LEGAL ALIENS, LOCAL CITIZENS: THE HISTORICAL, CONSTITUTIONAL AND THEORETICAL MEANINGS OF ALIEN SUFFRAGE

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Citizen: *1a: an inhabitant of a city or town*
2a: a member of a state[1]

There is no more invariable rule in the history of society: The further electoral rights are extended, the greater is the need for extending them: for after each concession the strength of democracy increases, and its demands increase with its strength.[2]

INTRODUCTION

Democracy promises rule by "the people," but the theory of democracy implies no specific set of arrangements for political membership or participation.[3] In practice, democracies have always deemed whole categories of people unfit to govern, denying them the vote and thus the opportunity to participate in the

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[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 411 (1981).

[2] ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 10 (Henry Reeve trans., & Phillips Bradley ed., Knopf 1946) (1840).

[3] Most dictionaries define democracy as "government by the people" but do not define "the people." *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 600 (1981). Abraham Lincoln's elegant and resounding formulation in the Gettysburg Address—"government of the people, by the people, and for the people"—has seized and held the American democratic imagination despite, or perhaps because of, the fact that the exact meaning of "the people" is left unspoken and, therefore, historically dynamic. *See* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 127-33, 145-47 (1992) (furnishing an exegesis of the address and arguing that it accomplished an "intellectual revolution" in American political thought by defining the American experiment as "the people's" commitment to the principles of liberty and equality embodied in the Declaration of Independence rather than a compact among sovereign states).

income,[7] African-Americans,[8] women,[9] and eighteen-year-olds,[10] to take the four most prominent categories of those enfranchised after political struggle.[11]

But if the story of expanding American suffrage captures a significant part of our history, there is somewhat more to the picture than meets the eye. As the franchise has expanded over the centuries to take in nearly all adult citizens, one group which voted and participated, at various points over a 150-year period, in at least twenty-two states and territories, lost its historic access to the ballot: inhabitants of individual states who are not citizens of the United States or, to use the reifying but inescapable idiom of immigration law, resident aliens.[12] Today, with the extraordinary, though still largely unwritten,[13] history of alien suffrage safely hidden from

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[7] *See generally* CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860 (1960) (tracing the dismantling of the property and wealth qualifications).

[8] *See* U.S. CONST. amend. XV, § 1.

[9] *See* U.S. CONST. amend. XIX.

[10] *See* U.S. CONST. amend. XXVI, § 1.

[11] The best overview of these transformations in the franchise is found in SHKLAR, *supra* note 5 at 15-19, 25-62 (discussing the four expansions of suffrage in the realm of citizenship). For discussions of specific franchise enlargements, see generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (Henry S. Commager & Richard B. Morris eds., 1988) (discussing agitation for the Fourteenth and Fifteenth Amendments and analyzing the efforts during Reconstruction to bring African-Americans into the franchise); LINDA G. FORD, IRON-JAWED ANGELS: THE SUFFRAGE MILITANCY OF THE NATIONAL WOMAN'S PARTY (1991) (discussing the role of militancy in the coming of women's suffrage); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965) (discussing the political twists and turns leading up to enactment of the Fifteenth Amendment). To date, there is no apparently thorough historical account of the passage of the Twenty-Sixth Amendment enfranchising 18-year-olds.

[12] I am aware of the pejorative, if not extraterrestrial, resonances emanating from the word "alien." Unfortunately, the term possesses a legal significance which makes it difficult to replace in every context. Moreover, the best alternative—"noncitizen"—is misleading since my argument is that people who do not qualify as national citizens can nonetheless be citizens of their state or, more importantly, their local communities. *See generally* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, UTAH L. REV. 279, 281 n.5 (1991) (arguing that the use of the word "alien" in the Immigration & Naturalization Act is dehumanizing and carries subtly racist connotations).

[13] Legal observers who have ventured into this field have correctly noted the dramatic absence of professional historical accounts of alien suffrage. *See* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-94 (1977) (stating that little has been written on the history of suffrage in the United States, particularly alien suffrage); *see also* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 292 n.214 (1992) (citing Rosberg *supra*, at 1093-94). Regardless of intellectual

Part I sketches the role alien suffrage has played in American history. The practice figured importantly in our nation-building process[16] until it was finally undone by the xenophobic nationalism preceding and accompanying World War I.[17] The state legislatures which enacted alien suffrage policies operated from a paradigm of strong federalism; most believed that, just as the United States had citizens, individual states could have citizens of their own.[18] Their motivation for extending the ballot to aliens varied according to place and time, but it was always a mixture of instrumental policy and democratic principle. In the eighteenth century, alien voting occupied a logical place in a self-defined immigrant republic of propertied white men: It reflected both an openness to newcomers and the idea that the defining principle for political membership was not American citizenship but the exclusionary categories of race, gender, property, and wealth.[19] Later, especially in the mid-nineteenth century, many states hoped to encourage rapid settlement by enfranchising aliens;[20] they knew that aliens were seeking the opportunity to participate in local affairs and the sense of belonging and respect that the ballot symbolized, the sense Judith Shklar has called "citizenship as standing."[21]

From the beginning, however, proponents of alien suffrage also justified the practice on the higher ground of democratic principle, especially natural-rights arguments. The state judicial opinions upholding alien suffrage,[22] the supportive speeches made in state constitutional conventions,[23] and various remarks made in the United States Senate thus provide a rich source of principled arguments for reviving alien suffrage today.

Part II provides a constitutional analysis concluding that state enfranchisement of noncitizens is neither forbidden by the Constitution, as is commonly assumed,[24] nor compelled by it,[25] as was argued by Gerald Rosberg in an important article published in

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[16] *See infra* part I.A.
[17] *See infra* notes 136-37 and accompanying text.
[18] *See infra* notes 36-38 & 82 and accompanying text.
[19] *See infra* notes 54-56 and accompanying text.
[20] *See infra* notes 87-90, 125-26 and accompanying text.
[21] SHKLAR, *supra* note 5, at 3.
[22] *See infra* notes 74-81, 277-82 and accompanying text.
[23] *See infra* notes 92-94 and accompanying text.
[24] *See infra* parts II.A-.C.
[25] *See infra* part II.D.

in our history can be recaptured and reconstructed, it is possible that Takoma Park will become an early precedent for grass-roots constitutional politics in the twenty-first century.

I. ALIEN SUFFRAGE AND THE COMPLEX MEANINGS OF CITIZENSHIP UNDER FEDERALISM: A HISTORICAL SKETCH

Until it was finally undone by the xenophobic nationalism attending World War I, alien suffrage figured importantly in America's nation-building process and in its struggle to define the dimensions and scope of democratic membership. Where alien suffrage was adopted, the practice was seen as conducive to a desired immigration (and assimilation) of foreigners and consistent with basic principles of democratic government. Moreover, the enactment of noncitizen voting laws was widely recognized as permissible within the constitutional regime of electoral federalism.[35] The class of aliens—or, more precisely, white male aliens—exercised the right to vote in at least twenty-two states or territories during the nineteenth century.[36] After a surge in anti-immigrant emotion at the turn of the century, there was a steady decline in alien suffrage and Arkansas became the last state to abandon noncitizen suffrage in 1926.[37]

As a chapter in the history of American federalism, the period of alien suffrage reflected a conception of states as sovereign political entities. The states with alien suffrage allowed non-U.S. citizens to participate in voting at all levels of American government, thereby turning them, explicitly or implicitly, into "citizens" of the state itself.[38] Participant states were thus exercising inde-

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[35] *See infra* parts II.A-.B.

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

[37] *See id.*

[38] Gerald Neuman has pointed out that the "early examples of alien suffrage were linked with the confusion over the relationship between state and federal citizenship." Neuman, *supra* note 13, at 293. There is nothing inconsistent with federalism in the idea that states may create state citizens of their own so long as they do not try to confer on any person national citizenship, a power which is the exclusive province of Congress. *See* U.S. CONST. art. I, § 8, cl. 4. The Fourteenth Amendment provides only that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. Thus, while states may not deprive any born or naturalized U.S. citizen of state citizenship, nowhere does the Fourteenth Amendment, or any other constitutional provision, prevent states from enfranchising, or conferring citizenship for local state purposes on persons *not* born or naturalized

nation-state citizenship was firmly established over citizenship's other possible meanings. There was, however, an exception to the constraining effects of war on alien suffrage: for complex reasons, the North's victory in the Civil War acted as a catalyst for the spread of alien suffrage in the late nineteenth century.

A. *Voting Rights for All White Men of Property: Alien Suffrage in the Early Republic*

The practice of noncitizen voting first appeared in the colonies, which generally required only that voters be local "inhabitants or residents," and not British citizens.[43] This early liberalism did not reflect universal tolerance, but simply the fact that "the ethnocentrism of the colonial period was primarily religious and only secondarily nationalistic."[44] Thus, many alien "inhabitants" who met the appropriate property, wealth, race, religion, and gender tests possessed the right to vote in the colonies. For example, French Huguenots voted in South Carolina, where the "electoral law had been so loosely drawn, it was said, that with only a property qualification every pirate of the Red Sea operating from a Carolina base could vote if he wanted to."[45] There was widespread alien voting in the colony's 1701 election, and despite conservative protests, the South Carolina Assembly in 1704 enacted an electoral law which formally allowed voting by aliens.[46]

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[43] WILLIAMSON, *supra* note 7, at 15. Delaware, Massachusetts, New Hampshire, and Virginia did not even require residence or inhabitation because not all property-owners necessarily lived on their property. *See id.*

[44] MAURICE R. DAVIE, WORLD IMMIGRATION 37 (1936) (paraphrasing Lawrence Guy Brown).

[45] WILLIAMSON, *supra* note 7, at 53.

[46] *See* ALBERT E. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 140 (Burt Franklin 1969) (1905). Describing the 1701 election as a "scene of riot, intemperance, and confusion," *id.* at 137 (citing 1 ALEXANDER HEWATT, AN HISTORICAL ACCOUNT OF THE RISE AND PROGRESS OF THE COLONIES OF SOUTH CAROLINA AND GEORGIA 151 (1779)), several conservative Englishmen from Colleton County filed this complaint with the colonial government:

> "[T]he votes of very many unqualify'd Aliens were taken & enter'd . . . a great number of Servants & poor & indigent persons voted promiscuously with their Masters & Creditors, and also several free Negroes were receiv'd, & taken for as good Electors as the best Freeholders in the Province. So that we leave it with Your Lordships to judge, whether admitting Aliens, Strangers, Servants, Negroes, &c., as good and qualified Voters, can be thought any ways agreeable to King *Charles'* Patent to Your Lordships, or the *English* Constitution of Government."

It is crucial to see that the early spirit of political openness toward aliens was perfectly compatible with the exclusionary definition of "the American people as Christian white men of property."[54] Indeed, when properly cabined within the existing rules of suffrage, alien voting subtly reinforced the multiple ballot exclusions of the time. To exclude aliens from voting would have given rise to the dangerous inference that U.S. citizenship was the decisive criterion for suffrage at a time when the majority of U.S. citizens, including almost all women and substantial percentages of men without property, were categorically excluded from the franchise.[55] On the other hand, alien enfranchisement reflected the assumption that the propertied white male alien voter would be sufficiently similar to other electors so as not to threaten fundamental cultural and political norms.[56]

If alien suffrage in the early years of the Republic reflected the states' power to define their own electorates and their elevation of

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rights of federal "citizenship" not obtainable in the states?

[54] *See generally* Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 19 (Donald W. Rogers ed., 1992). The states had mostly carried over the prevailing suffrage rule in the colonies, which was that eligible voters had to own "freeholds" worth a certain amount of money or composed of a certain number of acres. *See* WILLIAMSON, *supra* note 7, at 12-13. This rule was premised on the "concept that the freeholders were and should remain the backbone of state and society because they were the repository of virtues not found in other classes." *Id.* at 3; *see also* Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of* Martin v. Massachusetts, *1805*, 97 AM. HIST. REV. 349, 349 (1992) ("The political community fashioned by the American war was a deeply gendered one in which all white adults and a few black adults were citizens but white men's voices were privileged.").

[55] Exact figures are hard to find, but it is clear that most women and many men were excluded from the franchise in the colonial period. Williamson states that we "can accept as relatively correct the view that about 20 percent of the population at that time consisted of adult males, probably a conservative estimate for newer communities on the frontier or in western parts of the colonies." WILLIAMSON, *supra* note 7, at 24. Of the white male adult population, generally 50 to 80 percent appeared to be voters. *See id.* at 26-31; *see also* Collier, *supra* note 54, at 26 (noting that while a small fraction of the citizen population voted in the colonies, the numbers increased substantially after the Revolution).

[56] Although the point should not be overstated, it is somewhat instructive as to the original political meaning of alien suffrage that Chief Justice Taney referred approvingly to the practice several times in the course of his white supremacist opinion in the *Dred Scott* case, holding that African-Americans could never be U.S. citizens. *See infra* notes 144-46 and accompanying text. It is also worth noting in this regard that the demise of alien suffrage took place in the early twentieth century when larger number of immigrants came from Italian, Jewish and Mediterranean stock.

placed its stamp on the political culture of the states that would emerge from the territories. In 1802, for example, the new State of Ohio enfranchised all "white male inhabitants" twenty-one years old who had lived there for one year.[60]

Although aliens thus voted freely in state, federal and territorial elections in many places, their participation in local government was even more common. In 1809, in *Stewart v. Foster*,[61] the Pennsylvania Supreme Court gave the basic argument for local noncitizen voting in the course of finding that an alien freeholder, who had lived and paid borough taxes in Pittsburgh for one year, was entitled as a matter of state law to vote in the election of borough officers.[62] As a threshold matter, the court found it dispositive that the act incorporating Pittsburgh authorized only "citizens" to run as candidates in most elections for local office but gave all taxpaying male "inhabitants" the right to vote.[63] But the court went on to emphasize that, without the state's policy of inviting immigration, it might be forced to accept the English common law principle that "it is as proper to exclude an *alien*, as a woman or an infant."[64] But this argument, the court stated:

> [I]s not so forcible here, as it would be in *England*, because *Pennsylvania*, both under the proprietary government, and since her independence, has held out encouragement to aliens, unknown to the principles of the common law . . . . I am irresistibly led to the conclusion, that in the view of the legislature, the peace and prosperity of the borough were sufficiently secured, by providing that the officers elected should be citizens, although aliens of a certain description, who from length of residence, and payment of taxes, might be supposed to have a common interest with the other inhabitants, were indulged with the right of voting.[65]

At the same time as the ideology of local alien suffrage was being articulated in cases like *Stewart*, the War of 1812, which produced a militant nationalism and suspicion of foreigners,

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> territory, were authorized to choose representative [sic] to form a convention to frame a constitution and state government.

Id. at 394 (citation omitted).

[60] OHIO CONST. of 1802, art. IV, § 1 (1851); *see also infra* notes 75-82 and accompanying text (discussing an Illinois case which held that the suffrage provision includes aliens).

[61] 2 Binn. 110 (1809).

[62] *See id.* at 118-19.

[63] *See id.* at 117-18.

[64] *Id.* at 118.

[65] *Id.*

United States Congress, and then the framers of the Illinois Constitution, to adopt alien suffrage as a constitutional imperative.[74]

The *Spragins* court found that it was "well understood" that "the right of suffrage was extended to aliens" in the Northwest Territory "as one strong inducement for emigration."[75] Illinois's framers similarly believed that alien voting would help to "induce a flood of emigration to the state, and cause its early and compact settlement."[76]

But the *Spragins* court also emphasized Congress's historic commitment to the democratic inclusion of that "large portion of the inhabitants of Illinois" who were emigrants from France and Canada.[77] The court found that the framers of the Illinois Constitution had pursued "the same spirit of justice and liberality" as Congress by deliberately including all "inhabitants" in the democratic process.[78] The court then articulated a general constitutional preference for democratic inclusion where the simple facts of habitation, residence and common social membership establish a political relationship "between the governed and [the] governing."[79] According to the court, the Illinois Constitution:

> [I]ntended to extend the right of suffrage to those who, having by habitation and residence identified their interests and feelings with the citizen, are upon the just principles of reciprocity between the governed and governing, entitled to a voice in the choice of the officers of the government, although they may be neither native nor adopted citizens.[80]

The court added: "If the right of suffrage be a natural, and not a conventional one, there can be no just cause for abridging it, unless by way of punishment for crime, and under very peculiar circumstances, and for peculiar causes."[81]

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[74] *See Spragins*, 3 Ill. (2 Scam.) at 402-05. The court found it indisputable, as a matter of both textual interpretation and historical analysis, that the word "inhabitants" in the Illinois Constitution's suffrage provision was designed to include aliens and was not meant to be synonymous with "citizens." *Id.* at 402-05.

[75] *Id.* at 410.

[76] *Id.* at 398. The court noted, somewhat ironically, that this supposition's "influence on the convention, is believed to be beyond doubt; though its effects and influences may have failed in the extent of its anticipated operations." *Id.*

[77] *Id.* at 397.

[78] *Id.*

[79] *Id.* at 408.

[80] *Id.*

[81] *Id.*

Nonetheless, the declarant alien qualification succeeded in weakening the force of nationalist opposition to alien suffrage by recasting the practice of alien suffrage. It now became, much more clearly, a *pathway* to citizenship rather than a possible substitute for it: *non*citizen voting became *pre*-citizen voting. Thus, declarant aliens in Wisconsin, those presumably on the "citizenship track,"[86] won the right to participate in local, state, and national elections.

The Wisconsin formula of enfranchising aliens, but only those who had declared their intention to become citizens, proved popular as the country continued to push westward in the nineteenth century. The desire for immigration carried noncitizen voting along.[87] Less than three months after Wisconsin's admission, Congress passed an organic act for the Oregon Territory which embodied the same terms on alien voting.[88] It was followed in 1849 by a parallel provision in the organic act for the Territory of Minnesota.[89] Although Congress did not extend voting rights to aliens in the territories of Utah, New Mexico, and California (lands won during the Mexican War), it did include provisions for declarant alien suffrage in the enabling acts of the territories of Washington, Kansas, Nebraska, Nevada, Dakota, Wyoming, and

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However, Porter preserved sufficient academic composure to note that: "Although the situation has always been anomalous, it has been unquestionably constitutional." *Id.* at 121.

[86] Rosberg, *supra* note 13, at 1110.

[87] *See* PORTER, *supra* note 6, at 113. Porter noted:

> For the first time the alien found strong champions; for the first time he was really wanted in certain parts of the country, wanted so badly that inducements were held out to attract him. Up in the Great Lakes region—in Michigan, Indiana, Wisconsin, Illinois, and Minnesota—there were vast, uncultivated tracts of land awaiting exploitation. Most of these states had not been organized very many years and they were eager to grow, to develop their resources, increase their population and their wealth, gain larger representation in Congress, and become important units in the national government. What then could be more logical than to offer the swarming immigrants a hand in the government if they would only come? And a hand in the government meant the right of suffrage even before they were naturalized.

Id.

Porter points out that the influx of immigrants also provoked a backlash, symbolized by the famous Know-Nothing Convention in Philadelphia in September of 1847. *See id.* at 115 (pointing out, somewhat dubiously, that "the opposition to foreigners exercising the right of suffrage reached its highest point in this party, which maintained an organization until the Civil War").

[88] *See* Oregon Territorial Government Act, ch. 177, § 5, 9 Stat. 323, 325 (1848).

[89] *See* Minnesota Territorial Governmental Act, ch. 121, § 5, 9 Stat. 403, 405 (1849).

us alone rests the responsibility of making *a democratic constitution.*[94]

C. *From the Civil War to World War I: The Expansion and Contraction of Alien Suffrage*

During the period of the 1850s and 1860s, alien suffrage played a growing role in the struggle between north and south, with southerners trying to reduce and northerners trying to expand the political influence of immigrants, who were overwhelmingly hostile to slavery (if not necessarily friendly to blacks).[95] The issue of noncitizen voting became a bone of contention in congressional debate over the laws governing new territories and states. During Senate consideration of the Kansas-Nebraska Act, an amendment was offered to forbid noncitizen voting in the new territories. Pennsylvania Senator Brodhead stated that "I do not feel at liberty to go further than the people of my own state have gone in their Constitution. My state confines the right of voting to citizens of the United States."[96] Although, the debate concluded with Congress deciding not to limit the vote to citizens, it flared up again when Congress considered the Minnesota Statehood Enabling act.[97]

After the Civil War began, the Union's military manpower needs caused the armed forces to turn to aliens for help,[98] and the

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[94] *Id.* at 133.

[95] *See* EUGENE C. MURDOCK, ONE MILLION MEN: THE CIVIL WAR DRAFT IN THE NORTH 306 (1971) ("Probably a majority of every nationality group—even the Irish—did favor the Union."); *see also* Rosberg, *supra* note 13, at 1116-17 ("'[N]o matter how ignorant and stupid the immigrant might be, he was more than likely to be sure of one thing—that he did not believe in holding slaves. He could not discuss states' rights, theories of sovereignty, and nullification, but he was unequivocally opposed to the slaveholder.'" (quoting PORTER, *supra* note 6, at 3)); *id.* ("'South Carolina and Georgia want people much but they fear the migrations, and will check them rather than run the chance of importing people who may be averse to slavery.'" (quoting Congressman King's remark)). Of course, many immigrants were also hostile later to the injustices of the Union draft during the Civil War, and terrible anti-draft rioting broke out in many larger cities, including New York, in 1863. *See* JOHN W. CHAMBERS II, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 53-54 (1987).

[96] Cong. Globe, 34th Cong., 3d Sess. 809 (1857) (remarks of Sen. Brodhead of Pennsylvania).

[97] *See* Neuman, *supra* note 13, at 298-99. The Senate, motivated by southern suspicion of anti-slavery sentiment among immigrants, adopted the Clayton amendment, which would have limited the franchise in the new territories' first elections to citizens only. But the House of Representatives wanted to open elections in the new territories to aliens, and the House prevailed.

[98] *See* MURDOCK, *supra* note 95, at 305-32; *see also* ROBERT L. PETERSON & JOHN

applied only to "citizens" and, as a legal alien, he was therefore not draftable.[105]

In January of 1863, the Wisconsin Supreme Court unanimously rejected Wehlitz' claim.[106] Justice Paine noted that a system of bifurcated citizenship is inevitable in federalism:

> Under our complex system of government there may be a citizen of a state who is not a citizen of the United States in the full sense of the term. This result would seem to follow unavoidably from the nature of the two systems of government.[107]

After finding that the word "citizens" as used by Congress could apply to both U.S.-defined citizens and state-defined citizens, Justice Paine turned to the question of whether declarant aliens who had exercised the right to vote in Wisconsin were in fact citizens of the state. He acknowledged that:

> It may be possible for the state to confer the right of voting on certain persons without making them citizens, yet I should think it would require very strong evidence of a contrary intention to overcome the inference of an intention to create a citizenship when the right of suffrage is conferred.[108]

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[105] *See id.* at 469-70.

[106] *See id.* at 480.

[107] *Id.* at 470-71. Justice Paine found definitive support for this point in the then recent U.S. Supreme Court's decision in *Dred Scott v. Sandford*. *See id.* at 470-72. Justice Paine wrote:

> "The [C]onstitution has conferred on [C]ongress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so; consequently, no state, since the adoption of the [C]onstitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a state under the federal government, *although so far as the state alone was concerned he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the [C]onstitution and laws of the state attached to that character.*"

Id. at 472 (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405-06 (1856) (alteration in original)). This point has long been well-accepted by the states. *See, e.g.*, Leche v. Fowler, 6 So. 602, 602 (La. 1889) ("But a person may be a citizen of a particular state and not a citizen of the United States. To hold otherwise would be to deny to the state the highest exercise of its sovereignty . . . .").

[108] *In re* Wehlitz, 16 Wis. at 473. The Court then drew upon Justice Curtis's dissenting opinion in *Dred Scott*: "But further, though as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship . . . ." *Id.* (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) at 581 (Curtis, J., dissenting)).

to pass the Enrolment Act of March 3, 1863.[116] This Act, often described as the first precedent for the modern selective service system,[117] included in the draft males between the ages of twenty and forty-five "of foreign birth who shall have declared on oath their intention to become citizens."[118] Suddenly, many aliens who had declared their intentions to become citizens now wanted to renounce their plans.[119] On May 8, 1863 President Lincoln issued a proclamation giving such persons sixty-five days to exit the country or, at the lapse of this period, face the draft.[120] Significantly, however, all declarant aliens who had already voted were excluded from this offer and could not renounce their declarations of intent.[121] Thus, any alien who had voted in the United States was subject to the draft immediately, along with U.S. citizens. Aliens trying to escape military service were required to appear before their draft enrollment boards and show "that they had never voted in this country."[122]

While the North mobilized aliens to fight for the Union at the outset of the war, southern opposition to alien suffrage deepened. Delegates to the Confederate constitutional convention in Montgomery, Alabama in 1861 chose to do what the original American Founders had not: ban alien voting as a matter of constitutional law.[123] Article I, Section 2 of the Constitution of the Confederate States, which describes the powers and duties of the House of Representatives, follows precisely the parallel provisions in the United States Constitution except that it explicitly confines the franchise to citizens:

> The House of Representatives shall be composed of members chosen every second year by the people of the several States; *and the electors in each State shall be citizens of the Confederate States*, and

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up to Militia Act).

[116] Enrolment Act, ch. 75, 12 Stat. 731 (1863).

[117] *See* DUGGAN, *supra* note 100, at 23.

[118] MURDOCK, *supra* note 95, at 308 (quoting Enrolment Act, ch. 75, 12 Stat. at 731).

[119] *See id.* at 309.

[120] *See id.*

[121] *See id.*

[122] *Id.* In Massachusetts, Provost Marshal Samuel Stone, responsible for administering the draft in the Eighth District, required every alien claiming exemption from the draft "to present a certificate from his town or city clerk showing that he had never voted or claimed the right to vote." *Id.* at 312.

[123] *See* MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861, at 73-75 (1991).

by returning soldiers demanding and obtaining the right to vote as the just reward for their services and "the most basic and characteristic political act of the citizen-soldier."[128] Surely this logic, operating fiercely at the time with regard to blacks, did not escape the notice of alien veterans, who had fought for the blacks' freedom.[129] Finally, a more sobering interpretation of the move to alien suffrage is that the South had a great need to attract a cheap immigrant labor force in the wake of slavery's abolition.[130]

At any rate, the spread of noncitizen voting after the Civil War renewed the vitality of the practice. In 1894, a political scientist hostile to alien voting attributed recent statewide election results in Wisconsin and Illinois to "the weight of a foreign element"[131] and also described foreign newcomers as the heart of the Tammany political machine which "names a president, and in some degree controls an administration."[132] By the time the nineteenth century came to a close, according to Rosberg, "nearly one-half of the states and territories had some experience with voting by aliens, and for some the experience lasted more than half a century."[133]

The late nineteenth century revival of alien suffrage, launched by Wisconsin and accelerated by the defeat of the Confederacy, came to a halt at the turn of the twentieth century, when anti-immigration feeling ran very high. Alabama stopped allowing aliens to vote by way of a constitutional change in 1901, followed by Colorado in 1902, Wisconsin in 1908, and Oregon in 1914.[134]

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aliens who had volunteered for service and received honorable discharges without requiring any previous declaration of intention or previous residence of more than one year. *See In re* Wehlitz, 16 Wis. 468, 480 (1863).

[128] SHKLAR, *supra* note 5, at 45.

[129] *Id.* at 52. Shklar noted:

> The black man could, moreover, now claim to be a genuine citizen-soldier after his services in the Civil War. "'It is dangerous to deny any class of people the right to vote. But the black man deserves the right to vote for what he has done, to aid in suppressing the rebellion, both by fighting and by assisting the Federal soldier wherever he was found. He deserves to vote because his services may be needed again,' noted Douglass. 'If he knows enough to shoulder a musket and to fight for the flag, fight for the government, he knows enough to vote.'"

Id. (quoting Frederick Douglass) (footnote omitted).

[130] For a more complete discussion of the economic needs of the South, see generally, FONER, *supra* note 11, at 124-75.

[131] Chaney, *supra* note 92, at 136.

[132] *Id.* at 137.

[133] Rosberg, *supra* note 13, at 1099.

[134] *See* Aylsworth, *supra* note 36, at 115.

vote for a candidate for any office—national, state, or local."[141] Alien suffrage was pronounced dead and forever lost to our polity: "Because of a reversal of opinion by the state supreme court, alien suffrage in Arkansas became illegal in 1926, and the last vestige of this political anomaly passed from our election system, doubtless never to return."[142]

II. CONSTITUTIONAL PERMISSION FOR NONCITIZEN VOTING

During the long history of alien suffrage, neither the Supreme Court nor any lower federal court or state court ever found the practice unconstitutional. On the contrary, numerous state courts explicitly or implicitly endorsed noncitizen voting.[143] Although the Supreme Court was never forced to decide the issue directly, it explicitly and repeatedly signalled its acceptance of the practice. The Court made its first declaration on the subject in the infamous *Dred Scott* case in the course of distinguishing between "the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union."[144] The Court stated that "[e]ach State may still confer [all the rights and privileges of the citizen of a State] upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States."[145] And, again, later the Court noted that "in some of the States of the Union foreigners not naturalized are allowed to vote."[146]

The Court's observations about the permissibility of alien voting survived the enactment of the Fourteenth Amendment even if its central holding—that African-Americans could not be "citizens" within the meaning of the federal Constitution—did not. In 1874, the Court in *Minor v. Happersett*[147] cited the practice of noncitizen voting for the proposition that citizenship and suffrage are independent legal categories which do not necessarily imply one another.[148]

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[141] *Id.* at 114.
[142] *Id.*
[143] *See supra* notes 104-14 and accompanying text.
[144] Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 405 (1856).
[145] *Id.*
[146] *Id.* at 422.
[147] 88 U.S. (21 Wall.) 162 (1874).
[148] In *Minor*, a native-born white woman resident in the state of Missouri, argued that the disenfranchisement of women by Missouri's Constitution violated the

> the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.[151]

Thus, more than one hundred years ago, in the context of widespread alien voting, the Supreme Court clearly indicated its approval of the practice.

This passage was no lone shot in the dark. In 1904, the Supreme Court briefly revisited the topic of noncitizen voting and gave an even more explicit endorsement of its constitutionality. The occasion was the case of *Pope v. Williams*,[152] which upheld, against equal protection and general constitutional attacks, a Maryland statute requiring new residents to make a declaration of intent to become Maryland citizens one year before registering to vote.[153] In the course of emphasizing that "the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution,"[154] Justice Peckham observed: "The State might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in *Minor v. Happersett*, such persons were allowed to vote in several of the States upon having declared their intentions to become citizens of the United States."[155] As recently as 1973, the Supreme Court has remarked that "citizenship is a *permissible* criterion" for limiting voting rights, and thus, implicitly, not a compulsory one.[156]

The Supreme Court's periodic remarks assuming the legitimacy of alien suffrage reflect a proper reading of the constitutional regime governing elections. The Constitution prescribes no specific qualifications for voting in state elections and simply borrows from state-created suffrage qualifications to define the federal electorate. Article I, Section 2 provides that members of the House of Representatives shall be chosen "by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legisla-

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[151] *Id.* at 177.

[152] 193 U.S. 621 (1904).

[153] *See id.* at 632.

[154] *Id.*

[155] *Id.* at 632-33.

[156] Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (striking down, on equal protection grounds, a complete ban on aliens working in the New York Civil Service) (emphasis added).

varying constitutional conditions for federal office-holding and their complete silence as to a citizenship qualification for federal *voting* that they did not intend to create a U.S. citizenship suffrage qualification.

Given the permission for noncitizen voting implicit in the Constitutional provisions governing elections, it is necessary to question whether any other Constitutional provisions implicitly impose limits on the practice. Specifically, we must ask whether alien suffrage is consistent with the principles of republicanism and one person-one vote,[165] the various suffrage amendments,[166] and the Naturalization Clause.[167]

A. *Principles of Republicanism and Equal Voting Weight*

There is, no doubt, an argument to be had about whether noncitizen voting is consistent with republican theory, but the practice does not offend the Republican Guaranty Clause. Since its seminal 1849 decision in *Luther v. Borden*,[168] the Supreme Court has consistently found that the republicanism of a state government, institution, or practice is a non-justiciable political question reserved to Congress, or that the challenged practice is not, on its merits, offensive to the Guaranty Clause.[169] In *Luther*, the court refused

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[165] Relevant provisions are the Republican Guaranty Clause, whose significance is minimal; Article I, Section 2, which has been read to establish the principle of one person-one vote in Congressional elections; and the Fourteenth Amendment's Equal Protection Clause, which requires one person-one vote principles in state legislative elections. *See* U.S. CONST. art. IV, § 4; U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV.

[166] The Fifteenth Amendment forbids suffrage discrimination "by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. The Nineteenth Amendment forbids suffrage discrimination "by the United States or by any State on account of sex." U.S. CONST. amend. XIX, § 1. The Twenty-Fourth Amendment forbids suffrage discrimination "by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV, § 1. The Twenty-Sixth Amendment secures the right to vote for all citizens who "are eighteen years of age or older" against federal or state denial or abridgement "on account of age." U.S. CONST. amend. XXVI, § 1.

[167] U.S. CONST. art. I, § 8.

[168] 48 U.S. (7 How.) 1 (1849).

[169] As the Court stated:

> If the legislature of the State has the power to create and alter school districts and divide and apportion the property of such districts . . . the action of the legislature [in combining preexisting local school districts into a single district] is compatible with a republican form of government even if it be admitted that section 4, Article IV, of the Constitution applies to the creation of, or the powers or rights of property of, the subordinate

mainstream history of alien suffrage and the significant role Congress played in spreading the practice.[174]

Alien suffrage also does not offend the basic republican principle of one person-one vote because aliens can be persons within the meaning of this formulation. If the requirement of one person-one vote, which was extended to local government elections in *Avery v. Midland*,[175] meant one *citizen*-one vote, then noncitizen suffrage would unlawfully dilute the value of citizen votes.[176] But the Supreme Court has nowhere adopted one citizen-one vote as the constitutional standard, and it is hard to argue that it has done so implicitly.

In *Reynolds v. Sims*,[177] the Supreme Court found that the Fourteenth Amendment's Equal Protection Clause "guarantees the opportunity for equal participation by all *voters* in the election of state legislators,"[178] and struck down an Alabama reapportionment scheme which included radical disparities in the population of various state legislative districts.[179] In *Wesberry v. Sanders*,[180]

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[174] Congress promoted alien suffrage with the Northwest Ordinance of 1787. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. It also authorized aliens to vote in state constitutional conventions in Ohio, Indiana, Michigan, and Illinois. *See* ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art. V; *see also supra* notes 72-81 and accompanying text (discussing the adoption of an alien suffrage provision in Illinois and public policies supporting alien suffrage). Moreover, Congress admitted several states into the union whose constitutions explicitly provided for alien suffrage including Vermont, Virginia, Michigan, and Illinois. *See* VT. CONST. of 1767, § XXXVIII; VA. CONST. of 1776; MICH. CONST. of 1835, art. II, § 1; ILL. CONST. of 1818, art. II, § 27; *see also* Spragins v. Houghton, 3 Ill. (2 Scam.) 377 (1840) (pointing out that Congress approved the republicanism of alien suffrage).

> "It is here to be remembered, that the constitution of the state of Illinois was required, by the act of congress of the 18th of April, 1818, to be republican. . . . By the resolution of the congress of the United States, of the 3d December, 1818, it is expressly declared, that the constitution and state government so formed is republican . . . ."

Id. at 393.

[175] 390 U.S. 474 (1968).

[176] *See id.* at 475-76. The Supreme Court has held that state statutes "which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court." Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) (citing Reynolds v. Sims, 377 U.S. 533, 562 (1964)). In *Kramer*, the court held that a New York Education Law, which limited the franchise in school district elections to those who had a primary interest in school affairs, violated the Equal Protection Clause because it did not accomplish its purpose with sufficient precision and was not necessary to promote a compelling state interest. *See id.* at 632.

[177] 377 U.S. 533 (1967).

[178] *See id.* at 566 (emphasis added).

[179] *Id.* at 561-77.

[180] 376 U.S. 1 (1964).

persons denied the vote for conviction of crime] involves choices . . . with which we have been shown no constitutionally founded reason to interfere."[187]

B. *The Suffrage Amendments*

A more subtle question is whether noncitizen voting offends the various suffrage amendments (the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth) which make explicit mention of "citizens." The Fifteenth Amendment provides: "The right of *citizens* of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[188] If such language is not designed to exclude aliens from voting, perhaps it discloses a general understanding that voting is for citizens only. But this reading is badly strained: the language specifies only that states may not *exclude* any citizen from the franchise on the basis of race, not that the states may not *include* noncitizens in the franchise. Perhaps this is why the Court in *Minor v. Happersett*,[189] sitting only four years after approval of the Fifteenth Amendment, did not interpret the appearance of the word "citizens" to invalidate the common and readily visible practice of noncitizen voting in the states.[190]

Beyond its plain language, the Fifteenth Amendment's legislative history shows that Congress clearly contemplated that noncitizen suffrage would survive the amendment's adoption. Such a definitive record exists thanks to Massachusetts Senator Charles Sumner, who in 1869 offered an amendment that would have extended the Fifteenth Amendment's reach to ban racial discrimination in voting not only against citizens but against noncitizens as well.[191] The

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[187] *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (upholding Hawaii's use of registered voters as a legislative apportionment base, where such base led to distribution of legislators not substantially different from what would have resulted from the use of a population base).

[188] U.S. CONST. amend. XV, § 1 (emphasis added). In 1868, two years before ratification of the Fifteenth Amendment, the addition of the Fourteenth Amendment marked the first appearance of the word "citizens" in the Constitution.

[189] 88 U.S. (21 Wall.) 162 (1874).

[190] *See id.* at 177.

[191] Sumner's substitute language read: "The right to vote and hold office shall not be denied or abridged by the United States, nor by any State, on account of race, color or previous condition of servitude." CONG. GLOBE, 40th Cong., 3d Sess. 1030 (1869).

True to form, the brilliant and clever Sumner disingenuously disclaimed that his intention was to prevent racial discrimination in the enfranchisement of noncitizens,

> Senator from Massachusetts is adopted the State of Michigan and the State of Indiana, which formerly, and I believe now, allowed persons to vote without naturalization, could not discriminate against unnaturalized persons on account of race or color; but if the committee's amendment is adopted they could so discriminate. So that striking out these words enlarges the scope of the proposition and takes from the State of Indiana, by way of illustration, the power of discrimination among unnaturalized persons on account of race or color. . . . Citizenship and the right of suffrage were never synonymous terms; they do not necessarily go together at all. But if this amendment of the Senator from Massachusetts is adopted it will not be in the power of Indiana to discriminate against persons who are not citizens on account of race or color.[193]

Other Senators also made it clear that they opposed Sumner's amendment because they wanted to preserve the right of states to enfranchise white aliens while excluding the Chinese.[194]

Thus, the inclusion of the word "citizens" in the Fifteenth Amendment clearly does not work, and was not intended, to prevent noncitizen suffrage in the states. Rather, if the unabashed and highly specific intentions of Senator Sumner's adversaries are to be followed, the presence of the word "citizens" functions only to permit the states, in awarding the franchise, to discriminate between groups of noncitizens on the basis of race and color. Of course, it would be comforting to conclude that other Constitutional principles are available today to invalidate a law granting the vote to aliens of only one race, but it is not clear whether such principles have the momentum to overcome a legislative history so definitive in the eyes of a Supreme Court fixed on "original intent."[195] The

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[193] *Id.* at 1030.

[194] *See id.* at 1033. Indiana Senator Oliver P. Morton stated:

> Mr. President, there can be no mistake about one thing: that if the words "citizens of the United States" be stricken out, as suggested by the Senator from Massachusetts, the effect is to take away from any State the right to discriminate on account of race, color, or previous condition of slavery in the case of the Chinese, and that a Chinaman will be made eligible to office and will have the right to vote.

Id.

[195] The Fourteenth Amendment's Equal Protection Clause, commanding that no state "deny to *any person within its jurisdiction* the equal protection of the laws," U.S. CONST. amend. XIV, § 1 (emphasis added), is obviously the strongest candidate for such service in the unlikely event that a state were to pass such a law. It is clear that "an alien is entitled to the shelter of the Equal Protection Clause." Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (striking down a New York law reserving

tenuous to suggest that the Constitution has categorically prohibited a historically common and accepted state practice indirectly and by way of implication. This is especially so in the voting area, where the judiciary has traditionally deferred to the plenary power of the states, interfering only to expand—not contract—the circle of democratic inclusion.[199] Finally, citizenship and suffrage continue to be distinct legal categories: not all citizens get to vote, and not all voters are citizens. Several classes of citizens, such as ex-felons in many states, and children in all of them, are still disenfranchised.[200] Conversely, noncitizens are still permitted to vote in certain local elections, such as school board elections in Chicago and New York and municipal elections in a number of Maryland

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interpreted at the time of passage to abolish the power of states to enfranchise noncitizens. Indeed, the amendment enfranchising women was ratified by three states engaging in the practice (Arkansas, Indiana, and Texas) and none saw it as impairing the policy of alien suffrage. *See* 66 CONG. REC. 635 (1920). Furthermore, the Supreme Court has explicitly linked the role of the Nineteenth Amendment to that of the Fifteenth Amendment. *See* Leser v. Garnett, 258 U.S. 130, 136 (1972) ("[The Nineteenth Amendment] is in character and phraseology precisely similar to the Fifteenth.").

[199] *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (stating that "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices"). It is well-accepted that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 124-25 (footnote omitted). The Constitutional inroads made against the states' power over voting all reflect the conception of an *expanding* franchise. *See* U.S. CONST. amend. XIV, XV, XIX, XXIV, XXVI. Furthermore, the Court has usually intervened only to defend voting rights. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down a one-year residency requirement); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (striking down poll tax). Where courts have decided against voting rights, it is only in the course of acquiescing to state restrictions on the franchise. *See* Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) (upholding a state statute which made residents of a suburban community subject to certain city regulations, but not allowing them to participate in city elections); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) (upholding a literacy requirement for voting). It would be extraordinary for a court to strike down a state law extending the vote to state residents.

[200] *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989); Vita Wallace, *Give the Children the Vote*, THE NATION, Oct. 14, 1991, at 439.

It may be objected that children and ex-felons, both groups of citizens, are only permissibly excluded from the franchise because of the implications of Section 2 of the Fourteenth Amendment. But aliens stand on the same footing as they do. Without this language in Section 2, the argument that aliens have a constitutional right to vote would have additional, if not decisive, force.

Chicago school board election could be deported tomorrow by the Immigration and Naturalization Service for various statutory reasons, including marriage fraud,[206] smuggling,[207] terrorist activities,[208] or criminal conviction for most narcotics[209] and firearm offenses.[210] Both aliens and citizens can break the law, and the right of aliens to vote no more impairs the efficiency of the Immigration and Naturalization Service in enforcing immigration law than the right of citizens to vote impairs the efficiency of the Justice Department in enforcing criminal law.[211] In sum, the United States Constitution places no obstacles in the path of states and localities willing to enfranchise noncitizens.[212]

D. *Is Alien Suffrage Constitutionally Mandatory?*

The obverse of the argument that the Constitution forbids alien voting is that the Constitution requires it. Fifteen years ago, Gerald Rosberg presented a good argument for this proposition: that equal protection should be read to guarantee the right of resident aliens in the states to vote at all levels of government.[213] Although Rosberg's thesis offers important insights into the value of alien suffrage, it runs against the language of the Fourteenth Amendment and defies the logic of suffrage expansion in the United States. For even if we follow the doctrinal somersaults required to arrive at

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for the House of Representative after seven years or for the Senate after nine years. *See* U.S. CONST. art. I, § 3. Nor does she become a citizen for the purposes of gaining immunity from state laws which may legitimately discriminate against noncitizens. *See supra* note 136.

[206] *See* 8 U.S.C. § 1251(a)(1)(G) (1988 & Supp. III 1991).

[207] *See id.* § 1251(a)(1)(E).

[208] *See id.* § 1251(a)(4)(B).

[209] *See id.* § 1251(a)(2)(B).

[210] *See* 8 U.S.C.A. § 1251(a)(2)(C) (West Supp. 1992). Other classes of deportable aliens include those who were excludable by law at the time of entry, those who entered without inspection, and those who are engaged in espionage, sabotage, or any efforts to overthrow the government of the United States. *See* 8 U.S.C. § 1251 (1988 & Supp. III).

[211] *See* Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896).

[212] *But see* Neuman, *supra* note 13, at 324 ("It is probably true, however, that modern constitutional law would uphold an explicit congressional prohibition on alien voting."). This judgment is probably accurate given the great latitude the Supreme Court has allowed Congress in defining its naturalization power. But the historical role played by alien suffrage in American local self-government and the traditional power of states and localities to define their own electorates could equally yield the conclusion that an attempted congressional prohibition on noncitizen voting would infringe on the Tenth Amendment interests of the states or the people.

[213] *See generally* Rosberg, *supra* note 13.

Supreme Court simply noted that the case lacked a substantial federal question and summarily invoked the authority of *Sugarman v. Dougall*[220] and *Kramer v. Union Free School District*.[221] In *Sugarman*, the Court remarked: "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."[222] In *Kramer*, the Court struck down a New York law limiting the franchise in certain school board elections to parents of children in school and those owning or leasing local taxable property.[223] The Court there noted that even the plaintiff, an adult bachelor living at home with his parents, did not contest "that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot."[224]

Rosberg found irony in the Court's invocation of *Sugarman* and *Kramer* to reject the argument that the Constitution required alien suffrage.[225] *Sugarman* had determined that aliens were a suspect class for equal protection purposes.[226] *Kramer* found that statutes limiting the franchise give rise to strict or "exacting" judicial scrutiny because the right to vote is fundamental and "preservative of other basic civil and political rights."[227] If any two cases could produce an argument that alien voting was constitutionally compelled, Rosberg imagined, it would be the combination of *Sugarman* and *Kramer*. But the Supreme Court mobilized these cases for the opposite purpose: to show that aliens were not a suspect class for voting purposes and that voting statutes that enforced citizenship qualifications transgressed no constitutional boundary.[228]

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participation in the decision making process of the polity, a factor which indicates the 'general' nature of such elections." *Id.* It was an easy step then for the court to find that the statutory classification depriving aliens of the right to vote was "properly tailored to the state's interest." *Id.*

[220] 413 U.S. 634 (1973).

[221] 395 U.S. 621 (1969).

[222] *Sugarman*, 413 U.S. at 648-49.

[223] *See Kramer*, 395 U.S. at 625, 631-33.

[224] *Id.* at 625.

[225] *See* Rosberg, *supra* note 13, at 1102 ("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.").

[226] *See Sugarman*, 413 U.S. at 641.

[227] *Kramer*, 395 U.S. at 626, 628-29 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

[228] This was not the first time that the Court failed to take an opportunity to find

This cogent argument encounters one large doctrinal roadblock, recognized (if a bit brusquely) by Rosberg,[235] in the Fourteenth Amendment itself. Section 2 includes little-noticed language clearly indicating constitutional permission for states to impose citizenship as a voting qualification. It states that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, *and citizens of the United States*, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[236]

This provision, which operates to reduce a State's House representation in direct proportion to the number of its disenfranchised adult male citizens, white or black, marked a compromise between radical Republicans in Congress who wanted to guarantee all black citizens the right to vote and conservative Democrats who sought to preserve total state control over the franchise.[237] On the terms of the compromise, a state could employ a literacy test to keep blacks from voting, but would then face the prospect of not retaining its full representation in Congress.[238] "In the historical context, no one could have understood this language as anything other than an abandonment of the principle of Negro suffrage . . . ."[239] Many radical Republicans thus attacked the Fourteenth Amendment "[b]ecause it implicitly acknowledged the right of states to limit voting because of race, Wendell Phillips denounced the amendment as a 'fatal and total surrender.'"[240]

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generates excellent policy arguments for alien suffrage even if, as contended here, the underlying Fourteenth Amendment analysis to which they are attached is weak.

[235] *See* Rosberg, *supra* note 13, at 1102-04.

[236] U.S. CONST. amend. XIV, § 2.

[237] *See* FONER, *supra* note 11, at 252-53.

[238] *See id* at 253.

[239] Oregon v. Mitchell, 400 U.S. 112, 162 (Harlan, J., concurring in part and dissenting in part).

[240] FONER, *supra* note 11, at 255 (quoting Stevens Papers, Communication of Wendell Phillips to Thaddeus Stevens (Apr. 30, 1866)). Others thought that this

Congress to establish, as it had attempted to do in the 1970 Amendment of the Voting Rights Act, the right of eighteen-year-olds to vote in state and local elections.[244] As Justice Black stated: "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices . . . ."[245] On the other hand, a majority in *Mitchell* also found that Congress did possess the constitutional power—under Article I, Section 2 and the Necessary and Proper Clause, according to Justice Black,[246] or Section 5 of the Fourteenth Amendment, according to Justice Douglas[247]—to grant eighteen-year-olds the right to vote in *national* elections.

It is important to recall that eighteen-year-olds, like aliens, are within the class of persons which Section 2 of the Fourteenth Amendment implicitly consigned to their fate in the political processes of the states. Thus, Rosberg's argument that aliens have a constitutional right to vote in state elections even *without* congressional legislation loses force when it is recognized that eighteen-year-olds were deemed by the Supreme Court not to have such a right even *with* congressional legislation.

The message contained in *Mitchell* was sharpened and elaborated in the Supreme Court's 1974 decision in *Richardson v. Ramirez*.[248] In *Ramirez*, the Court reversed a California Supreme Court judgment holding that California's disenfranchisement of convicted felons violated equal protection.[249] Crucial to the Court's decision was its interpretation of Section 2 of the Fourteenth Amendment, which reduces the popular basis for representation when a state denies the right to vote "to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States . . . *except for participation in rebellion, or other crime.*"[250] Focusing on the meaning of the italicized section, Justice Rehnquist determined that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, [and] . . .

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[244] *See Oregon*, 400 U.S. at 118.

[245] *Id.* at 125 (Opinion of Black., J.).

[246] *See id.* at 119-31.

[247] *See id.* at 141-44 (Douglas, J., concurring in part and dissenting in part).

[248] 418 U.S. 24 (1974).

[249] *See id.* at 56.

[250] Oregon v. Mitchell, 400 U.S. 112, 161 n.12 (emphasis added) (quoting U.S. CONST. amend. XIV, § 2).

tions of Section 2, it completely failed to confront the problem of black disenfranchisement, much less the disenfranchisement of women. Much later, the Fourteenth Amendment came to play a role in advancing principles of equal protection among eligible and existing registered voters,[258] but African-Americans were only liberated from their widespread disenfranchisement and subjugation under *Dred Scott*[259] by way of the enactment of the Fifteenth Amendment,[260] passed two years after the Fourteenth Amendment and the Voting Rights Act of 1965. Similarly, women only escaped their Court-approved disenfranchisement through passage of the Nineteenth Amendment in 1920.[261] And eighteen-year-olds gained the complete right to vote in 1971 with ratification of the Twenty-Sixth Amendment.[262] This constitutional amendment became necessary after a majority of the Supreme Court, in *Oregon v. Mitchell*,[263] found that Congress did not have the power, under Section 5 of the Fourteenth Amendment or any other constitutional provision, to invade the political domain of the states by lowering the voting age in state and local elections to eighteen.

There may be grounds to criticize judicial reluctance to declare new voting rights for excluded groups, but it is not clear that judicial, as opposed to political, enlargement of the franchise is to be preferred. The matter of who votes is the central question in a community's process of political self-definition. It is, therefore, a constitutional question in the strictest sense of the word: it determines who constitutes the body politic. While it is often thought that constitutional questions belong exclusively to the courts, Paul Brest has rightly emphasized that "[c]onstitutional discourse and decision-making are the most fundamental prerogatives and responsibilities of citizens."[264] It is clearly more demo-

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[258] *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 630-33 (1969) (upholding the right of an otherwise eligible voter who does not own or otherwise lease taxable property or have children enrolled in public schools to vote in school district elections); Carrington v. Rash, 380 U.S. 89, 96 (1965) (establishing the right of a member of the armed services to vote where he is domiciled in the service even if he did not reside there prior to service); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (establishing the principle of one person-one vote in state legislative elections).

[259] 60 U.S. 393 (1856).

[260] U.S. CONST. amend. XV.

[261] U.S. CONST. amend. XIX.

[262] U.S. CONST. amend. XXVI.

[263] 400 U.S. 112, 117-18 (1970).

[264] Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) (emphasis omitted).

kinds of social power and resources. While Rosberg makes an attractive argument that the Supreme Court veered away from a plausible destination for its equal protection holdings,[268] he neglects the deep meaning of the American constitutional experience. Enlargement of the electorate has taken place by way of democratic amendment to the Constitution,[269] not judicial reappraisal of the meaning of constitutional terms long present. Of course, this contention may be resisted in the alien suffrage context by those who assume that citizens would simply never extend the right to vote to noncitizens. But this assumption is not only wrong as a matter of history, but, as I shall now argue, unduly fatalistic as a matter of present political judgment.

III. THE CASE IN DEMOCRATIC THEORY FOR NONCITIZEN VOTING AT THE LOCAL LEVEL

The argument for noncitizen voting in local government is founded on the essential democratic ideas that pervade American political and constitutional development. From the time of the Revolution these ideas were central to the development of alien suffrage, and they will form the principal rationale for any renewal of the practice. But these ideas are bolstered today by evolving norms of international human rights and "community democracy," norms which reflect profound changes in global economic structure and tremendous surges in international immigration. The present case for noncitizen voting thus draws on both classical American democratic principles and an emerging global ideology of local democracy.

A. The Classical Democratic Argument

The traditional democratic argument for suffrage rights, formulated in the language of liberalism and natural rights, has never lost its vitality.[270] It is second nature to Americans, reducible to a few familiar maxims: government must rest on the consent

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[268] *See* Rosberg, *supra* note 13, at 1109 (arguing that "[i]f the right to equal treatment in the electoral process owes its origin to the [E]qual [P]rotection [C]lause, . . . it must be persons and not just citizens who enjoy that right").

[269] *See* U.S. CONST. amend. XIV, XV, XVI, XIX.

[270] "No historically significant form of government or of citizenship is in principle incompatible with the exclusion of large groups of people, but natural-rights theory makes it very difficult to find good reasons for excluding anyone from full political membership in a modern republic." SHKLAR, *supra* note 5, at 37.

intended to enfranchise aliens in Pittsburgh local elections.[279] But Blackenridge pressed further, arguing that it would have been "wrong," according to constitutional, corporate or natural law principles, for the state to exclude aliens from these elections.[280] His argument invoked two main lines of democratic principle:

> The being an inhabitant, and the paying tax, are circumstances which give an interest in the borough. The being an inhabitant, gives an interest in the police or regulations of the borough generally; the paying tax gives an interest in the appropriation of the money levied. A right, therefore, to a voice mediately or immediately in these matters, is founded in natural justice. To reject this voice, or even to restrain it unnecessarily, would be wrong. It would be as unjust as it would be impolitic. It is the wise policy of every community to collect support from all on whom it may be reasonable to impose it; and it is but reasonable that all on whom it is imposed should have a voice to some extent in the mode and object of the application.[281]

The first line of democratic principle in Justice Blackenridge's concurrence is that "being an inhabitant, gives an interest in the police or regulations of the borough generally."[282] This argument may be captured in the phrase "no governance without representation," a democratic precept going back to John Locke,[283] Thomas

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[279] *See id.* at 122.

[280] *See id.* Blackenridge wrote:

> Could the legislature have restrained farther without departing from a general principle of almost every corporate body? Even in the monarchical republic of *Britain*, every individual of that community is supposed to be represented, *virtually*, as they call it, and to have a voice. I do not believe that a legislature of *Pennsylvania*, would incorporate with a farther restraint of privilege, unless by oversight. I believe they have not done it. I have not examined at this time; but so far as my memory serves me, there is no incorporation of a borough in which the being an inhabitant for a reasonable time, and the paying a borough tax, does not entitle to a voice for borough officers.

Id.

[281] *Id.* Blackenridge went on to draw a line between the exclusion of aliens from holding public office and the exclusion of aliens from voting: "Reasons of policy may warrant the restraining the eligibility to office, but it must be a strong case of the *salus populi* indeed, that will warrant the restraining, much less excluding, the right of electing to office." *Id.*

[282] *Id.*

[283] Locke stated:

> 'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it. But still it must be with his

ed at numerous levels and in many forms, the principle of no taxation without representation would argue for enfranchising the vast majority of aliens, who pay exactly the amount of local property taxes,[290] federal income taxes,[291] state income taxes, and state and local sales taxes that they would pay if they were citizens.[292]

B. *Objections*

The contemporary relevance of the arguments proposed by Justice Blackenridge in 1809 might be challenged on two separate grounds, one from a republican direction and one from a liberal direction.

The republican challenge would contend that his argument presupposes a common sense of membership and community

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[290] It might be objected, of course, that the only relevant tax for the purposes of this discussion is the local property tax and that not all aliens own property. But aliens who are tenants, in effect, pay property taxes through their rent. *See* MINN. STAT. ANN. § 290A.04 (West 1989 & Supp. 1992) ("A refund shall be allowed each claimant in the amount that property taxes payable or rent constituting property taxes . . . ."); *see also id.* § 290.A03 ("'Rent constituting property taxes' means the amount of gross rent actually paid . . . which is attributable . . . to the property tax paid on the unit . . . ."); OR. REV. STAT. § 310.630 (1986 & 1992 Supp.) ("Rent constituting property taxes . . . ."); Marjorie E. Powell, Note, *Resolving the Problem of Undocumented Workers in American Society: A Model Guest Worker Statute*, 17 U. MICH. J.L. REF. 297, 300 n.14 (1984) ("Illegal aliens contribute tax revenue through sales taxes and property taxes through rent payments.").

[291] *See* 26 C.F.R. § 1.1-1(b) (1992) ("[A]ll citizens of the United States . . . and all resident alien individuals are liable to the income taxes imposed by the Code . . . ."); *see also* Ambach v. Norwick, 441 U.S. 68, 81 n.14 (1979) ("As our cases have emphasized resident aliens pay taxes . . . ."); United States v. Gonzales, No. 89-F.1740, 1991 U.S. Dist. LEXIS 3087, at *5 n.2 (D. Colo. Feb. 6, 1991) ("'All United States citizens and resident aliens must pay federal income tax.'") (quoting 26 C.F.R. § 1.1-1(b)).

[292] The analogy of municipal corporations to private corporations, of course, may be rejected today. The argument is undoubtedly available that localities are no longer thought of as independent and self-governing corporations. *See* Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907) ("Municipal corporations are political subdivisions of the State created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."). *See generally* Richard Briffault, *Our Localism: Part I–The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85-99 (1990) ("[A] local government is merely an administrative arm of the state, utterly lacking in autonomy or in constitutional rights against the state that created it."). On this logic, the municipal electorate should presumably be vertically integrated with the state and national electorate. Such an argument does not do justice to the experience or meanings of local democracy and participation. *See generally* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1059 (1980) (arguing that the city's powerlessness against the state infringes on people's ability to participate in the decisions that structure their lives).

suffrage may actually be seeking to *prevent* the emergence of such community. As Elizabeth Mensch and Alan Freeman point out, romantic rhetoric about communitarianism and republican character often conceals underlying realities of political domination.[296]

Secondly, we must recognize that the differences between citizens and noncitizens are probably much less significant than we often imagine. The class of resident aliens, to begin with, includes enormously variegated groups in terms of country of origin, reason for emigrating, age, race, income and so on; they are likely to have more in common with particular groups of citizens than they are with each other. Resident noncitizen Irish may identify more closely with Irish-Americans than they do with noncitizen Mexicans, who in turn may inhabit Mexican-American communities but know nothing about Canadian expatriate enclaves in Maine, and so on. Moreover, most immigrant aliens have made important ties to their local communities through marriage, friendship, church, and work.

Finally, aliens are now seen as sufficiently integrated to justify their membership in most intermediate social institutions. As Cass Sunstein notes, "[c]itizenship, understood in republican fashion, does not occur solely through official organs."[297] On this understanding, aliens already participate in numerous forms of citizen action. They occupy university faculty positions, belong to community associations and political clubs, participate in women's organizations, and join (and lead) labor unions under the protection of the National Labor Relations Act.[298] Alien shareholders in American private corporations have always maintained the right to vote in shareholder elections. This fact is not thought to create any

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[296] *See* Elizabeth Mensch & Alan Freeman, *A Republican Agenda for Hobbesian America?*, 41 FLA. L. REV. 581, 599 (1989) (arguing that the "fiction of 'sovereignty of the people' which legitimates a constitutional structure far removed from direct, participatory democracy, serves to perpetuate the illusion that as Americans we really do speak as 'the people,' even though the political reality is far closer to the alienated, transactional world of Dahl (or Hobbes)," and calling for a rejection of romanticism about republican ideals and a direct political confrontation with "our Hobbesian reality").

[297] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1573 (1988).

[298] *See, e.g.*, NLRB v. Apollo Tire Co., 604 F.2d 1180, 1181 (9th Cir. 1979) (holding that employed aliens, even undocumented aliens, are "employees" within the meaning of the National Labor Relations Act and as such are entitled to file unfair labor practice claims); Hotel & Restaurant Employees Union, Local 25 v. Smith, 563 F. Supp. 157, 159 (D.C. 1983) (labor unions legally bound under Act to provide protection to alien members).

legal and constitutional judgments passed on efforts to disenfranchise people for a period of even *less* than five years.

First of all, courts have repeatedly struck down state policies forbidding college students to register to vote in their campus communities, despite the fact that the majority of college students will only be residents in those communities for *four* years, if not less.[303] The courts have emphasized that the four years spent at college are sufficient to generate community attachments and responsibilities. As the Supreme Court of New Jersey stated, college students registering to vote:

> are subject to and concerned with not only the state laws and regulations but with the local laws and regulations as well. It is there that they pay their sales and gasoline taxes along with any other applicable charges, it is there that they deal with the local courts and local governmental bodies, and it is there that they are classified as residents by the Census Bureau.[304]

Secondly, in *Dunn v. Blumstein*,[305] the Supreme Court struck down, on both equal protection and right to travel grounds, a Tennessee statute confining the vote to persons who had been residents of the state for *one* year and residents of their county for three months.[306] The Court rejected the claim that "durational residence requirements are necessary to further a compelling state interest,"[307] and specifically found impermissible "Tennessee's

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[303] *See, e.g.*, Williams v. Salerno, 792 F.2d 323 (2d Cir. 1986) (upholding injunction against Westchester County Board of Elections' policy of rejecting college students' voter applications); Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973) (striking down as a violation of equal protection a statutory presumption that college students have not acquired voting residence in campus home); Hershkoff v. Board of Registrars of Voters, 321 N.E.2d 656 (Mass. 1974) (compelling registration of college students in Worcester and finding that if they have an intention to make their campus residence their home "for the time at least," it becomes their domicile "even if they intend to move later on . . ."); Wilkins v. Bentley, 189 N.W.2d 423 (Mich. 1971) (invalidating as due process violation a statute providing that no elector may acquire a voting residence while in school).

[304] Worden v. Mercer County Bd. of Elections, 294 A.2d 233, 347 (N.J. 1972) (striking down, in the absence of a compelling state interest, restriction against registration of college students in their campus communities). All of the characteristics mentioned in the text also apply to aliens, including being counted in the Census. *See* U.S. CONST. art. I, § 2, cl. 3.

[305] 405 U.S. 330 (1972).

[306] *See id.* at 360; *see also* Carrington v. Rash, 380 U.S. 89 (1965) (striking down on equal protection grounds a provision of the Texas Constitution prohibiting any member of the U.S. armed forces who moved to Texas during his or her military duty from registering to vote there).

[307] *Dunn*, 405 U.S. at 360.

on behalf of this amendment, ratified during the heyday of youth protest against the Vietnam War, was that the draft age was eighteen: it was often said by the young that those who were old enough to fight were old enough to vote.[314] This time-honored argument about enfranchising classes of people asked to serve in the military should apply equally as well to aliens, who have been subject, in various degrees, to military conscription ever since it began during the Civil War.[315]

It may still be objected that a great many aliens are not planning to become citizens in the minimum five-year period. At first blush, of course, this fact argues even more forcefully for local alien voting: if it is undemocratic to disenfranchise aliens for a term of five years, surely it is more unjust to disenfranchise them for ten or twenty years. But the point may be pressed that, whether their reasons are economic, political, familial, or psychological, those aliens postponing or foregoing the opportunity to become citizens have cast doubt on the durability of their loyalty or commitment to the local community.[316]

This point is vulnerable to sweeping criticism. Immigration law already provides for deportation of alien persons who engage in espionage, sabotage, revolutionary activity, terrorism, or any conduct that "would have potentially serious adverse foreign policy consequences for the United States."[317] Moreover, our constitu-

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[314] The Senate Judiciary Committee Report issued with the proposed amendment stated, *inter alia*, that young people had "earned the right to vote by bearing the responsibilities of citizenship." S. REP. NO. 26, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 931, 936.

[315] *See* Charles E. Roh, Jr. & Frank K. Upham, Comment, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501, 501-02 n.4 (1972) (noting that in general, "male aliens within the age group designated by the draft laws have been liable for conscription"); *see also* Neuman, *supra* note 13, at 306.

[316] *See* Neuman, *supra* note 13, at 328.

> Unwillingness to renounce a prior citizenship may reflect a wide variety of factors. Sometimes unfavorable economic consequences under the former country's law, such as forfeiture of accrued pension rights or ineligibility to inherit from relatives, may be dominant. Political exiles may wish to preserve the option of return in case of an unlikely change in the character of the regime. Some business immigrants use the United States as a base for international activities, while maintaining close ties with their homelands. Some immigrants expect ultimately to retire to the land of their childhood. Others may have no intention to make practical use of their prior citizenship, but view it as a part of their psychological identity that they are reluctant to renounce.

Id.

[317] 8 U.S.C. § 1251 (a)(4)(A)-(C) (Supp. II 1990).

C. *Republicanism and Alien Suffrage*

While the democratic argument for alien suffrage has traditionally been formulated in the language of liberalism and natural rights theory, it may also gain momentum from recent interest in the recovery of civic republicanism as a political and constitutional theory. Of course, abstract political theories do not resolve concrete political questions,[323] and, as noted, republican ideology has often proven quite serviceable for exclusionary and reactionary politics. But its contemporary exponents have been careful to define republican politics as compatible with liberal rights and have pushed the boundaries of republicanism out far enough to make its normative commitments deeply relevant to the question of alien suffrage.[324] If we can overcome the urge to identify the participatory "citizens" of republican thought with the legal "citizens" of the nation-state, then we can find much of value in the republican revival.

Cass Sunstein has identified four governing principles to which "liberal republicanism" is committed: deliberation in politics (or "civic virtue"), the equality of political actors, universalism and the notion of a common good, and "citizenship, manifesting itself in broadly guaranteed rights of participation."[325] These principles "are closely related to one another" and all support the develop-

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63 Ind. 507, 510-11 (1878) (permitting alien electors in Indiana eligibility to become township trustees); Woodcock v. Bolster, 35 Vt. 632, 640 (1863) (upholding "direct and positive" statutory language extending to aliens the right to vote and "hold office in towns and school districts").

[323] *Cf.* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").

[324] *See* Sunstein, *supra* note 297, at 1541 (elaborating a version of republicanism "that is not antiliberal at all"); *see also* Baker, *supra* note 293, at 493 (contrasting Michelman's "liberal republicanism" with his own "republican liberalism," which is defined as a liberal conception of rights joined with a republican conception of politics) The best republican scholarship acknowledges that republicanism and liberalism are not two opposite political philosophies but continuous tendencies along several independent axes of political ethics. *See* Michelman, *supra* note 294; Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987). Horwitz asserts:

> The argument becomes endlessly complex when one attempts to determine who the liberals and the republicans were in 1789. Even Hamilton and Jefferson will not easily fit the liberal or republican models, as these are only ideal types. These models capture only implicit tendencies, which are, at best, immanent in the thought of any one person.

Id. at 67.

[325] Sunstein, *supra* note 297, at 1541.