien's right to vote is its summary affirmance of a three-judge district court decision upholding state and federal laws that exclude aliens from service on grand and petit juries. Perkins v. Smith, 426 U.S. 913 (1976), *affg.* 370 F. Supp. 134 (D. Md. 1974). The district court assumed for the sake of argument that strict scrutiny was the appropriate standard of review, but it found that the state and federal governments had a compelling interest in barring aliens from jury service. There is surely some basis for distinguishing the alien's interest in jury service from the interest in voting. Yet in view of the district court's apparent assumption that the federal and state governments have greater latitude in denying aliens political rights than civil or economic rights, it seems clear that the district court would also have upheld a statutory ban on the right of aliens to vote.

48. 418 U.S. 24 (1974).

claim that the state law is now unconstitutional under the equal protection clause, since the Supreme Court has recognized that concepts of equality do evolve and that a practice deemed unobjectionable in 1868 may be impermissibly discriminatory today.[49]

In his opinion for the Court in *Ramirez*, Mr. Justice Rehnquist was careful to avoid relying on the argument—made several times by Mr. Justice Harlan but always rejected by the Court[50]—that section 2 was intended to be the exclusive remedy for any form of electoral discrimination. The fact that a discriminatory state practice could occasion the sanction of reduced congressional representation under section 2 of the fourteenth amendment does not, in other words, rule out the possibility that the practice could be completely enjoined under the equal protection clause of section 1.[51] But Mr. Justice Rehnquist argued in *Ramirez* that the withholding of a sanction under section 2 for the denial of the vote to convicted felons amounted to an implicit validation of state laws denying felons the vote, and he concluded that the equal protection clause of section 1 was not applicable as a test of the law's validity. The dissenters pointed out that two years earlier the Supreme Court had struck down under the equal protection clause laws imposing a durational residence qualification for voting, even though the durational residence qualification was considered just as acceptable in 1868 as the preclusion of voting by felons.[52] The difference, Mr. Justice Rehnquist replied, was that durational residence requirements were not explicitly exempted from the sanction of section 2,[53] although plainly they were implicitly exempted. Thus, although it was appropriate to test the durational residence requirement under the evolving standards of the equal protection clause, the analogous requirement that a voter have no felony conviction was immune from any equal protection scrutiny.

As construed in *Ramirez*, section 2 of the fourteenth amendment disposes of the claim that a denial of the vote to aliens is unconstitutional under section 1. Section 2 treats aliens and felons precisely alike—a state that denies the vote to aliens is just as free from any

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49. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966).

50. *Compare* Carrington v. Rash, 380 U.S. 89 (1965), and Reynolds v. Sims, 377 U.S. 533 (1964), *with* 380 U.S. at 97-99 (Harlan, J. dissenting) and 377 U.S. at 593-615 (Harlan, J., dissenting).

51. *See generally* Van Alstyne, *The Fourteenth Amendment, the "Right" To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

52. 418 U.S. at 76 (Marshall, J., dissenting).

53. 418 U.S. at 54.

sanction under section 2 as a state that denies the vote to felons. And if one must infer from the absence of a sanction under section 2 that there can be no remedy under section 1, the aliens will inevitably lose.[54]

In my view, the equal protection arguments for alien suffrage warrant serious consideration, *Ramirez* notwithstanding. In the first place, the *Ramirez* reading of section 2 may not endure. It goes well beyond anything required by the language, history, or purpose of the fourteenth amendment,[55] and it is hard to square with the Court's earlier rejection of Justice Harlan's argument that section 2 ousts the equal protection clause in the area of voting rights. Moreover, even if section 2 is dispositive, it is not a very satisfying way to dispose of the case because it resolves the equal protection arguments by making it unnecessary to consider them on the merits. If those arguments are as strong as I believe them to be, one can reasonably ask how equal protection analysis could have brought us to a point where, but for the *deus ex machina* of section 2, state laws denying aliens the vote would have to be held unconstitutional. Is section 2 an anachronism that unfortunately compels us to ignore the logic of the equal protection arguments, or is there something seriously wrong with those arguments?

III. The Equal Protection Claim

A. *The Standard of Review*

In the orthodox view, the world of equal protection review is divided into two parts—strict scrutiny, which few state statutes can evidently withstand, and restrained review, which most state statutes can handle very nicely. To gain access to the area of strict scrutiny, the challenger of the state statute must demonstrate either that

54. In Skafte v. Rorex, — Colo. —, 553 P.2d 830 (1976), *appeal dismissed*, 97 S. Ct. 1638 (1977), the Colorado case that denied the alien's right to vote, the state supreme court rejected the argument that § 2 of the fourteenth amendment, as construed in *Ramirez*, was dispositive. The court argued that § 2 was applicable only to the elections specifically mentioned in the section—elections for national political office and for state legislative, judicial, and executive offices. The election at issue in the Colorado case was a local school board election, to which the court found § 2 inapplicable. The court's conclusion seems sound, but it still leaves little room for the equal protection clause to operate. The court's second argument—that the implicit approval of a citizenship requirement in § 2 does not warrant the conclusion that § 1 is inapplicable—is persuasive. Unfortunately, even though *Ramirez* is cited by the Colorado court as support for this argument, 553 P.2d at 832, the argument is clearly inconsistent with the Supreme Court's analysis in *Ramirez*.

55. *See, e.g.*, Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293, 304 (1976).

the statute involves a suspect classification or that it denies a fundamental right. The denial to aliens of the right to vote would seem an obvious candidate for the stricter standard of review, because alienage stands near the top of the "suspectness" gradient (immediately next to race), and voting stands at the top of the gradient along which rights are laid out in order of their importance. If one had to imagine a case that called any more obviously for strict scrutiny, it would have to be the explicit denial of the vote to a racial minority.

Of course, the system of equal protection analysis just described is in a state of considerable disarray. General agreement no longer exists on the number of different standards of review, the rigor with which the rational basis test is to be applied, or the extent to which the fundamentality of the right is relevant to the choice of a standard of review. But much remains intact. Some classifications are still suspect, and alienage is plainly one of them. Although the right to vote no longer enjoys quite the special place it held a few years ago and the validity of any fundamental rights argument is now problematic, if any right is still considered fundamental it is the right to vote. And to pass the strict scrutiny test a statutory classification must still be predicated on a compelling state interest. Thus, despite all the confusion of the last few years, a statute withholding from aliens the right to vote would still seem to require testing under the rigorous standards of strict scrutiny.

I don't think anyone knows precisely what combination of characteristics makes a class suspect for purposes of equal protection analysis. But I have no doubt that a critical factor—perhaps the single most important factor—is political powerlessness. It is the discrete and insular minority, of which aliens as a class are a "prime example,"[56] that obtains the benefit of heightened judicial solicitude, because such a minority requires "extraordinary protection from the majoritarian political process."[57] The relaxed standard of review generally applicable to state legislation is said to rest on the presumption of its constitutionality. And that presumption rests in turn on the expectation that all groups potentially affected by the legislation have had an opportunity to express their views and pursue their interests in the legislative forum. Where a group is completely excluded from the legislative process the presumption of constitutionality cannot stand, and therefore the courts must scrutinize with

56. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n. 4 (1938)).

57. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

unusual strictness legislation that disadvantages the group. A state statute or practice that has the purpose and effect of excluding the group from the political process clearly requires the strictest review of all, for it is the very fact of exclusion that made the classification suspect and necessitated strict scrutiny in the first place.[58] Put another way, the invalidation of a statute that excludes the members of a suspect class from participation in the political process is itself a way of eliminating, over the long run to be sure, the need for strict scrutiny. By protecting the members of the class from the majority's efforts to keep them powerless, the Court can make its determination of suspectness self-liquidating. Over time the members of the class will develop the ability to protect their own interests in the legislative process, and the need for extraordinary judicial protection will then disappear.

Even if alienage were not considered a suspect classification, strict scrutiny would still be the appropriate standard for reviewing state laws that deny aliens the right to vote. "The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though . . . 'the right to vote in state elections is nowhere expressly mentioned.' "[59] The protected position of the right to vote is based on a recognition that "[n]o right

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58. I am starting from the premise that alienage is a suspect classification and for that reason am assuming that strict scrutiny is the appropriate standard for review of a statute denying aliens the vote. It might be thought, however, that the problem should be approached from another direction. That is, if one were to ask first whether aliens should be allowed to vote, and then, assuming the answer was in the negative, to ask whether alienage should therefore be considered a suspect classification, it might seem possible to avoid strict scrutiny in reviewing the decision to deny them the vote. Under this view it is precisely the denial of the vote to aliens, for which the state presumably has a rational basis, that makes alienage a suspect classification and makes strict scrutiny analysis necessary in reviewing all subsequently imposed disabilities. *See* Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 580 & n.30, 79 Cal. Rptr. 77, 86 & n.30, 456 P.2d 645, 654 & n.30 (1969); *cf.* United States v. Thompson, 452 F.2d 1333, 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972). But asking the questions in this order will not, in fact, eliminate the need for strict scrutiny in reviewing the denial of the vote. As I hope to show in a moment, the very fact that the state is attempting to enforce an absolute denial of the right to vote should itself be reason enough for strict scrutiny, whether or not the target group is specially protected under the suspect classification banner. Besides, the denial of the vote to aliens is not the only factor accounting for their relative powerlessness, and lack of political power is not the only argument that could be offered in support of the conclusion that alienage is a suspect classification. The classification might well be suspect, in other words, even if aliens had the right to vote. On that understanding, the denial of the vote can be upheld only if justified under the standards of strict scrutiny.

59. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973) (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966)).

is more precious in a free country" than the right to vote,[60] since voting is "preservative of all rights."[61] To withhold the right to vote is to withhold the political power that would enable persons and groups to protect themselves in the legislative forum. The presumption of constitutionality, which rests on the "assumption that the institutions of state government are structured so as to represent fairly all the people,"[62] cannot operate where the state denies some persons the vote, any more than it can operate where a state draws lines on the basis of a suspect classification. The citizenship qualification is not simply a means of diluting the votes of certain persons,[63] nor does it merely make it more difficult for certain persons to cast their ballots.[64] It is a means of totally excluding from the political process an identifiable segment of the population,[65] and as such it must be justified in terms of a compelling state interest.[66]

To be sure, many of the formulations of the right to vote speak expressly in terms of a right of *citizens* to participate on an equal basis with other *citizens*.[67] But since the cases have all involved

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60. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

61. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

62. Kramer v. Union Free School Dist., 395 U.S. 621, 628 (1969).

63. *Cf.* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote").

64. *Compare* O'Brien v. Skinner, 414 U.S. 524 (1974), *with* McDonald v. Board of Election Commrs., 394 U.S. 802 (1969).

65. *Cf.* Chapman v. Meier, 420 U.S. 1, 17 (1975); White v. Regester, 412 U.S. 755, 765-69 (1973); Gordon v. Lance, 403 U.S. 1, 5 (1971); Hunter v. Erickson, 393 U.S. 385, 393 (1969).

66. In Hill v. Stone, 421 U.S. 289, 295 (1975), the Court described Kramer v. Union Free School Dist., 395 U.S. 621 (1969), as holding that it is only qualifications on the right to vote other than those based on age, residence, or citizenship that must be justified in terms of a compelling state interest. But *Kramer* plainly did not hold that a citizenship qualification could be upheld under a lesser standard of review, since citizenship was not at issue in *Kramer* any more than it was in *Hill*. The opinion in *Hill* does not, in any case, offer any reason for testing a citizenship qualification under a different standard. In dissent, Justice Rehnquist pointed out that the Court had divided all voter qualifications into two categories: residence, age, and citizenship on the one hand, and all others on the other. He added that "this judicially created classification would itself scarcely survive a 'rational basis test,' unexplained as it is by any of our decisions." 421 U.S. at 306.

67. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Reynolds v. Sims, 377 U.S. 533, 565 (1964). It is also true that the three constitutional amendments dealing directly with the qualifications of voters—the fifteenth (race), nineteenth (sex), and twenty-sixth (age)—all refer to the voting rights of citizens, as opposed to persons. But the language of these amendments is without significance to the present inquiry. The latter two amendments speak in terms of citizenship because they deliberately track the verbal formula of the fifteenth amendment: "The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." And the amendments do not, in any case, purport to declare who will be the eligible electors, but only to rule out the use of certain

citizens, the references to the rights of citizens do not represent a holding that the right is one of citizens alone. Besides, many of the cases speak of the right as one of persons, not citizens.[68] The references to citizenship should be taken, in my view, as rhetorical flourish. An impassioned declaration of the right of persons to vote does not have quite the force of the same plea on behalf of citizens. In any event, even if the references to citizens, as opposed to persons, were advertent and deliberately designed to make citizens the exclusive beneficiaries of the right, what would be the legal or logical basis for that limitation? The only argument I can imagine is that voting is a right that springs from the privileges and immunities clauses of article IV or the fourteenth amendment. If valid, that argument would neatly dispose of the claim that it is persons, and not just citizens, who have a right to equal treatment in the voting process, since the clauses speak of the privileges and immunities of citizens. The problem with the argument, of course, is that the Supreme Court has emphatically denied that voting is a right or privilege of state or national citizenship.[69] Indeed, the Court has frequently denied that there is any such thing as a "right to vote." The references to that right are simply convenient shorthand for the right to "participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process."[70] This right to equal treatment, as the voting rights cases have clearly acknowledged, is derived from the equal protection clause, which de-

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criteria in deciding who will be allowed to vote. The reference to the rights of "citizens" in the fifteenth amendment is, of course, one more indication of the general understanding during the Reconstruction period that aliens enjoyed no constitutional right to vote. *See* Sugarman v. Dougall, 413 U.S. 634, 648 n.13 (1973). But that is a proposition I readily accept, and it is by no means fatal to the aliens' claim so long as one accepts the view that concepts of equality do evolve. *See* text at note 49 *supra*. Moreover, the drafters of the fifteenth amendment spoke in terms of the rights of citizens because they were working against the background of the *Dred Scott* decision, 60 U.S. (19 How.) 393 (1857), which had linked the civil and political rights of blacks with the question of citizenship. Professor Bickel has described the fourteenth amendment, with its definition of national citizenship in § 1, as a means of exorcising *Dred Scott*. A. BICKEL, THE MORALITY OF CONSENT 41 (1975). The wording of the fifteenth amendment serves that same end.

68. *See, e.g.*, Connor v. Finch, 97 S. Ct. 1828, 1830 (1977); Mahan v. Howell, 410 U.S. 315, 319 (1973); Wesberry v. Sanders, 376 U.S. 1, 18 (1964); Gray v. Sanders, 372 U.S. 368, 381 (1963).

69. *See* Pope v. Williams, 193 U.S. 621, 632 (1904); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874). But compare Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (separate opinion of Douglas, J.), with 400 U.S. at 213-14 (Harlan, J., concurring in part and dissenting in part).

70. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973).

clares that no state shall deny any *person* the equal protection of the laws.[71] It is precisely the distinction between citizens, who are the beneficiaries of the privileges and immunities clause, and persons, who enjoy the protection of the equal protection clause, that has made possible the invalidation under the latter clause of statutes that discriminate against aliens.[72] . If the right to equal treatment in the electoral process owes its origin to the equal protection clause, and it undeniably does, then whatever the dicta in earlier cases it must be persons and not just citizens who enjoy that right.[73] That is not to say that aliens have an unqualifiable right to vote. The equal protection clause does not stand in the way of a state decision to withhold the vote from aliens or any other group of persons, provided that the state decision can pass the rigorous test of strict scrutiny.

B. *The State Interest in Denying Aliens the Vote*

On the assumption that strict scrutiny is the appropriate test for measuring the validity of a statute denying aliens the vote, the statute

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71. The only exception is Wesberry v. Sanders, 376 U.S. 1 (1964), the reapportionment case involving congressional districting. The Court found the governing principle in neither the equal protection clause nor the privileges and immunities clause, but rather in article I, § 2 of the Constitution, which provides that representatives shall be chosen "by the People of the several States."

72. A. BICKEL, *supra* note 67, at 42-48.

73. If the right to vote belongs to citizens alone, then it might be said that an extension of the franchise to aliens would not only go beyond anything required by the Constitution but would itself be unconstitutional. Enlarging the electorate to include persons other than citizens would water down the vote of citizens in much the same way as malapportionment. *Cf.* Oregon v. Mitchell, 400 U.S. 112, 208 n.88 (1970) (opinion of Harlan, J., concurring in part and dissenting in part) (posing the question whether the lowering of voter qualifications unconstitutionally dilutes the votes of those meeting the higher standards). The problem with that argument is that apportionments are now generally worked out on the basis of census tabulations of the total population—citizens and aliens, voters and nonvoters. *See* Gaffney v. Cummings, 412 U.S. 735, 746-47 (1973); *cf.* Burns v. Richardson, 384 U.S. 73, 92-93 (1966). Even the division of seats in Congress among the states is based on total population, 2 U.S.C. § 2a(a) (1970), although there has been at least one effort to exclude aliens from the base by constitutional amendment. *See* N.Y. Times, Feb. 14, 1946, at 1, col. 6. The citizen who lives in a district where there are many aliens now has a vote that is greater in weight than the vote of a citizen who lives in a district with fewer aliens. *Cf.* Note, *Student Voting and Apportionment: The "Rotten Boroughs" of Academia*, 81 YALE L.J. 35, 47 (1971) (citizen who lives in district with many students has more voting power than a citizen who lives in a district with fewer students). The citizen casts his own vote and also the vote of his disenfranchised alien neighbor. The resulting disparity in the voting strength of citizens is evidently viewed by the Supreme Court as too trivial to require correction. But surely if a state were to correct the problem by allowing aliens to cast their own votes, the effort could not be viewed as inconsistent with the spirit of the reapportionment decisions.

can be upheld only if the state is able to demonstrate that it serves a compelling state interest. Plainly, every state discerns some interest in excluding aliens from the polls, since every state does in fact bar them from voting. But it is not enough that such statutes "further a very substantial state interest."[74] The end must be legitimate; the statute must be drawn with precision and tailored carefully to serve the state's objectives; and there must be no less drastic means of serving those objectives.

It is important to keep in mind certain characteristics of the aliens whose right to vote is at issue. My concern is the right to vote of resident aliens. I have no quarrel with a state's conclusion that nonresident aliens should be excluded from the polls. For this purpose the term nonresident has significance under both state and federal law. It is clear that only aliens domiciled in the state—residents as a matter of state law—have a substantial claim to the right to vote. If a state can exclude nonresident citizens from voting, its power to exclude nonresident aliens is surely no less. Moreover, it is only the resident alien, as defined by the federal immigration laws, whose rights are at issue here. A resident alien is an immigrant admitted to the United States for permanent residence, entitled to work and live anywhere in the country. During the past 50 years resident aliens have been admitted to the United States in limited numbers—currently, about 400,000 each year[75]—and only after passing two careful screenings, one by an overseas consular official who issues the immigrant visa and the other by the immigration official who inspects the alien at the port of entry. Resident aliens are on a citizenship track—after five years they are eligible for naturalization. Their right to remain in the United States does not depend, however, on their obtaining citizenship. They serve in the armed forces and were subject to conscription under the selective service laws.[76] They

74. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

75. By contrast, the number of nonresident aliens admitted for temporary periods each year exceeds 3 million. E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 668 (3d ed. 1975).

76. *See generally* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 2.49 (rev. ed. 1977). An alien who left the United States to avoid military service would incur the penalty of perpetual exclusion from the country. 8 U.S.C. § 1182(a)(22) (1970). In general, the United States has not conscripted nonimmigrant aliens under the selective service laws. As of January 1, 1971, federal regulations exempted most classes of nonimmigrants, including foreign students, officials of foreign governments, journalists, and exchange visitors, from the duty to register with the selective service. *See* 32 C.F.R. § 1611.2(b)(1)-(11) (1971). *See also* 50 U.S.C. App. §§ 453, 454 (1970); Comment, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L. L.J. 501 (1972).

pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law. Resident aliens enter the United States with the intention of making this country their home, and it appears that the great majority of them remain here indefinitely. Nonresident aliens, by contrast, are admitted to the United States for strictly limited periods of time that are determined before they enter the United States. Included in the category of nonresident aliens are officials of foreign governments, temporary visitors for business or pleasure, foreign students, temporary workers and trainees, foreign journalists, and many others who are neither expected nor permitted to remain in this country indefinitely.

What is the basis, then, for the state's determination that resident aliens should not share the franchise with resident citizens? The states are said to have broad power to preserve "the basic conception of a political community,"[77] and one might suppose that aliens—by definition, strangers or outsiders—need not be defined as included within the community, any more than residents of another state or minor children need be so included. The validity of that conclusion may seem obvious, but the articulation of the reasoning underlying it is no easy task.

The denial of the vote to aliens might be thought to rest on a finding that aliens, even resident aliens, have a lesser stake than citizens in national, state, and local issues. Differences in the stake that potential voters have in the outcome of elections can apparently be taken into account by a state in deciding who will be allowed to vote and who will not,[78] provided that there is a "genuine difference in the relevant interests of the groups that the state electoral classification has created."[79] In *Kramer v. Union Free School District*,[80] the Supreme Court struck down a statute limiting the right to vote in school district elections to those who owned or leased real property in the district or were parents of children enrolled in the public schools. The Court concluded that the statute did not accomplish with sufficient precision its goal of limiting the political community to those directly affected by school affairs. The statute's classifica-

77. Dunn v. Blumstein, 405 U.S. 330, 344 (1972). *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

78. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

79. Town of Lockport v. Citizens for Community Action, 97 S. Ct. 1047, 1053 (1977).

80. 395 U.S. 621 (1969).

tion included as voters many persons "who have, at best, a remote and indirect interest in school affairs," while at the same time it excluded others "who have a distinct and direct interest in the school meeting decisions."[81] As a test of stake in the decisions of government, a classification based on alienage is far more imprecise than the classification held invalid in *Kramer*. Resident aliens drive on the same highways as citizens, pay the same taxes, breathe the same air, require the same police and fire protection, and send their children to the same schools. To deny them the right to vote is, in the language of *Kramer*, to leave them without "any effective voice in the governmental affairs which substantially affect their lives."[82]

I should make clear, however, that the case for alien suffrage does not rest on the proposition that every person affected by government policy must have a voice in its formulation. *Kramer v. Union Free School District* does not establish that proposition, and its ramifications, if true, would be very great. The decisions of a city council, for example, may have a direct impact on a great many persons who now have no right to vote for the members of the council: transients, residents of neighboring communities, children, and others besides resident aliens. Yet the resident aliens' claim need not stand or fall with the claims of these other groups, as I hope to make clear by briefly contrasting the position of the resident aliens with that of these other groups.

The transient's interest, though often substantial, is distinguishable from that of the resident, whether citizen or alien, because the transient will predictably have a different view of short-run benefits and long-run costs than will persons who intend to reside in the community indefinitely. Drawing lines on the basis of that distinction is difficult, and the courts have recognized the potential for abuse where the label of transiency is casually applied. They have viewed with increasing skepticism state claims that particular segments of the population, students for example, are just passing through and lack a sufficient stake in the community to deserve the vote.[83] In the case of resident aliens (as opposed to nonresident aliens), there can be no doubt that the transient label is inappropriate. Resident aliens have the same stake as citizens in the long-range welfare of the communi-

81. 395 U.S. at 632.

82. 395 U.S. at 627. *See* Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

83. *See* Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974); Ramey v. Rockefeller, 348 F. Supp. 780 (E.D.N.Y. 1972); Newburger v. Peterson, 344 F. Supp. 559 (D.N.H. 1972).

ties in which they live. They may, to be sure, move from one community to another, and some will return to their country of origin. But citizens also move, and I know of no reason to believe that resident aliens have a higher rate of mobility than other persons. Like citizens (and unlike nonresident aliens), their right to remain in their communities is unlimited by any state or federal law. They are not subject to removal at the caprice of government officials. They can be deported, of course, but only by action of the federal government and only under exceptional circumstances. If the resident alien is a transient because of the possibility of deportation, then citizens should also be considered transients because of the possibility of removal to prison upon conviction of a crime.

In contrast to resident aliens, who settle in communities of their choice and depart only when they prefer to live elsewhere, soldiers have relatively little control over the places in which they live. Nevertheless, the Supreme Court has rejected the argument that soldiers can be denied the vote on the theory that they lack a sufficient commitment to the future of the communities in which they are stationed. If soldiers reside in a state with an intention to make it their home, "they, as all other qualified residents, have a right to an equal opportunity for political representation."[84] The alien who has established bona fide residence in the community is surely no more a transient than the soldier.[85]

Just as transients may be excluded from the definition of the political community, residents of neighboring communities may be, and routinely are, excluded as well. Yet the ramifications of a governmental decision cannot always be confined within geographic boundaries, and nonresidents will often find themselves affected by decisions in which they did not participate. It may be impossible, moreover, to dismiss their interests, like those of transients, as ephemeral. A decision to construct an airport or shopping center in one corner of a city may have a direct, substantial, and long-range impact on the interests of persons who live near the site but outside the city limits and who have no role in the election of the public officials who make the decision. Still, the geographic line—for all its arbitrariness—is far more easily defended than a line drawn on the basis of citizenship. The nonresident will only occasionally feel the impact of decisions made in adjacent cities, and the physical

84. Carrington v. Rash, 380 U.S. 89, 94 (1965).

85. *Cf.* Evans v. Cornman, 398 U.S. 419 (1970) (residents of federal enclave entitled to vote in state elections).

separation will often attenuate the impact, where there is any at all. The same line that divides the community of possible voters also divides the community of possible taxpayers. Nonresidents do not participate directly in the decision, but by the same token they do not pay the taxes that finance the programs approved. Resident aliens, by contrast, pay taxes along with other residents of the community, and they lack the protection from the impact of decision that distance affords the nonresident. Moreover, the drawing of an arbitrary geographic line can be justified in large part by the need to draw a line somewhere.[86] The governmental action of a community can affect not only persons who live immediately outside its borders, but also on occasion those who live a few hundred or even a few thousand miles away. If the right to vote must be extended to every person touched by these effects, there may be no stopping point short of what would be quite literally universal suffrage.

The same line drawing problem does not exist with respect to resident aliens. The logic of allowing them to vote does not require the extension of the vote to limitless numbers of persons who live far from the epicenter of the decision and who may have only the slightest and most theoretical interest in local affairs. And unlike nonresidents, aliens have no place to turn for representation of their views. Nonresidents have influence in their own communities, and they may be able to persuade their elected representatives to convey their views to the decisionmakers on the other side of the geographic line. They also participate in the election of representatives to higher levels of government—county, state, and national—that may have power to grant relief. Aliens, on the other hand, can look only to their countries of origin, and they are unlikely to find any substantial help in that direction. As nonresidents of their own countries they probably have no vote or political influence there either. And the very fact that they have emigrated to the United States may produce an attitude of nonchalance, or worse, on the part of government officials in the countries they have left. Besides, the issues on which they need representation will often have no significance in their countries of origin. It is not so much their interest as aliens that needs protection, but their interest as parents, homeowners, taxpayers, draftees, and consumers. The governments of the countries they have left behind are unlikely to see any benefit for themselves

86. *See* Note, *The Right To Vote in Municipal Annexations*, 88 HARV. L. REV. 1571, 1577-78 (1975).

in representing these interests, and the likelihood that such representation would prove effective in any case is obviously very small.

A third group routinely denied the vote is children, and they undoubtedly can have the same direct long-range interest in the welfare of their communities as resident aliens. The exclusion of children from the franchise is itself a subject of much controversy, however, and the concern about the exclusion has constitutional dimensions.[87] Moreover, children do not bear all of the obligations (tax-paying, military service, and the rest) that are imposed on the adult residents, whether citizen or alien, of the community. Indeed, the principal argument for lowering the voting age to eighteen was that this age marks the assumption of these obligations more accurately than the age of twenty-one. And even though children have no formal voice in the making of government decisions that may affect them, their parents do have such a voice and presumably will undertake much of the responsibility for representing the interests of their children. The resident alien has no comparable representative.

The denial to aliens of the right to vote cannot be justified on the theory that aliens as a class lack the necessary stake or interest in governmental affairs. A possible alternative rationale is that aliens have qualities that interfere with their ability to vote intelligently or responsibly. At least four different claims seem possible—that aliens will become involved in vote fraud, that aliens will vote as a bloc and tip the political balance in favor of positions they support, that aliens lack the knowledge of national and local affairs that is needed to cast an intelligent vote, and that aliens cannot be trusted with the vote because they lack loyalty to the United States and its political and social institutions.

1. *Vote Fraud*

The first of these arguments can be dismissed quickly. Although the state interest in preventing vote fraud is doubtless compelling,[88] there is no reason whatsoever to believe that aliens are more likely than citizens to lie about their residence, sell their votes, or stuff ballot boxes. In any case, the primary responsibility for preventing fraud at the polls does and should rest on the statutes that impose

87. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 240 (1970) (opinion of Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

88. *See* Dunn v. Blumstein, 405 U.S. 330, 345 (1972).

criminal penalties for such fraud.[89] Surely these statutes need be no less effective against aliens than they are against citizens.

2. *Bloc Voting*

The second possible claim is that aliens should be excluded from the polls because they are likely to vote as a bloc. If the vice of bloc voting is that it will substantially compound the harm of having aliens cast their votes without sufficient knowledge of the issues and adequate loyalty to the institutions of the United States, its seriousness depends on the validity of the assumption that aliens would, in fact, lack the necessary knowledge and loyalty. The validity of that assumption is a question to which I will turn in a moment. But what of the argument that bloc voting is harmful in itself—that it is a vice to be avoided even on the assumption that aliens would have the intelligence and loyalty required to vote responsibly? Although it may seem unlikely that any state would exclude aliens from the polls in reliance on such an argument, I suspect that it is one of the most plausible explanations for the unwillingness to grant aliens the vote. In terms of social and economic position, aliens may be less diverse than the population as a whole.[90] And their common experience of giving up a homeland in another country, migrating to the United States, and learning to cope with life here may tend to produce a considerable similarity of viewpoint on important public issues. To a legislator who is trying to decide whether aliens should be allowed to vote, the argument that they lack knowledge and loyalty is likely to be much less impressive than the argument that they are likely to vote in unison in support of positions that he opposes. To take an obvious example, in the controversy over alien suffrage before the Civil War, the aliens' attitude toward slavery was an important factor. One historian has pointed out that "[n]o matter how ignorant and stupid

89. *See* 405 U.S. at 353-54.

90. Historically aliens as a class have probably been less skilled and less educated than the population as a whole. But given the stringent immigration qualifications now in effect, a high percentage of new immigrants are very highly skilled. A system of immigration preferences was established for the Eastern Hemisphere in 1965, Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. §§ 1101, 1151 *et seq.* (1970)). As a result of the emphasis on skills in the occupational categories, Eastern Hemisphere immigrants are "much more likely to be highly trained or professional workers than are immigrants from any other area." Abrams & Abrams, *Immigration Policy—Who Gets In and Why?*, 38 THE PUB. INTEREST 3, 17 (1975). The system of priorities has now been carried over to the Western Hemisphere, and more Western Hemisphere immigrants will be subject to the labor certification requirements. *See* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976). Thus, the overall level of skills should rise.

the immigrant might be, he was more than likely to be sure of one thing—that he did not believe in holding slaves. He could not discuss states' rights, theories of sovereignty, and nullification, but he was unequivocally opposed to the slaveholder."[91] It was surely no accident that none of the Southern states extended the franchise to aliens before the Civil War, whereas alien declarants were specifically allowed to vote under the Reconstruction constitutions of Alabama, Arkansas, Florida, Georgia, South Carolina, and Texas.

The fear that aliens will vote as a bloc and that bloc voting will prove harmful in itself cannot provide an adequate basis for the disenfranchisement of aliens. Even if there were evidence that aliens would vote as a bloc, the goal of stifling bloc voting would be illegitimate. The Supreme Court has repeatedly insisted that the states are barred from " '[f]encing out' from the franchise a sector of the population because of the way they may vote."[92] It may be true that aliens are much more likely than citizens to favor, for example, high tariffs or low taxes or increased aid for urban areas, but the desire to forestall the concentrated expression of these views is not a constitutionally permissible reason for denying aliens the right to vote.

3. *Lack of Knowledge Needed To Vote Intelligently*

The claim that aliens lack the knowledge to vote intelligently is plainly more difficult. The interest in insuring the knowledgeability of voters is apparently legitimate,[93] at least so long as the state does not attempt to limit the franchise to those who have an understanding of the "local viewpoint."[94] But to uphold a voter qualification rule on the basis of this interest, the state must demonstrate that its classification is carefully tailored to the objective. It may well be true that immigrants who have arrived recently in the United States will know little about this country's institutions of government or about the issues on which election campaigns are fought. As a general proposition, long-time residents of a community are always likely to

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91. K. PORTER, *supra* note 12, at 130. *Cf.* F. FRANKLIN, *supra* note 28, at 47 (discussing opposition to passage of Naturalization Act of 1790 on grounds that aliens opposed to slavery would be admitted).

92. Carrington v. Rash, 380 U.S. 89, 94 (1965). *See also, e.g.*, Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

93. *Cf.* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) (literacy test not invalid on its face).

94. Dunn v. Blumstein, 405 U.S. 330, 355 (1972).

be more knowledgeable about local affairs than newcomers. This difference in relative understanding of local issues makes rational a durational residence requirement for voting. But rationality is not enough in the sensitive area of voting rights, as the Supreme Court made clear in striking down such requirements in *Dunn v. Blumstein*.[95] A classification in terms of length of residence is simultaneously under- and over-inclusive. It excludes some newcomers who are as knowledgeable about local affairs as long-time residents, and it includes some long-time residents who are as ignorant of local affairs as newcomers. As expensive as it may be to separate the knowledgeable newcomers from the unknowledgeable, the state cannot constitutionally withhold the right to vote from all new residents in the service of some "remote administrative benefit."[96]

The citizenship qualification for voting is undeniably a form of durational residence requirement. And it is a requirement of exceptional severity, since immigrants are ordinarily ineligible for citizenship until they have resided in the United States for five years. To be sure, the citizen who takes up residence in a new state immediately before an election, and who is therefore the beneficiary of the *Dunn* ruling, is in a somewhat different position from the alien, who is a new resident of the country as well as of the state. Nevertheless, the analogy between the durational residence requirement struck down in *Dunn* and the denial of the vote to aliens is close enough to raise considerable doubt about the effort to sustain that denial on the argument that alien newcomers lack the knowledge required of good voters.

Dunn upheld the right of new residents to vote in state and local elections as well as elections for national offices. It is not at all clear that a New Yorker who moves to Texas and votes in a local election soon after arrival will be any more knowledgeable about local issues than a citizen of France who moves to the United States and takes up residence in Texas. The knowledge will be acquired if there is a reason for acquiring it and if the opportunity to acquire it is at hand. With regard to the reason for gaining the knowledge, one cannot distinguish the alien newcomer from the citizen newcomer. They both have a stake in the outcome of local elections. They both pay taxes and send their children to the public schools. If an issue arises that concerns the level of taxation in the community or the

95. 405 U.S. 330 (1972).

96. 405 U.S. at 351 (quoting Carrington v. Rash, 380 U.S. 89, 96 (1965)).

quality of the schools, the alien newcomer is no more likely to view the issue with indifference than is the citizen newcomer. But perhaps the difference between the two is in the ability and opportunity to gain the necessary information, as opposed to the desire to obtain it. *Dunn* implicitly recognizes that a very substantial part of voter education takes place in the days immediately preceding an election. And the principal educators are the candidates for public office and their supporters. The candidates will make an effort to reach out to potential voters to explain their positions, not because of any commitment to voter education in the abstract, but because they want their votes. If aliens have votes to offer, the candidates will come to them. The contest for their votes will inevitably produce a substantial amount of political education and instruction on the issues.

Of course, the state's fear may be that alien newcomers will lack the knowledge of local issues that is necessary to appreciate the subtleties of the debate. And they may miss the debate entirely if they cannot understand the English language. But again the classification is grossly over-inclusive. The great majority of aliens are literate in some language, if not English, since literacy has been a prerequisite to admission for almost all immigrants since Congress imposed the requirement[97] over President Wilson's veto in 1917. Besides, a substantial amount of voter education already takes place in languages other than English.[98] The Voting Rights Act Amendments of 1975,[99] which suspend the use of literacy tests and devices that can effectively disenfranchise members of a language minority,[100] rest on the premise that there is no necessary correlation between intelligent voting and the ability to speak or read the English language.

Moreover, it is hardly the case that all or even most resident aliens are unable to speak English. In addition to the immigrants who were raised in English-language countries or educated in English-language schools, there are a great many aliens who have

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97. *See* 8 U.S.C. § 1182(a)(25) (1970). The literacy qualification applies to most prospective immigrants who are at least 16 years of age and physically capable of reading. *See* 8 U.S.C. § 1182(b) (1970).

98. *See* Katzenbach v. Morgan, 384 U.S. 641, 654-55 & n.15 (1966); Cardona v. Power, 384 U.S. 672, 675-76 (1966) (Douglas, J., dissenting); Puerto Rican Organization for Political Action v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972), *affd.*, 490 F.2d 575 (7th Cir. 1973).

99. 42 U.S.C. § 1973 *et seq.* (1970 & Supp. V 1975).

100. For a list of the states and counties covered by the minority language provisions of the Voting Rights Act, see U.S. COMMN. ON CIVIL RIGHTS, USING THE VOTING RIGHTS ACT 16-20 (1976).

learned English since their arrival in the United States.[101] The great majority of aliens have lived in the United States for years, and they are likely to have gained some understanding of English and some familiarity with American political processes during their residence here. The citizenship requirement for voting assumes that it will take at least five years of residence to gain the understanding needed to vote intelligently in an American election. Whether or not that was true of all aliens a century ago, when television and other modern sources of information were not available and a rather high proportion of new immigrants was illiterate,[102] it is certainly not true for all aliens today. A great many will have gained whatever understanding is necessary long before the five years have elapsed.

But what if the knowledge a state expects its voters to have is not the sort that can be acquired in the period immediately preceding an election, even by a person who speaks English well and is anxious to learn? Perhaps the state is looking for a subtler kind of knowledge—for example, an understanding of the history of the United States, and in particular an ability to see the issues of the day in their historical context; an appreciation of the role of political institutions, especially political parties; and an ability to look behind ideological debate in order to discern the real clash of interests that underlies it. To return to the example of the immigrant who opposed slavery but knew nothing of nullification or theories of sovereignty, it may be that the state's goal is precisely to insure that voters will cast their ballots on the basis of some understanding of concepts like nullification and state sovereignty. A substantial number of aliens may, in fact, lack that kind of understanding even after years of residence in the United States. But few citizens have that kind of knowledge either. The classification, in other words, is seriously under-inclusive. Naturalization is not predicated on a demonstration of this kind of knowledge, and the naturalized citizen is not presumptively more likely to have it than the unnaturalized alien. Nor could very many native-born citizens meet this exacting standard. It seems unlikely, therefore, that this standard is what the state has in mind when it bars aliens from voting. And if it is, the classifi-

101. The number of permanent resident aliens in the country as of January 1975 has been estimated at 4,255,725. Of these, 325,410 were nationals of Canada and 289,674 of Great Britain. [1975] INS ANN. REP. 21. Another 868,198 were nationals of Mexico, *id.*, and many of them live in areas where Spanish is almost an official second language. *Cf.* Faruki v. Rogers, 349 F. Supp. 723, 731 (D.D.C. 1972).

102. *See* U.S. IMMIGRATION COMMN., ABSTRACT OF REPORTS, S. DOC. No. 747, 61st Cong., 3d Sess. 98-100 (1911) (Dillingham Commission Report).

cation is simply not tailored to fit the objective with anything like the kind of precision that the strict scrutiny standard demands.

The classification produces two types of mistakes: it allows some uninformed persons to vote, and it prevents some well-informed persons from voting. Since we deny the vote to all aliens, the only mistake we can make with regard to this group is that of excluding a well-informed person from the polls. If the proportion of aliens who are well informed is greater than one-half, the classification is completely irrational, for it produces a greater number of mistakes than would result from adopting the opposite rule and allowing all aliens to vote. (I am assuming that withholding the vote from an informed person is considered at least as serious a mistake as offering the vote to an uninformed person.) But even assuming that the proportion of aliens who can meet the knowledge standard, however lenient it may be, is less than one-half, one still ought to determine the proportion of citizens that has the necessary knowledge. The proportion with the necessary knowledge may be no greater than the counterpart proportion of aliens. If so, one can reasonably ask why aliens are singled out for special treatment. And if fewer than one-half of all citizens have the knowledge we are after, we could reduce the overall number of mistakes by changing our rule for citizens and excluding them all from the polls. It may seem preposterous to eliminate all elections, but the only alternative would be to concede that knowledgeability is not really the quality upon which we are insisting.

Yet even if one makes the fairly generous assumption that, say, 75% of all citizens have the necessary knowledge, whereas only 20% of all resident aliens could meet the standard, it would seem essential, considering that the standard of review is strict scrutiny, to go on and consider the relative size of the two populations. There are approximately 4 million resident aliens in the United States, and of these slightly more than 3 million are of voting age. About 80 million citizens voted in the 1976 presidential election. Assuming that 20% of the aliens are well enough informed to vote intelligently, we make 600,000 mistakes by excluding each of the 3 million adult aliens from the polls. If we allowed all 3 million to vote, the number of mistakes would jump to 2.4 million (assuming that all would actually vote), since 80% of the aliens are presumed to be uninformed. The net increase in the number of mistakes would be 1.8 million. It is important to note, however, that we are already admitting to the polls a large number of uninformed voters. On the assumption that 25% of all citizens lack the necessary knowledge,

the number of uninformed voters for the 1976 presidential election would be approximately 20 million.

I do not mean to adopt a cavalier attitude toward the addition of 2.4 million uninformed aliens to the voter rolls. Even one vote can decide an election, and 2.4 million votes would provide a healthy margin of victory in some presidential contests. But putting that number alongside the 20 million mistakes that I am assuming we already tolerate, one gets a better sense of the potential costs of allowing all aliens to vote. If we can live with 20 million uninformed voters, it is not altogether clear how one could demonstrate a compelling interest in preventing another 2.4 million uninformed persons from going to the polls. Allowing aliens to vote, even on the very generous assumption that few aliens have the necessary knowledge whereas almost all citizens do, would increase the proportion of uninformed votes among the total number cast from 25% to 27%.[103] I have no doubt that it would be rational to minimize the total number of mistakes by excluding all aliens. But what the state must show is need, not just rationality. And assuming that some 20 million uninformed citizens are already going to the polls, there is substantial reason to doubt that the real purpose of the disqualification of aliens is, in fact, to deny the vote to the uninformed.

I have argued in the preceding paragraphs that it is better to admit all aliens to the polls than to exclude them all, even assuming that a large majority lack the knowledge to cast an intelligent vote. It may seem that I have made the case for alien suffrage needlessly difficult. After all, the strict scrutiny standard prohibits a state from treating every member of a group alike when a less restrictive means could be used to achieve the same objective. If the state's real goal is to allow only knowledgeable persons to vote, should it not be re-

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103. Of course, resident aliens are heavily concentrated in some areas of the country, and the impact of allowing them to vote would therefore be greater in some areas than others. But it remains true even in those states with the greatest number of resident aliens that extending the vote to all aliens would produce at worst only a small marginal increase in the number of uninformed voters. Just under one-half of all the resident aliens live in three states—California, New York, and Texas, INS ANN. REP., *supra* note 101, at 21—so the total number of voting age aliens in these three states should be approximately 1.5 million. The citizens of these three states cast a total of almost 18 million votes in the 1976 presidential election. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1976, at 455. On the continued assumption that 20% of all resident aliens have the knowledge required to vote intelligently while 75% of all citizens can meet that standard, the effect of allowing aliens to vote would be to increase the number of uninformed votes cast in these three states (assuming that all aliens of voting age would vote) from 4.5 million to 5.7 million. The proportion of uninformed votes cast in these three states would thus increase from 25% to just under 32%.

quired to make some effort to screen out those who lack the necessary qualification and allow the qualified to vote? I have no trouble with the suggestion that it would be too expensive or too administratively inconvenient to do the required screening, since in the context of strict scrutiny these concerns are traditionally thought insufficient to justify the rejection of a less restrictive means in favor of a more sweeping rule. The real problem is that the obvious screening devices—literacy tests, American government and history tests, tests of comprehension of spoken English—all raise serious difficulties of their own. They tend to place in the hands of election examiners a measure of discretion that produces a grave risk of discrimination on the basis of race, national origin, or political viewpoint. The suspension of all sorts of voter qualification tests in the 1975 Voting Rights Act Amendments is a good indication of the federal government's concern about this possibility of abuse.

It may at first seem paradoxical to deny the vote to all aliens in order to avoid the need for a system of tests that might result in the invidious denial of the vote to some number less than all. But two reasons could be offered in support of a state's preference for a total ban. First, it is not just the possibility of error that makes the testing process so unattractive. The spectacle of having state officials determine what is the "correct" view of American history or the "correct" view of the role of political parties is troubling in itself. Thus, even if the sorting out of aliens could be guaranteed error-free, the creation of the elaborate testing system needed to accomplish this result could be thought more worrisome than the mistakes we now make by excluding from the polls some number of aliens who are as well informed as citizens. Second, the decision to test aliens for knowledge of public affairs could require the testing of citizens as well. The need for testing aliens is much greater, of course, since we are assuming that a much higher percentage of aliens than citizens is uninformed. But the imposition on aliens of a requirement that they prove themselves informed while citizens are automatically assumed to be sufficiently informed would raise many of the same equal protection problems as the total exclusion of aliens.[104] And the appalling potential for abuse implicit in a decision to provide knowledge tests for 80 million citizen voters could well be enough to destroy the argument that case-by-case screening of aliens is a less restrictive means of achieving the state's objective than banning them altogether.

104. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (holding unconstitutional a federal statute that granted benefits to all spouses of male members of the armed forces but to spouses of female members only on proof of dependency).

It may be possible, however, to find some device for sorting out aliens according to knowledge that would reduce somewhat the number of mistakes without at the same time creating the potential for abuse of a knowledge or literacy test. One possible candidate is a durational residence requirement for aliens that would be long enough to insure some experience with life in the United States, though still substantially shorter than the five years required for naturalization. The point is not to draw a new line only marginally different from the one that now exists. The citizenship qualification is more than just a durational residence requirement. Many aliens who have lived in the United States for years are nevertheless unable to vote because they have not taken advantage of the opportunity for naturalization. If lack of knowledge is what disqualifies the alien from voting and if it is long-term residence in the United States that gives the alien the necessary knowledge, why is it that we refuse to extend the vote to all immigrants who have lived here for at least five years, whether or not they have gone ahead and been naturalized?

To explain our refusal to take that step in terms of the supposed concern about the knowledgeability of aliens, one has to believe that naturalization itself has value as a measure of the immigrant's understanding of American political issues. I am not persuaded that naturalization has any such value. True, aliens who seek naturalization are expected to study the American political system, and they are tested on their understanding of it. But the test demands nothing more than a rudimentary level of understanding—a level that has undoubtedly been achieved by a great many unnaturalized aliens who have lived in this country for five years or more.[105] These aliens remain unnaturalized not because they are unwilling to learn about American government or unable to pass the test, but rather, it would appear, because they are reluctant to take the required oath of renunciation[106] and give up the citizenship they presently hold. Their reluctance to take the oath may speak badly

105. The knowledge test requires the petitioner for naturalization to answer five or six questions such as, "What document declared the 13 colonies to be free and independent States?"; "On what day do we celebrate our Nation's birthday?"; "Who is the President now?"; "Who discovered America?". The questions are reported in J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 487-88 (2d ed. 1973). In fiscal year 1975, 141,537 petitions for naturalization were granted and 2,300 were denied. The number denied for lack of understanding of American history and principles of government was 14. INS ANN. REP., *supra* note 101, at 130, 134.

106. 8 U.S.C. § 1448 (1970).

for their loyalty to the United States, and in that sense it may be a sufficient reason to deny them the vote. But putting the loyalty question aside for a moment, the fact remains that one cannot completely explain the ban on alien voting in terms of the need for knowledge of American political issues. To the extent that a lack of knowledge is the state's real concern, a simple durational residency requirement would do a more precise job of sorting aliens than the naturalization requirement, and it would still avoid the potential abuse of testing for English literacy, knowledge of local affairs, and the like.

4. *Disloyalty*

The claim that aliens lack the loyalty required to vote responsibly, like the claim that they lack the knowledge to vote intelligently, is not inherently implausible. But it is important to make clear exactly what is meant by disloyalty. The state may fear that some aliens would use the opportunity to vote as a means of accomplishing goals that are disloyal in the broadest sense—disruption, subversion, and ultimately destruction of the state. I have no doubt that the interest in preventing that kind of disloyalty is compelling under any standard. But that interest cannot explain the denial of the vote to aliens, since there is no reason to believe that aliens would engage in such acts, or, at any rate, would engage in such acts any more frequently than citizens. The conclusion that there is inadequate nexus between the alleged end and the means chosen seems to me so obvious that I very much doubt the means could be upheld on this theory even under a rational basis test.

Aliens who seek admission to the United States are subject to very careful screening, and they cannot gain admission if a consular officer or the Attorney General "knows or has reasonable ground to believe [that they] probably would, after entry . . . engage in activities that would be prohibited by the law of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security . . . ."[107] Specifically declared ineligible for admission are aliens who are, or at any time have been, anarchists, communists, or persons who advocate or teach the overthrow by force of the government of the United States.[108] An alien who has managed to gain entry into the United States is subject, to

107. 8 U.S.C. § 1182(a)(29) (1970).
108. 8 U.S.C. § 1182(a)(28) (1970).

the same extent as any citizen, to the laws relating to espionage, sabotage, public disorder, and the rest. And the resident alien can even be prosecuted for treason—the crime against allegiance—since he owes at least a temporary allegiance while present in the United States and is no freer than a citizen to give aid and comfort to the country's enemies.[109] Moreover, a resident alien who is an anarchist, a communist, an advocate of sabotage or destruction of private property, or any one of a great many other things, can be removed from the country altogether by deportation.[110]

It is not entirely clear, of course, that the deportation and exclusion rules will accomplish their objective and keep the United States free from aliens committed to subversion, sabotage, and disruption. And the spies, saboteurs, and assorted ne'er-do-wells who might manage to slip into the country in spite of the best efforts of consular and immigration personnel could probably do more mischief if allowed to vote than they are now able to accomplish without the right to vote. But given the nature of an election, it could not be very much more. And what about the citizens who advocate or teach subversion, who are anarchists, or who are committed to the destruction of private property? They are not subject to any screening at all, and yet they are all allowed to vote. Most citizens were, of course, born in this country and educated here (naturalized citizens and persons born to American parents overseas being the principal exceptions), but birth and education cannot guarantee that a person will never believe in anarchy, violence, or revolution. Given the screening and threat of deportation to which aliens are subject and citizens are not, a state cannot rationally conclude that aliens as a class are more likely than citizens to use the ballot to subvert national security.

Putting aside the question of disloyalty in the sense of subversion, there remains a very troublesome problem in connection with the loyalty of aliens. In its subtlest form the claim that aliens lack the loyalty to vote responsibly is intertwined with the claim that aliens

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109. The crime of treason, as defined at 18 U.S.C. § 2381 (1970), is applicable not only to citizens, but to anyone "owing allegiance to the United States" who commits any of the proscribed acts. On the vulnerability of aliens to prosecution for treason, at least for treasonous acts committed in the United States, see Powers, *Treason by Domiciled Aliens*, 17 MIL. L. REV. 123 (1962); 17 GEO. WASH. L. REV. 283 (1949). *See also* F. Franklin, *supra* note 28, at 2 (Continental Congress resolved that transients owed allegiance and could be prosecuted for treason); *cf.* Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948), *appeal dismissed*, 338 U.S. 883 (1949).

110. 8 U.S.C. § 1251 (1970).

lack the knowledge to vote intelligently. Immigrants who have arrived recently in the United States may know little about this country's institutions of government or about the issues on which election campaigns are fought. They can certainly learn about these matters, and it would not take very long for many of them to gain this knowledge. But in all likelihood many immigrants are also largely ignorant of this country's values and traditions and therefore cannot have developed an appreciation of or commitment to them. The naturalization requirement for voting could be seen as responsive to this concern in two different ways. First, the durational residence feature gives the immigrant an opportunity to develop a feel for American values and traditions. Second, the act of naturalization itself represents a formal and solemn commitment to the country, its values, and its institutions. The testing of a prospective citizen's loyalty, knowledge, and character is critical, under this view, not so much because it screens out the undeserving candidate but rather because it makes the attainment of naturalization difficult and meaningful. The judicial setting and the oath of renunciation and allegiance (with its grand language about foreign princes and potentates and bearing true faith and allegiance to the United States)[111] drive home to the new citizen the significance of the occasion.[112] It all adds up to a very deliberate and ritualized act of opting into the community and accepting its values and traditions as one's own.

In my view, this argument is the most substantial one that can be made in defense of the citizenship qualification for voting. And yet it is by no means free of difficulty. If everything is going to turn on a sense of commitment to the country's values and traditions, it would seem important to know exactly what values and traditions, or "societal and political mores,"[113] we have in mind. There has been a recurring tendency in this country, as Sacco, Vanzetti, and

111. 8 C.F.R. § 337.1 (1977):

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the armed forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God."

112. The Immigration and Naturalization Service reports that it makes an effort to schedule naturalization ceremonies at places of special historical significance. INS ANN. REP., *supra* note 101, at 21.

113. Perkins v. Smith, 370 F. Supp. 134, 138 (D. Md. 1974), *affd. mem.*, 426 U.S. 913 (1976).

a great many others could attest, to blame aliens for the introduction of ideas that many citizens have found offensive. From the very beginning the terms "alien" and "sedition" have shown a remarkable affinity for one another. How does one go about deciding which values are truly American and which foreign? Which traditions are the ones that the alien must appreciate and understand—the traditions of those who were once slaves or those who were once masters; those who won the Mexican-American War or those who lost it; those who came from Ireland or those who despised the Irish and would have sent them back?

The very fact that neither candidate in an election wins all the votes is in itself a good indication that the electorate is already divided on fundamental value questions. Political analysts typically assume that different segments of American society—Catholics, Chicanos, blue-collar workers, Polish-Americans—have their own values and traditions that influence their voting behavior. To which set of values and traditions are the aliens expected to commit themselves? Do we exclude them from the polls until they have narrowed the choice to two—the Democratic tradition and the Republican tradition—and then turn them loose to make a free choice between Alexander Hamilton and Thomas Jefferson? Or is it rather that the central value and tradition of this country is that there is no central value and tradition? Perhaps aliens are entitled to hold whatever views they want, but they cannot be allowed to vote until they have come to understand and cherish the fact that they may hold whatever views they want. One has an intuitive sense that an alien who has not been socialized in the United States will lack certain characteristics or attitudes that are fundamentally American. But given the diversity of socialization experiences available in the United States, this intuition would seem a rather treacherous foundation on which to build an argument of compelling state interest.

Instead of trying to determine the substantive content of the country's values and traditions, one might do better to focus on the act of commitment to the United States that naturalization apparently involves. In terms of values, culture, and language, resident aliens may be indistinguishable from at least some group of American citizens. And their loyalty may be beyond question, at least in the sense that they think well of the country and wish it no harm. But what may be lacking is a willingness on the part of resident aliens to identify themselves with the country and its people and to give up once and for all their attachment to the countries in which they were born. The unnaturalized alien is perhaps holding something

back, refusing to join in. Yet, although all that may be true, the burden on the state is not to show that aliens are somehow different from citizens, but rather to show a relationship between the difference and the state's legitimate interest in regulating the franchise. So long as aliens are not disloyal in the larger sense of being subversive or disruptive, what harm could result from allowing them to cast a ballot even though they may not have made a wholehearted commitment to the United States? What exactly is it that the state fears? Perhaps at bottom the argument is essentially symbolic. Aliens cannot share in the administration of the social compact until they have formally consented to be bound by its terms. Law, in this view, "has its origins in a contract, an imagined legal transaction," and the concept of citizenship is what "defin[es] the parties to the original contract and the membership of the society."[114] This contractual view of the nature of the state has a long tradition, and it was influential at the time of the founding of this country. But can it really be possible to construct a compelling state interest out of a metaphor concerning the origins of civil society? It was this same metaphor, as Professor Bickel has pointed out,[115] that furnished the reasoning behind the Supreme Court's decision in the *Dred Scott* case.[116] Surely we have reached the point where, if a state is to withhold fundamental political rights by classifying persons along lines that are inherently suspect, it must be able to point to some concrete harm that its measure will prevent. In this context it is hard to see what the harm could be.

Besides, it is simply not correct to say that unnaturalized aliens have made no commitment to the United States. In contrast to native-born citizens, whose commitment, if any, is tacit, resident aliens have committed themselves knowingly and voluntarily. They have all had to make considerable effort to qualify for an immigrant visa, which is ordinarily a good deal harder to obtain than a certificate of naturalization. Even after proving themselves qualified, they have had to wait months and even more often years for a visa to become available. And they have given up their homes in the countries of their birth and resettled in the United States.[117] Moreover,

114. A. BICKEL, *supra* note 67, at 5.

115. *Id.*

116. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

117. Speaking at the Constitutional Convention on the question of a durational citizenship requirement for senators, Benjamin Franklin declared: "When foreigners after looking about for some other country in which they can obtain more happiness, give a preference to ours, it is a proof of attachment which ought to excite our confidence & affection." *Quoted in* 4 J. MADISON, WRITINGS 148 (Hunt ed. 1903).

most resident aliens had ties to the United States even before they arrived, for they have tended to follow their countrymen and kinsmen in chains of migration. Nearly forty per cent of those admitted each year are close relatives of American citizens,[118] and the proportion of close relatives will increase now that Congress has finally carried over to the Western Hemisphere the system of immigration preferences that has been applied to the Eastern Hemisphere for the past ten years.[119] Furthermore, their children born in the United States are citizens of this country at birth. Resident aliens are committed enough to the United States to serve in the armed forces, and they have been drafted into the army in the same way as citizens. A resident alien is admitted in the expectation that he will make the United States his home and remain here indefinitely. Nothing in state or federal law prevents him from developing a strong sentimental attachment to the United States and its people or from making a good faith commitment of his future to this country and to the state in which he lives. And the very act of voting in an American election would itself represent a form of commitment on the part of the alien to the United States.[120] Finally, if the state insists that the alien voter make an overt and solemn commitment to the United

118. Of the 386,194 permanent residents admitted in fiscal year 1975, 91,504 gained admission as immediate relatives of United States citizens. INS ANN. REP., *supra* note 101, at 6, 36. Immediate relatives are defined as "the children, spouses, and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age." 8 U.S.C. § 1151(b) (1970). Aliens who can qualify as immediate relatives are not subject to any numerical limitation. Of the aliens subject to numerical limitation, 160,460 entered under the system of preferences applicable to the Eastern Hemisphere. Of these, 52,868 were the beneficiaries of preferences for adult children, spouses, brothers, and sisters of citizens (and another 43,077 entered under preferences for the spouses, sons, and daughters of resident aliens). INS ANN. REP., *supra* note 101, at 43. The system of prefences gives relatives priority for 74% of the available visas. 8 U.S.C. § 1153 (1970).

119. Until passage of the Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976), no system of preferences applied in the Western Hemisphere, and visas were made available according to the order in which applications were filed. Under the system of preferences, relatives of citizens and resident aliens will now have priority for 74% of the visas allocated to the Western Hemisphere.

120. The point is implicitly recognized in the federal statute providing for the expatriation of American citizens who vote in political elections in other countries. 8 U.S.C. § 1481(a)(5) (1970). Some years before the statute was enacted a House committee explained its purpose in these terms: "Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state." Codification of the Nationality Laws of the United States, H.R. Comm. Print, pt. 1, 76th Cong., 1st Sess. 67, *quoted in* Perez v. Brownell, 356 U.S. 44, 54 (1958). The federal statute in question was held unconstitutional in Afroyim v. Rusk, 387 U.S. 253 (1967).

States, it could require as a precondition to voting the taking of an oath of allegiance. It is "clear that one need not be a citizen in order to take in good conscience an oath to support the Constitution."[121]

Moreover, why should one assume that the citizen's commitment to the United States is in some sense different from or greater than the alien's? The citizen's commitment presumably arises from birth and schooling in this country and from having parents who identify themselves as citizens. But not all citizens were born or raised in the United States. A child born overseas to American parents is under some circumstances a citizen of the United States at birth.[122] And a child born here may be taken to another country as an infant and raised there. Furthermore, not all native-born citizens are raised by citizens, since the children of aliens are citizens at birth and remain citizens whether or not their parents are ever naturalized.[123] Some citizens are dual nationals—they have acquired American citizenship by birth in this country and also the citizenship of one or both their parents, or they have acquired American citizenship by virtue of birth overseas to an American parent and also the citizenship of the country of their birth—and they will owe allegiance not just to the United States but to another country as well. In all of these cases there may be some reason to doubt the existence of the kind of open and unreserved commitment to the United States and its people that citizenship is assumed to involve. Yet all of these citizens, unlike resident aliens, are allowed to vote.

The number of these cases is small, however, and perhaps they can be dismissed as representing a de minimis exception to an otherwise sound general principle. But there is also a much larger group of American citizens who, though born and raised here by citizen-parents, nevertheless feel a very strong sentimental attachment to a state other than the one in which they live or to a foreign homeland they may never have known. The Texas-born New Yorker, who identifies himself as a Texan and who looks forward eagerly to the day he can return to Texas, is entitled to vote in New York even though he has not committed himself unreservedly to his adopted state.[124] And considering the pride we now take in our ethnic

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121. Hampton v. Mow Sun Wong, 426 U.S. 88, 111 n.43 (1976). *See also In re* Griffiths, 413 U.S. 717, 726 n.18 (1973).

122. 8 U.S.C. § 1401(a)(3), (4), (7) (1970).

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

124. *Cf.* Ramey v. Rockefeller, 348 F. Supp. 780 (E.D.N.Y. 1972); Newburger v. Peterson, 344 F. Supp. 559 (D.N.H. 1972).

heterogeneity, no one would suggest that a citizen is less than fully American merely because he studies the language, culture, and history of another country, visits it, dreams of retiring there someday, or even uses his political privileges here to urge a tilt toward that country in the foreign policy of the United States. We have come to accept and even cherish the fact that many citizens will retain what Justice Frankfurter called "old cultural loyalty"[125] to another country, and the line between cultural matters and political matters is known to be indistinct. The internment during the Second World War of persons of Japanese ancestry—citizen and alien alike—is a powerful reminder of how far we have been willing to go on the supposition that national origin may be much more accurately predictive of loyalty than is citizenship. In short, it is hard to see what it is about resident aliens that makes us insist on excluding them from the polls for want of the necessary commitment to the United States.

Yet it may be objected that the net effect of this kind of argument is to deny the existence of any distinction at all between the citizen and the alien. If the alien is indistinguishable from the citizen in terms of knowledge of affairs in the United States, loyalty, and commitment to the people and institutions of the United States, and if for that reason the alien has a constitutional right to vote, then it may appear that the concept of citizenship has been robbed of all its meaning. Plainly, nothing that I have said would jeopardize the distinction between the citizen and the nonresident alien. But one might insist that under the view presented here resident aliens would in effect be naturalized as of the moment they take up residence in the United States. Much of the difficulty arises, however, from

125. The phrase was used by Mr. Justice Frankfurter in Baumgartner v. United States, 322 U.S. 665, 674 (1944), a case that involved a government attempt to revoke naturalization. Baumgartner was a Nazi sympathizer of German birth who "spoke so persistently about the superiority of German people, the German schools, and the engineering work of the Germans, that he aroused antagonism among his co-workers and was transferred to a different section" of the plant in which he worked. 322 U.S. at 667-68. Baumgartner sent his children to Germany because he wanted them to be educated in German schools, and he attended meetings of organizations where the German national anthem was sung and the Nazi salute offered. And, when the Germans captured Dunkirk, he announced: "Today I am rejoicing." 322 U.S. at 669. Yet, even in the midst of the Second World War, the Supreme Court was unwilling to permit his denaturalization. The standard for denaturalization is, to be sure, stricter than the standard for naturalization, and Baumgartner might have failed to become a citizen in the first place if the record had reflected what it later showed. But Justice Frankfurter's opinion for the Court makes clear that "[f]orswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth." 322 U.S. at 674.

the assumed equation of citizenship and voting. My argument is not that resident aliens look like citizens, so therefore they must be citizens. It is rather that in pertinent respects resident aliens are enough like citizens that it may be unconstitutional to distinguish between them in allocating the right to vote.

Citizens have historically enjoyed certain rights and undertaken certain obligations that resident aliens did not share. Every time one of those rights or obligations is passed on to aliens the gap between citizens and aliens narrows. If we are determined to maintain a gap, to preserve a sense of "we" and "they," we could disqualify aliens from owning land or deny them welfare benefits or make them all wear green hats. The imposition of these disabilities on aliens may seem intolerable. But why should it be any more tolerable to make the burden of preserving the distinction between citizens and aliens fall exclusively on the right to vote, the most precious right of all?

Moreover, extending the franchise to aliens would not, in fact, completely close the gap between citizens and aliens, since voting is not the only distinction between the two that survives the Supreme Court's recent decisions on the rights of aliens. By the terms of the Constitution itself aliens are ineligible to hold certain offices in the government of the United States. Aliens do not have the same right as citizens to gain admission to the United States. Citizens born abroad can take up residence in this country whenever they desire. Citizens can abandon their residence in the United States without fear of losing their right to return. Aliens, on the other hand, gain the right to reside in the United States only upon compliance with the stringent terms of the immigration laws. And resident aliens who abandon their domicile in this country will not necessarily be readmitted. When citizens travel outside the United States they carry American passports, and they expect and ordinarily receive the diplomatic protection of the United States when the need for it arises. Aliens, even resident aliens, have no right to call upon the United States for that protection and would not receive it in any case. Citizens are entitled to have the government represent their interests in international tribunals. Aliens have no such right, and under international law the government would be barred from representing them even if it had any interest in doing so. Citizens are generally free from any obligation to register with the government or to inform the government regularly of their whereabouts. Aliens are subject to rather elaborate reporting requirements. Citizens can be held to account in American courts for conduct overseas in some cir-

cumstances where aliens apparently cannot.[126] Citizens can confer an immigration preference on their relatives overseas in a considerable number of situations where aliens cannot.

It is not altogether clear that all of these distinctions between citizens and aliens can withstand strict scrutiny. But they all involve action of the federal government as opposed to the states, and for that reason the applicable standard of review may be less rigorous than strict scrutiny.[127] In any case, considering the primacy of the right to vote one could reasonably argue that it is distinctions like these that should bear the burden of differentiating citizens from aliens, and not the distinction between voting and not voting. We could, in other words, grant the right to vote to resident aliens and still leave them readily distinguishable from citizens. Yet that result would remain unacceptable to those who believe that allowing aliens to vote would eviscerate the concept of citizenship. Their assumption must be that political rights are inherently and properly rights of citizenship, whereas civil rights have no necessary connection with citizenship and properly belong to "persons." In the earliest part of the country's history, however, the assumption was precisely the reverse: citizenship "carried with it civil rights but no political privileges."[128] Citizenship, and in particular naturalization, was thought important because it determined whether or not a new settler would be able to own and convey land.[129] Even today, as I indicated earlier, the Supreme Court insists that citizenship as such confers no right to vote. Indeed, it would seem anomalous to equate citizenship with voting so long as we separate the power to make persons citizens from the power to make persons voters. The former power inheres in the national government, the latter in the states.

Yet I cannot deny the existence of a widespread assumption that the right to vote is not only a right of citizenship, but the quintessential right of citizenship.[130] And the conferral of the right to vote

126. *Cf.* Blackmer v. United States, 284 U.S. 421 (1932) (citizens abroad subject to service of subpoena).

127. *See* Mathews v. Diaz, 426 U.S. 67 (1976); *cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

128. Start, *Naturalization in the English Colonies in North America*, in AMERICAN HISTORICAL ASSN., ANNUAL REPORT FOR THE YEAR 1893, at 319 (1894); *cf.* F. FRANKLIN; *supra* note 28, at 38: "Throughout the debate [on the Naturalization Act of 1790] the principal rights involved in citizenship were regarded as landholding and office-holding. Only occasionally did suffrage as an independent right receive notice."

129. *See* Start, *supra* note 128, at 319-20.

130. One of the principal reasons for seeking naturalization is doubtless the desire to obtain voting privileges. If aliens were allowed to vote, it is quite possible

on aliens would undermine that assumption. But where does the assumption come from, and why should we insist on preserving it? Intuitively, it seems that there must be some explanation for the assumption. After all, the very fact that it is so widespread may be an indication that it responds to some important inner need of citizens to distinguish themselves from what are perceived to be outsiders, even where the outsiders are their neighbors. But I do not believe that it is possible to articulate an explanation for this assumption without moving the discussion to a level of extremely high abstraction and without putting a great deal of weight on symbolic values. To sustain the disenfranchisement of aliens on the strength of that kind of reasoning would be fundamentally inconsistent, it seems to me, with our ordinary approach in determining which state interests are compelling. I am reluctant to conclude that, because I have so much difficulty articulating the state's interest, it must be less than compelling. But I am confident at least that the validity of laws denying aliens the vote is by no means self-evident. It is surely not enough to tip one's hat at the state interest in having knowledgeable and loyal voters and let it go at that.

IV. Conclusion

The denial to aliens of the right to vote leaves them seriously disadvantaged. Thanks to the protection offered by the courts, the risk to which aliens are exposed is somewhat limited. Indeed, in some respects they may be better off with the suspectness label than they would be with the right to vote. With political privileges they would presumably win in the legislative forum on some issues and lose on others. But so long as the Supreme Court protects them from the majority, as a group they can never lose. Groups that have political privileges—farmers, union members, downtown merchants—often lose on important issues and find themselves disadvantaged by state legislation that imposes special burdens upon them. If giving up the right to vote would necessitate strict scrutiny of such legislation, the groups might do better to sacrifice their political privileges and take their chances in court. And yet I doubt that any

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that fewer aliens would seek naturalization. Indeed, one of the purposes of a citizenship qualification for voting may be to maintain an incentive for aliens to become citizens. However worthy that purpose may be, it is clearly an impermissible basis for state legislation. *See* Nyquist v. Mauclet, 97 S. Ct. 2120, 2126 (1977).

group would voluntarily make that choice. Although the Supreme Court may be able to prevent the infliction of disproportionate burdens on the members of a group, it cannot provide them with disproportionate benefits. Aliens are unable to participate in the political process—forming alliances, trading support, and acquiescing in certain losses in order to make possible later gains—that permits other groups to promote their own interests in the legislative forum.[131] The denial to resident aliens of that opportunity can only be justified on the basis of some compelling state interest. And it is far from clear that it can, in fact, be justified under that exacting standard.

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131. *See generally* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT 131-45 (1965).