Citizens, Residents, and the Body Politic

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For more than a century, courts and policymakers have described citizenship as a necessary marker of the political community, defining the boundaries of who participates in our democracy and on what terms. State and federal prohibitions on noncitizen voting remain largely unchallenged and immune from public controversy or scholarly scrutiny. Yet recent jurisprudence on citizenship and voting rights may open the doctrinal door for enfranchisement claims brought by lawful permanent residents—those noncitizens with the greatest national stake and standing.

This Comment offers two contributions to the discussion of noncitizen suffrage. First, it provides a novel descriptive framework, weaving together parallel developments in the Supreme Court's thinking about citizenship, the franchise, and the special status of lawful permanent residents in the political community. Second, the Comment presents a normative argument that both responds to deep-seated justifications for upholding blanket voting prohibitions and outlines a limited voting rights regime for lawful permanent residents.

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INTRODUCTION

In 2011, the debate over political participation rights for noncitizens reignited during a challenge to a federal prohibition on campaign donations by foreign nationals temporarily in the United States.[1] *Bluman v. FEC*, heard by a three-judge panel of the D.C. District Court and summarily affirmed by the U.S. Supreme Court in 2012, upheld the ban on contributions, recognizing Congress's power to exclude noncitizens from democratic participation and governance.[2] *Bluman* thus joined a lineage of cases permitting the exclusion of noncitizens from rights of self-governance like holding office and, most paradigmatic, voting.[3]

But overlooked in the D.C. court's decision was a distinction it drew between different classes of noncitizens, a distinction that may open the jurisprudential door to challenges by *lawful permanent residents* to secure greater participatory rights.[4] Congress specifically exempted such residents from the restrictions on campaign contributions by temporary foreign visitors.[5] And the D.C. panel further suggested that any attempt to extend prohibitions to lawful permanent residents would provoke "substantial questions" not present for other noncitizens, such as business visitors or tourists.[6] Lawful permanent

1. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 290–91 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012); Paul Sherman, Op-Ed., *Let Noncitizens Contribute to U.S. Elections*, N.Y. TIMES (Jan. 3, 2012), http://www.nytimes.com/2012/01/04/opinion/let-noncitizens-contribute-to-us-elections.html.

2. *Bluman*, 800 F. Supp. 2d at 287–88.

3. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); Foley v. Connelie, 435 U.S. 291, 296–97 (1978); Sugarman v. Dougall, 413 U.S. 634, 647–48 (1973).

4. *See Bluman*, 800 F. Supp. 2d at 290–91. Throughout this Comment, I use "lawful permanent resident" to refer to "[a]ny person not a citizen of the United States who is residing the [sic] in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant." *See Lawful Permanent Resident Definition*, *Glossary of Terms*, USCIS, http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr.

5. *Bluman*, 800 F. Supp. 2d at 284.

6. *Id.* at 292.

residents, the court observed, have an altogether different relationship to the American political community than other foreign nationals, possessing a stake in national affairs that makes them more like citizens than temporary visitors.[7] Given a greater stake and standing, their exclusion from activities of self-governance may thus demand heightened judicial scrutiny.[8]

Although limiting its holding to campaign finance, the court wrote that no clear constitutional line exists between activities like political speech through donations and direct participation through voting.[9] Both represent core activities in democratic self-government.[10] Following that logic, the question arises whether lawful permanent residents—the largest group of disenfranchised voting-age individuals in America—may credibly argue for heightened judicial scrutiny of state and federal voting restrictions.[11] The question assumes still greater significance in light of ever-mercurial proposals for immigration reform, which could allow millions of previously undocumented immigrants to legally create a home in the United States but prohibit their access to the ballot box for more than a decade while they navigate uncertain pathways to citizenship.[12] The lack of a meaningful political voice for such "provisional" residents, who are nonetheless subject to taxation and the nation's laws, raises special constitutional and policy concerns.

Yet for more than a century, citizenship has been commonly described as a necessary marker of the body politic, defining the boundary of who may partake in our democracy and on what terms.[13] Blanket prohibitions on noncitizen voting remain largely unchallenged in the courts[14] without any great

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7. *Id.* at 290–91.

8. *See id.* at 291–92. Lower courts have recently made a similar distinction between classes of noncitizens for Second Amendment purposes. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012) (upholding a statute criminalizing firearm possession by undocumented immigrants, but noting that courts have rejected similar prohibitions for lawful permanent residents); People v. Bounasri, 915 N.Y.S.2d 921, 924 (N.Y. City Ct. 2011) (using the Equal Protection Clause to invalidate gun ownership restrictions on lawful permanent residents and noting similar decisions in Michigan, Nevada, and California).

9. *Bluman*, 800 F. Supp. 2d at 289–90.

10. *See id.*

11. *See infra* note 38 and accompanying text.

12. *See Summary & Analysis: Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*, NAT'L IMMIGR. L. CENT. (last updated August 15, 2013), http://www.nilc.org/s744summary1.html.

13. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1981); Foley v. Connelie, 435 U.S. 291, 296–97 (1978); Sugarman v. Dougall, 413 U.S. 634, 647–49 (1973). *See generally* STANLEY A. RENSHON, NONCITIZEN VOTING AND AMERICAN DEMOCRACY 4 (2009) (noting that the citizenship examination, which is a prerequisite to voting, tests "basic knowledge" that fourth graders are tested on in national civics examinations); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1–3 (1991); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

14. Only a handful of lower courts have directly addressed the constitutionality of state prohibitions against noncitizen voting. *See, e.g.*, Skafte v. Rorex, 553 P.2d 830 (Colo. 1976); Padilla v. Allison, 113 Cal. Rptr. 582 (Ct. App. 1974); People v. Rodriguez, 111 Cal. Rptr. 238 (Ct. App. 1973).

controversy or scholarly scrutiny.[15] Indeed, the most prominent academic critique of such suffrage restrictions was articulated thirty-seven years ago by Gerald Rosberg, who questioned the constitutionality of noncitizen disenfranchisement and called for the use of the Fourteenth Amendment's Equal Protection Clause to invalidate such laws.[16] Since then, Rosberg has remained a lonely voice in the voting rights wilderness, joined by a handful of supporters who agree that noncitizen voting may make public policy sense but who largely stop short of questioning the constitutionality of state and federal prohibitions.[17]

I argue in this Comment that it is time to revive and revise Rosberg's call for heightened judicial scrutiny as applied to lawful permanent residents, using both Equal Protection and First Amendment frameworks to challenge the disenfranchisement of those who legally have made America their home and have a long-term stake in its prosperity. Such an argument has slowly gained doctrinal credibility through recent decades of Supreme Court jurisprudence on citizenship and voting,[18] embodied in *Bluman*, coupled with dramatic changes to American demographics at a time of increasingly elastic national borders and national identities.[19]

Constitutional tolerance of state and federal disenfranchisement of lawful permanent residents is increasingly tenuous in light of four developments that make such restrictions a doctrinal anomaly: (1) the erosion of citizenship as an exclusive locus of rights as a result of the Supreme Court's Fourteenth Amendment due process and equal protection jurisprudence; (2) the related dilution of citizenship as a proxy for national stake, allegiance, and political literacy; (3) the rejection of a traditional notion of voting as an expression of national standing, in favor of a conception of voting as an exercise in "being counted" on equal terms in the democratic process; and (4) the recent and developing understanding of lawful permanent residents as situated differently in the political community from other noncitizens, and thus deserving of greater constitutional protections.

In the end, I argue that the blanket use of citizenship as a condition for membership in the body politic is inconsistent with, and even antithetical to, the liberal and rights-oriented trajectory of modern constitutional thought that values the right to vote as a fundamental expression of individual freedom and

15. *See* Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545 (1989); Raskin, *supra* note 13; Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT'L J. CONST. L. 30 (2010); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

16. Rosberg, *supra* note 15.

17. *See supra* note 15.

18. *See* discussion *infra* Parts I, II.

19. *See infra* note 38 and accompanying text; *see also Trends in International Migrant Stock*, THE UNITED NATIONS (2012), http://esa.un.org/MigOrigin.

agency.[20] Instead, citizenship-based voting restrictions are justified by republican models of the body politic, where voting serves as an instrument of an independent public interest and common good. Such republican models are often tinged with nativism cloaked in the language of popular or state sovereignty.[21] This remains one area where the notions of stake, standing, and political literacy—debunked as necessary qualifications in other voting rights contexts—still pervade.[22]

Few concepts are more deeply implanted in our shared civic subconscious than citizenship, the invisible badge of belonging and participating in a democratic society.[23] The acquisition and withholding of this privilege helped inspire the nation's bloodiest war, spawned our greatest civil rights leaders, and instigated our ugliest incidents of nativism. Today, the question of a pathway to citizenship for millions of undocumented residents has reopened a political and social schism. But given decades of transformative jurisprudential, geopolitical, and demographic changes, does it still make sense to think of citizenship as the exclusive ticket into the voting booth? Or is it instead an increasingly hollow, outdated view of national identity that poorly reflects what we care about in democratic participation?[24]

Incongruously, even as the notion of citizenship has maintained a central and ever-divisive place in our civic and political discourse, it has been reduced to a muted constitutional concept in other contexts.[25] Decades of Supreme Court decisions have shifted the "rights of citizens," as understood a century ago, to the "rights of persons" who reside inside our national borders.[26] Lawful permanent residents maintain due process rights,[27] enjoy equal access to public education,[28] legally buy firearms,[29] and exercise First Amendment rights at

20. *See* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 330 (1992); *infra* notes 145–46 and accompanying text.

21. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 139–42 (2000); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445–46, 456–57 (1989).

22. *See* Michelman, *supra* note 21, at 459; STANLEY A. RENSHON, CENT. FOR IMMIGR. STUD., ALLOWING NONCITIZENS TO VOTE IN THE UNITED STATES? WHY NOT (2008), *available at* http://www.cis.org/sites/cis.org/files/articles/2008/renshon_08.pdf.

23. *See* Jana Mason, *Citizenship Under Attack: Congress Investigates Motive Behind INS Initiative*, 17 REFUGEE REP., Nov./Dec. 1996, at 1 (writing that the "unassailable symbols" of being American are "[m]otherhood, apple pie, and citizenship").

24. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 147 (2002); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 54 (1975).

25. *See infra* notes 26–33 and accompanying text.

26. *See* ALEINIKOFF, *supra* note 24, at 7, 46; *see also infra* notes 27–33 and accompanying text.

27. *See* Shaughnessy v. United States, 345 U.S. 206, 212 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886).

28. Plyler v. Doe, 457 U.S. 202, 230 (1982).

29. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012); Fletcher v. Haas, 851 F. Supp. 2d 287, 303–05 (D. Mass. 2012).

political rallies.[30] They are counted for census and apportionment purposes,[31] pay taxes, donate on equal terms to campaigns,[32] and fight in the U.S. military.[33]

Yet, no state court has ever recognized a noncitizen's enfranchisement claim, and the Supreme Court has not entertained the question.[34] Indeed, no Supreme Court decision has ever directly granted any group the right to vote. Enfranchisement, that right said to be "preservative of all rights" in *Yick Wo v. Hopkins* (1886), and again in *Harper v. Virginia Board of Elections* (1966), has instead been left to the exigencies of history and politics.[35] Without directly ruling on the question of noncitizen voting, the Supreme Court has repeatedly observed that states may exclude foreign citizens from activities "intimately related to the process of democratic self-government"[36] as "part of the sovereign's obligation to preserve the basic conception of a political community."[37]

Today, approximately thirteen million lawful permanent residents live in America. This population accounts for more than 5 percent of the country's voting-age population and is the largest group of individuals entirely excluded from the most basic participation in the democratic process.[38] Under current naturalization laws, the doors to the political community remain firmly locked for at least five years for most new immigrants, many of whom are among the most vulnerable to discrimination and abuse.[39] More than half of lawful permanent residents have been in the country more than eight years, and 20

30. Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding that resident aliens are protected by the First Amendment in the context of deportation).

31. For a description of census policy regarding noncitizens, see *Question 16*, *Congressional Apportionment: FAQs*, U.S. CENSUS BUREAU, https://www.census.gov/population/apportionment/about/faq.html#Q16. For an overview of episodic, heated debates about counting immigrants for apportionment purposes, see Carl E. Goldfarb, Note, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 YALE L.J. 1441, 1442–44 (1995).

32. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 290–91 (D.D.C. 2011).

33. *See, e.g.*, *Joining the U.S. Navy by Non-U.S. Citizens*, U.S. NAVY, http://www.navy.mil/navydata/nav_legacy.asp?id=167 (last visited Dec. 27, 2013).

34. *See supra* note 14.

35. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966); *Yick Wo*, 118 U.S. at 370.

36. Bernal v. Fainter, 467 U.S. 216, 220 (1984).

37. Foley v. Connelie, 435 U.S. 291, 296 (1978) (internal quotation marks and citation omitted).

38. *See* NANCY RYTINA, DEP'T HOMELAND SEC., ESTIMATES OF THE LAWFUL PERMANENT RESIDENT POPULATION IN 2011 (July 2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2011.pdf. According to DHS data, there are nearly two million more lawful permanent residents than undocumented residents in America. By comparison, an estimated 5.85 million individuals cannot vote due to the felony conviction prohibition. *See* CHRISTOPHER UGGEN, ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 (2012), *available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

39. *See* 8 U.S.C. § 1427 (2012); *see also* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 66 (2006).

percent have resided in the United States more than twenty years.[40] Since Rosberg's article was published, the number of new immigrants obtaining lawful permanent resident status has increased from under 450,000 in 1977 to 1.1 million in 2012.[41]

In individual congressional districts, the picture of a changing America is still more pronounced. More than a quarter of the population in California's Thirty-Fourth District is now comprised of noncitizens (including both lawful permanent residents and undocumented residents), a percentage similar to Florida's Twenty-Seventh District and New York's Fourteenth District, among others.[42] Twelve California municipalities have populations that are majority noncitizen.[43] The impact of globalization and increasingly transient populations only promises to accelerate these changes in our composition and self-conception.[44]

Ultimately, the question of noncitizen enfranchisement provides a singularly powerful lens for understanding the boundaries of "We the People"[45]—of counting and being counted in a democratic society. Such democratic participation facilitates social assimilation, protects individual dignity, and provides for the representation of minority communities and interests. The question is not one of national borders but of national identity.[46] Are we still, or do we aspire to be, Walt Whitman's America, an America that is "not merely a nation but a teeming nation of nations?"[47] The longer that prohibitions stand unchallenged, the more they suggest a different America, a country with an implicit and explicit bias against newly settled communities that remain some of the most economically and socially powerless.

Before proceeding, it is necessary to say a word about terminology. Most scholarship and judicial opinions frame the relevant issue as between "citizens"

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40. *See* RYTINA, *supra* note 38.

41. RANDALL MONGER & JAMES YANKAY, DEP'T HOMELAND SEC., U.S. LEGAL PERMANENT RESIDENTS: 2012 (March 2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf; Rosberg, *supra* note 15, at 1110. Still more dramatic, recent immigration reform proposals would create a class of millions more "provisional" residents. *See supra* note 12 and accompanying text.

42. Noncitizen population estimates by Congressional district are available at http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#5yrfeature, which uses data from the American Community Survey Five-Year Estimate (2008–2012).

43. Lisa Garcia Bedolla, *Rethinking Citizenship: Noncitizen Voting and Immigrant Political Engagement in the United States*, *in* TRANSFORMING POLITICS, TRANSFORMING AMERICA 51, 55 (Taeku Lee, et al. eds., 2006).

44. For an excellent discussion of the impact of globalization on American identity and citizenship, see PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008).

45. U.S. CONST. pmbl.

46. *See* Tamar Jacoby, *What It Means to Be American in the 21st Century*, *in* REINVENTING THE MELTING POT 293, 294–95 (Tamar Jacoby ed., 2004).

47. WALT WHITMAN, LEAVES OF GRASS, at iv (David S. Reynolds ed., Oxford University Press 2005) (1855).

and "aliens," a historical framing that by definition reaffirms the legitimacy of democratic alienation and translates into essentially a framework of "us the citizens" versus "them the aliens."[48] Yet in administrative contexts, the term "aliens" has been replaced by the more accurate descriptor *lawful permanent residents* when referring to noncitizens legally residing in the United States.[49] I use the term *lawful permanent residents* to also include new categories of provisional residency that may be created in the future. The change in descriptors is fruitful, framing the issue not as between citizens and strangers but instead as between citizens and residents who help weave the fabric of our economic and social life, whose children share our schools, who sit beside us in workplaces, and who enrich our cultural resources.

This Comment consists of four parts. Part I analyzes changes in the historical and constitutional understanding of citizenship, focusing on the Fourteenth Amendment, naturalization policy, and the Supreme Court's post-1970 equal protection jurisprudence that extended protections to noncitizens as a class to facilitate their equal participation in social and economic life. Part I argues that just as the centrality of robust state citizenship dissolved in the late nineteenth century, national citizenship has been divorced of its constitutional import in a variety of contexts.

Part II reveals how changes in the understanding of citizenship have been mirrored by changes in the Supreme Court's understanding of voting, a transformation embodied in the "one person, one vote" jurisprudence[50] and a voting rights regime focused on the individual's equality of voice in the electoral system. As with citizenship, this shift has been from a republican understanding of voting, as an expression of stake and standing, to a liberal model that values individual expression and equitable representation. I maintain that the very idea of a political community of voters as distinct from a community of lawfully settled adult residents is constitutionally suspicious given this jurisprudence.

Part III describes and responds to the principal arguments for upholding bans on noncitizen voting, namely, that constitutional structure, precedent, compelling state interests, and the demands of democratic legitimacy counsel against judicial intervention.[51] As Sanford Levinson wrote a decade ago, "[m]ost trained lawyers would regard litigation premised on the view that the fourteenth amendment bars exclusion of noncitizens from the ballot as

48. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); Rosberg, *supra* note 15.

49. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 MIAMI INTER-AM. L. REV. 263, 276 (1997). U.S. Citizenship and Immigration Services now uses *lawful permanent resident* to refer to "any person not a citizen of the United States who is residing the [sic] in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant." *Lawful Permanent Resident Definition*, *Glossary of Terms*, USCIS, http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr.

50. Reynolds v. Sims, 377 U.S. 533, 558 (1964).

51. *See* Raskin, *supra* note 13.

'frivolous.'"[52] Today, it may remain prudentially unwise to bring such a claim in most courts. Doctrinally, however, I argue that it is increasingly credible, as evidenced by cases like *Bluman* that may presage judicial challenges in the coming years.

Part IV lays out the full normative argument for judicial intervention using either the Equal Protection Clause or First Amendment to compel enfranchisement of lawful permanent residents in certain circumstances. It outlines a regime that both allows for durational residency restrictions on voting by lawful permanent residents while at the same time justifying the exclusion of undocumented residents from the polls. The special status of undocumented residents, as distinguished from both lawful permanent residents and temporary visitors, is largely outside of this Comment's inquiry.

As will be evident, opening the door to noncitizen resident voting need not implicate other forms of participation like holding political office or performing the intimate functions of government—instances where the state interest in exclusion may be far more compelling.[53] The case for extending voting rights to lawful permanent residents is neither a call for universal suffrage nor radical egalitarianism; instead, it is an appeal for rational, constitutionally based suffrage.

I.
CONSTRUCTING AND DISMANTLING THE CITIZEN AS A REPOSITORY OF CONSTITUTIONAL RIGHTS AND PRIVILEGES

Three general periods mark the formation and transformation of citizenship as a constitutional creature: (1) the nation's founding era when national citizenship was a weak bond, secondary to the ties of state citizenship; (2) the rise of a national, normalized citizen as central in civic life and the Supreme Court's jurisprudence, beginning with the Fourteenth Amendment's ratification and continuing through the middle of the twentieth century; and (3) the dramatic weakening of citizenship as both a locus of rights and a proxy for allegiance beginning in the late 1960s, a period that has eroded citizenship as a surrogate for shared values, political literacy, and community standing (the very concepts that re-emerge in Part II's discussion of voting rights).

Part I describes and analyzes this transformation that bears directly on justifications for noncitizen disenfranchisement, helping to understand such prohibitions as founded on an outdated conception of citizenship.

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52. Levinson, *supra* note 15, at 555.

53. *See* discussion *infra* Part IV. Despite the significant conceptual differences between voting and holding office, the Supreme Court has routinely joined them together in the same package of participatory rights withheld from noncitizens. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973).

A. Citizenship Circa 1787

National citizenship was an uncomfortable fit for a country founded by exiles and comprised of a fragile patchwork of former colonies intent on limiting the newly minted federal power. The Constitution, through congressional power over naturalization, created national citizenship.[54] The Bill of Rights recognized, vested, and protected individual rights from federal government intrusion, while Article IV's Privileges and Immunities Clause granted limited claims against the states.[55] But the new civic being was a weak and malleable one. In most contexts, "the line separating citizens from aliens was not clearly or consistently drawn, either in law or practice."[56]

What was clear, however, was that this fledgling national identity took a backseat to state ties. States had largely unrestrained power to define their body politics.[57] In early America, it was thus possible to be a citizen of a state without being a citizen of the nation.[58] And when it came to voting, national citizenship played little part in state-sanctioned enfranchisement,[59] leading to a cantankerous assemblage of suffrage schemes based on instrumental state aims of politics, economics, settlement, and expanding frontiers.[60] Terms like "citizen," "person," and "inhabitant" were often conflated,[61] and the right to vote had far more to do with factors like race, property ownership, gender, and moral standing.[62] Some states like Vermont and Wisconsin extended the franchise liberally to noncitizens who met such qualifications.[63] The federal government selectively did the same in extending suffrage to inhabitants of the Northwest Territories to encourage settlement.[64]

Through the late eighteenth and early nineteenth centuries, noncitizen voting expanded and contracted with the tides of nativism and pragmatic tolerance. At the turn of the nineteenth century, many states altered their voting laws, exchanging the term "inhabitant" for "citizen" because they feared an influx of undesirable foreign workers.[65] Legislatures assumed noncitizen workers to be poor, and hence unwelcome. This sentiment manifested prominently in the widespread antipathy to Irish immigrants who were derided

54. Neuman, *supra* note 20, at 292. The Naturalization Act of 1790, however, limited naturalization to immigrants who were "free white person[s]" of "good character." 1 Stat. 103 (1790).

55. *See* U.S. CONST. art. IV, § 2, cl. 1.

56. KEYSSAR, *supra* note 21 at 32; *see also* Minor v. Happersett, 88 U.S. 162, 166 (1875) (holding that citizenship did not give women the right to vote).

57. Neuman, *supra* note 20, at 302–04.

58. *Id.* at 303–04.

59. *Id.*

60. KEYSSAR, *supra* note 21, at 6–7.

61. *See* Rosberg, *supra* note 15, at 1095.

62. *See* KEYSSAR, *supra* note 21, at 9–14; Bedolla, *supra* note 43, at 52; *see also* Minor v. Happersett, 88 U.S. 162, 162 (1875).

63. Raskin, *supra* note 13, at 1400–08.

64. KEYSSAR, *supra* note 21, at 30.

65. *Id.* at 32.

as politically illiterate, insufficiently versed in American values, and threateningly Catholic—themes that still punctuate contemporary nativist thought.[66]

The suffrage pendulum swung back again in the mid-nineteenth century, after the Civil War, when many states granted declarant noncitizen voting to those who had fought, met certain residency requirements, and declared their intention of becoming citizens.[67] In all, twenty-two states and territories allowed noncitizens to vote at some point in their history,[68] and state courts uniformly upheld such extensions of the franchise.[69]

Speaking at the Illinois Constitutional Convention of 1847, delegate David Davis offered a particularly rousing defense of noncitizen suffrage, invoking the need to obtain the "consent of the governed"[70] to justify such enfranchisement:

> [W]e should not abandon the principle that all men are to have some participancy in the affairs of government, particularly when they may be called upon to contribute to the support of that government. These people . . . are subject to pay taxes, they are liable to be called on to perform road labor and various other duties; and, sir, they, like your Shields and your Baker, when the tocsin of war has sounded, rally to the field of battle. Shall we say that such men shall not exercise the elective franchise?[71]

But the beginning of the late nineteenth century brought the sweeping revocation of state laws permitting noncitizen voting. This reversal was driven by xenophobia, a burgeoning sense of national citizenship after the Civil War, and the disappearance of the instrumental reasons for noncitizen voting like encouraging settlement.[72] Surveying the history more than a century later, scholar Gerald Neuman wrote, "The conditions that made declarant alien suffrage politically attractive in the United States have receded into history, and the very existence of the practice is widely forgotten."[73]

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66. *Id.* at 82.

67. *Id.* at 104–05.

68. Raskin, *supra* note 13, at 1397.

69. KEYSSAR, *supra* note 21, at 33.

70. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self evident—that . . . governments . . . deriv[e] their just powers from the consent of the governed . . . .").

71. David Davis, Speech at the Illinois Constitutional Convention of 1847, *in* 14 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY 564 (Clarence Walworth Alvord ed., 1919).

72. Neuman, *supra* note 20, at 299–300; Raskin, *supra* note 13, at 1397. Arkansas became the last state to abolish noncitizen voting in 1926.

73. Neuman, *supra* note 20, at 311. Despite state antipathy, a handful of localities have enfranchised noncitizens for local elections. In New York City noncitizens with children in public schools were allowed to vote in school board elections from the 1970s until the boards were disbanded in 2009. Noncitizens are still allowed to vote in Chicago school board elections and in several Maryland municipalities. Such experiments, however, have not been widely embraced. *See* KEYSSAR,

B. The Fourteenth Amendment's Construction of National Citizenship

The contraction of noncitizen voting came, not coincidentally, at the same time that national citizenship, still fragile after the Civil War, was indelibly forged by the Fourteenth Amendment,[74] two world wars,[75] and the tightening of federal immigration and naturalization laws in the late nineteenth and early twentieth centuries.[76] The confluence of nationalism, constitutional law, and immigration policy embedded national citizenship at the center of civic and political life. As *Dred Scott v. Sanford* made plain, the Supreme Court viewed the Bill of Rights and Constitution as benefiting citizens.[77] African Americans, the court held, were not American citizens and therefore had no standing to sue in federal court.[78] Similarly, immigrants deemed undesirable were routinely excluded from schools, prevented from giving court testimony, and deprived of a range of constitutional protections afforded citizens.[79]

Eleven years after *Dred Scott*, the Fourteenth Amendment provided the first national definition of citizenship and extended its privileges to all those born in the United States.[80] More importantly, it articulated the rights of these national citizens through the guarantees of due process, equal protection, and privileges and immunities. The Amendment thus simultaneously undermined state sovereignty and the rights of state citizenship. In vesting citizens with new constitutional rights against the states through the process of incorporation,[81] national citizenship became a lodestone of American identity at the same time that federal power increasingly competed with state authority.

This development, however, took another two decades to mature. The Slaughter-House Cases of 1873 held that the Fourteenth Amendment's privileges and immunities provided citizens with only the narrowest band of protections against the states, giving a temporary reprieve to state autonomy.[82] Under the Supreme Court's interpretation, the only rights uniquely granted to

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supra note 21, at 310; RENSHON, *supra* note 13, at 9 (describing a 2005 proposal to enfranchise noncitizens in New York City municipal elections); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 21 IMMIGR. & NAT'LITY L. REV. 477 (2000) (providing a survey of enfranchisement initiatives and state-by-state obstacles to overcome); Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57 (2006) (examining a failed San Francisco enfranchisement initiative).

74. *See* KEYSSAR, *supra* note 21, at 90; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1260 (1992).

75. *See* HAYDUK, *supra* note 39, at 34 (focusing on World War I).

76. *See* KEYSSAR, *supra* note 21, at 139–40.

77. Amar, *supra* note 74, at 1223.

78. Dred Scott v. Sandford, 60 U.S. 393, 406 (1856).

79. *See* MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 10–12 (1946).

80. KEYSSAR, *supra* note 21, at 90.

81. Amar, *supra* note 74, at 1260.

82. *See* Slaughter-House Cases, 83 U.S. 36, 77–78 (1872).

national citizens were seeming trivialities like using seaports and gaining access to the seat of government.[83]

The reprieve for states ended in 1908 when the Supreme Court in *Twining v. New Jersey* held that certain protections contained in the Bill of Rights were incorporated against the states through the Fourteenth Amendment's Due Process Clause.[84] Subsequent cases incorporated other provisions of the Bill of Rights, vesting national citizens with a cache of new rights against state and local governments. Incorporation thus helped solidify the dominance of national citizenship and federal power, while weakening the scope of states' power over their residents. "We the People" took shape as a national body of citizens armed with rights and privileges that no state power could strip.[85]

What did this newly minted national citizen look like? Despite the blanket grant of citizenship to African Americans through the Fourteenth Amendment, naturalization laws remained clearly focused on the ideal or natural citizen—politically fluent, white, English-speaking, and preferably from familiar, trustworthy European stock.[86] Prior to 1870, naturalization was open only to free whites, and the legacy of those prohibitions continued for decades.[87] In 1922, the Supreme Court held that residents of Japanese heritage were ineligible to become citizens.[88] Chinese immigrants could only naturalize beginning in 1943.[89]

The earliest naturalization requirements, which were also the de facto rules of entry into the political community, included tests that persist today, such as language proficiency, knowledge of civics, good moral character, and the oath of allegiance.[90] Citizenship could be revoked for socialists and for voting in foreign elections. Naturalized citizens were required to present naturalization papers to election officials to register to vote.[91]

Underlying these early naturalization rules was a distinctly republican concept of citizenship as a proxy for shared interests and values in the service of an independent common good.[92] Ironically, nowhere was this more evident than in *Korematsu v. United States*, a case upholding an exclusion order that forced Japanese American *citizens* (and noncitizens) into internment camps

83. *Id.* at 79.
84. Twining v. New Jersey, 211 U.S. 78, 113–14 (1908).
85. Amar, *supra* note 74, at 1260.
86. *See* ALEINIKOFF, *supra* note 24, at 7; HAYDUK, *supra* note 39, at 30 (2006).
87. Neuman, *supra* note 20, at 307.
88. Takao Ozawa v. United States, 260 U.S. 178, 198–99 (1922).
89. Neuman, *supra* note 20, at 307.
90. 8 U.S.C. § 1448(a)(5)(A)–(C) (2012); 8 U.S.C. § 1427(a)(3) (2012).
91. HAYDUK, *supra* note 39, at 37; KEYSSAR, *supra* note 21, at 139–140; *see also* Immigration Act of 1917, 39 Stat. 874–75 (1917) (providing sweeping exclusions of immigrants on ideological grounds, including the exclusion of anarchists, citizens of Asian countries, and homosexuals).
92. *See generally* KEYSSAR, *supra* note 21, at 139–40; SHKLAR, *supra* note 13, at 5, 13; Levinson, *supra* note 15, at 557; Michelman, *supra* note 21, at 456–58.

during World War II.[93] With wartime deference, the Supreme Court recognized the government's concerns about the loyalty of those interned, noting that approximately five thousand American citizens of Japanese ancestry had refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor.[94] Importantly, these very standards of loyalty and standing as necessary conditions of citizenship were many of the same tests required for voting—tests the Supreme Court would later uniformly reject.[95]

Although the Fourteenth Amendment became the paradigmatic statement of the rights of national citizens, those rights could prudentially be extended to noncitizens, just as suffrage was selectively extended decades before.[96] But there were hints of still greater protections coming. Just eighteen years after the Amendment's ratification, the Court in *Yick Wo v. Hopkins* upheld the "rights of every citizen of the United States equally with those of the strangers and aliens" living within the United States.[97] Striking down a local ordinance as discriminatorily directed against Chinese laundry owners, the Supreme Court began to decouple constitutional protections and citizenship. Similarly in *Takahashi v. Fish and Game Commission*, the Supreme Court held that an ordinance restricting fishing licenses for Japanese Americans violated the Fourteenth Amendment's equal protection guarantees.[98]

But *Yick Wo* and *Takahashi* proved to be constitutional fool's gold.[99] In the shadow of two world wars abroad and separate-but-equal citizenship at home, the Supreme Court stiffened toward outsiders as it focused on restoring the equality of citizens at the expense of noncitizen protections.[100] During the Warren Court (1953–1969)—groundbreaking in its protection of the rights of minority citizens—no law was struck down because of discrimination based on citizenship status.[101] The Court instead clearly framed constitutional protections in the language of citizenship, writing in *Reid v. Covert* that "[t]he rights and liberties which citizens of our country enjoy . . . have been jealously preserved from the encroachments of Government by express provisions of our written Constitution."[102] As *Reid* made clear, the Constitution applies "in full whenever and wherever the government acts against U.S. citizens"—even superseding

93. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).
94. *Id.* at 219.
95. *Infra* Part II.
96. Amar, *supra* note 74, at 1222.
97. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
98. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948).
99. Just seven years after *Yick Wo*, the Supreme Court held that Congress had "absolute and unqualified" power to arrest and deport immigrants without constitutional restraint. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).
100. *See* ALEINIKOFF, *supra* note 24, at 48.
101. *Id.*
102. Reid v. Covert, 354 U.S. 1, 6–7 (1957).

international treaties.[103] In *Kennedy v. Mendoza*, Chief Justice Warren described citizenship as "a most precious right," holding that, without due process, the government could not strip citizenship from a Mexican American who had evaded military service.[104] And dissenting in *Perez v. Brownell*, in which the Supreme Court held that Congress could revoke citizenship for voting in a foreign election, Chief Justice Warren offered perhaps the strongest endorsement of the constitutional centrality of citizenship: "Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."[105]

The Warren Court's judicial focus on the constitutional protection of citizenship was accompanied by legislation enacting increasingly restrictive naturalization policies. Such policies further codified the vision of a "natural" citizen.[106] Citizenship implied "good citizenship."[107] And good citizens looked much the same. The years following World War II witnessed dramatic reductions in new flows of immigrants as second-generation European immigrants assimilated into the political fabric.[108] But non-Europeans confronted a different reality. Jim Crow laws, which isolated both African American citizens and Latino immigrants, remained on the books. Asian immigrants were excluded from citizenship until after World War II.[109] Mexican immigrants specifically "were sought after as low-paid agricultural workers, not as potential members of the American polity."[110] And as *Perez* made clear, citizenship could be revoked for acts found to be disloyal or un-American.[111]

Given the judicial and legislative buttressing of citizenship during this period, it is easy to understand the development and entrenchment of an unrebuttable presumption that the body politic, like much of the Constitution, was the exclusive domain of citizens. Indeed, attitudes toward citizenship, naturalization policy, and voting rights (discussed in Part II) neatly aligned until the late 1960s. America wanted Americans to embody a certain look. The Constitution was a vehicle used to preserve that look.

But in its latter years the Warren Court began a retreat from constructions of the model citizen, not through equal protection jurisprudence, but instead

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103. ALEINIKOFF, *supra* note 24, at 46.

104. Kennedy v. Mendoza–Martinez, 372 U.S. 144, 159 (1963).

105. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C. J., dissenting).

106. *See* ALEINIKOFF, *supra* note 24, at 34–35, 54.

107. *See id.*; *see also* Korematsu v. United States, 323 U.S. 214, 219–20; SHKLAR, *supra* note 13, at 5.

108. ALEINIKOFF, *supra* note 24, at 54.

109. *Id.* at 12; *see also* KONVITZ, *supra* note 79, at 12.

110. ALEINIKOFF, *supra* note 24, at 12; *see also* Gregory Rodriguez, *Mexican-Americans and the Mestizo Melting Pot*, *in* REINVENTING THE MELTING POT 125, 128–29 (Tamar Jacoby ed., 2004).

111. Perez v. Brownell, 356 U.S. 44 (1958).

through its naturalization decisions. In *Trop v. Dulles*, the Court had earlier held that desertion from the armed forces during wartime was an insufficient ground for revocation of citizenship.[112] Six years later, *Schneider v. Rusk* established that the government could not revoke citizenship for moving abroad following naturalization.[113] And most dramatically in *Afroyim v. Rusk* (1967), the Court sweepingly reconfigured the idea of the model citizen, upholding the right to maintain dual citizenship and—overruling *Perez*—holding that Congress had no power under the Constitution to revoke citizenship unless an individual voluntarily renounced it.[114] In particular, the government could no longer strip citizenship as a consequence of voting in a foreign election.[115]

For a nation that had for decades equated citizenship with shared values, loyalty, and political literacy, this was no small move. Indeed, it suggested that citizenship no longer formed a monolithic ideal. Rather, citizenship was a more descriptive, and perhaps symbolic, badge that no longer mandated undivided allegiance, complete assimilation, or subscription to an independent common good. *Afroyim* and its progeny made clear that the oath of allegiance, still required by the Immigration and Naturalization Act today, was a toothless, albeit symbolically profound, ceremony.[116] The first sentence of the oath reads: "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."[117] But if the acquisition of citizenship did not require renouncing ties to foreign governments or abstaining from voting in foreign elections, then the oath became either practically hollow or forced, ceremonial perjury.

C. Contemporary Transformations in the Construction of Citizenship

The 1970s signaled a further, two-front assault on the monolithic American citizen, both in courtrooms and naturalization policy. The Burger Court (1969–1986) brought new protections for noncitizens. These protections were widely extended under the banner of the Fourteenth Amendment's Equal Protection Clause—providing the irony that the Amendment that first codified national citizenship was subsequently used to dilute its exclusive privileges. The Court first announced such protections for noncitizens in *Graham v. Richardson*—mandating that state welfare benefits be extended to "aliens" as a

112. Trop v. Dulles, 356 U.S. 86 (1958).

113. Schneider v. Rusk, 377 U.S. 163 (1964).

114. Afroyim v. Rusk, 387 U.S. 253 (1967).

115. *Id.* at 267. Changes in naturalization law accompanied a liberalization and equalization of U.S. immigration policy that eliminated discrimination based on race and national origin. *See* Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (1965).

116. *See Afroyim*, 387 U.S. 253; 8 U.S.C. § 1448 (2012).

117. *Naturalization Oath of Allegiance to the United States of America*, USCIS, http://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america; *see also* 8 U.S.C. § 1448 (2012).

"discrete and insular" class,[118] following the logic of the famed footnote four from the *Carolene Products* case.[119] The Court broadly held that state laws discriminating based on "alienage" should be reviewed using strict scrutiny to guarantee equal protection of the laws for noncitizens.[120]

Graham dealt a blow to the republican model of citizenship. Reviving the jurisprudence of *Yick Wo*, the Supreme Court held that citizens laid no claim to an exclusive repository of constitutional rights.[121] The promises of the Fourteenth Amendment were not based on the badge of birth. Rather, they derived from the act of being governed within the nation's borders. They were based, in part, on residency. As the Burger Court repeatedly held, noncitizens particularly needed protection as a suspect class because they faced a history of discrimination and were politically powerless.[122] The potential for prejudice, the Court found, was at its highest when such a group could not participate in the political process.[123]

In subsequent terms, the Supreme Court continued to recalibrate constitutional thinking about the rights and privileges of citizens and noncitizens. It struck down citizenship as a basis for the holding of civil service jobs in *Sugarman v. Dougall* (1973),[124] the licensing of attorneys in *In re Griffiths* (1973),[125] the accrediting of engineers in *Examining Board v. Flores de Otero* (1976),[126] and the granting of financial aid for higher education in *Nyquist v. Mauclet* (1977),[127] among others.

The Court, however, carved out three broad exceptions from the promise of equal protection for noncitizens. More fully discussed in Part IV because of their bearing on objections to noncitizen voting, these exceptions established that noncitizens could be treated differently in (1) state laws related to self-government and the democratic process,[128] (2) laws that Congress enacts or the executive enforces under its plenary power over immigration,[129] and (3) state laws relating to *undocumented* immigrants.[130]

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118. Graham v. Richardson, 403 U.S. 365, 372, 376 (1971).

119. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (first suggesting a heightened standard of review for legislation that prejudices "discrete and insular minorities").

120. *Id.* at 376.

121. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886).

122. *See Graham*, 403 U.S. at 372; ALEINIKOFF, *supra* note 24, at 6–7, 61; Rosberg, *supra* note 15, at 1105.

123. *See Graham*, 403 U.S. at 372 (citing *Carolene Products*, 304 U.S. at 152–53 n.4).

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

125. *In re* Griffiths, 413 U.S. 717 (1973).

126. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976).

127. Nyquist v. Mauclet, 432 U.S. 1 (1977).

128. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); Foley v. Connelie, 435 U.S. 291, 295–96 (1978); *Sugarman*, 413 U.S. at 648.

129. ALEINIKOFF, *supra* note 24, at 63; David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 384–85 (2003); *see also* Mathews v. Diaz, 426 U.S. 67, 69, 84–87 (1976) (upholding a five-year residency requirement for

Perhaps sensing that earlier decisions had brought it too close to an evisceration of citizenship, in 1978 the Supreme Court forcefully articulated the first of these exceptions in *Foley v. Connelie*, using language that harkened back to the old understanding of the "historic value" of citizenship and the body politic:

> It would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of "strict scrutiny" because to do so would obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship. The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others . . . . Accordingly, we have recognized a State's historical power to exclude aliens from participation in its democratic political institutions, as part of the sovereign's obligation to preserve the basic conception of a political community.[131]

Foley upheld the constitutionality of a state law classification that prohibited noncitizens from serving as police officers.[132] Future cases extended its logic to other peace officers like probation officials, and to teachers.[133] Such classifications, the Supreme Court held, should only receive rational basis review because of the need to preserve the state's historic power to exclude aliens from participation in governmental institutions.[134] Although at times referring obliquely to voting within this same framework, the Supreme Court's focus centered on preventing noncitizens from holding direct and coercive power over citizens.[135] As discussed further in Part III, such cases are a questionable analogue to voting.

Despite these exceptions to applying strict scrutiny to noncitizen classifications, the Supreme Court had undeniably changed its thinking about citizenship.[136] Even the Rehnquist Court, while retreating somewhat on the question of noncitizen rights,[137] recognized an expansion in the possible boundaries of the body politic beyond citizenship status. In *United States v. Verdugo-Urquidez*, the Court held that Fourth Amendment search and seizure protections do not apply to property owned by a *nonresident* alien and located in a foreign country.[138] But in so holding, the Court implied that "the people"

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noncitizens to receive Medicare benefits and noting that congressional restrictions based on alienage receive greater deference than similar state classifications).

130. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982).

131. *Foley*, 435 U.S. at 295–96 (internal quotation marks and citations omitted).

132. *Id.* at 300.

133. Ambach v. Norwick, 441 U.S. 68 (1979); *Cabell*, 454 U.S. at 432.

134. *Cabell*, 454 U.S. at 443–44.

135. *Id.*

136. *See* ALEINIKOFF, *supra* note 24, at 61–63.

137. *Id.* at 69–70.

138. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

has no necessary relationship with citizenship.[139] Instead, "the people" refers "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[140] Taking the Court's words at face value, "We the People," that bedrock of popular sovereignty and the body politic, was open for new members.

In addition to judicial decisions, post-1968 naturalization policy enacted by Congress and the executive significantly changed the contours of citizenship. The Warren Court's holdings in *Afroyim*, *Schneider*, and *Trop* were codified in the 1978 Citizenship Law Amendments.[141] These Amendments repealed prior provisions that allowed the government to revoke citizenship for voting in foreign elections, living abroad following naturalization, and deserting the armed forces during wartime.[142] Two years later, the Court took *Afroyim* one step further, ruling in *Vance v. Terrazas* that any action that could result in a loss of citizenship must be performed voluntarily with the intention of giving up citizenship.[143] The Court held that taking an oath of allegiance to a foreign nation did not, on its own, constitute such voluntary assent to the relinquishment of U.S. citizenship.[144] These changes were codified in the 1986 Citizenship Law Amendments signed by President Ronald Reagan.[145] The amendments also prevented the loss of citizenship through foreign military service—even if that military was engaged in hostilities with the United States—so long as there was no intention to relinquish U.S. citizenship.[146] Finally, the 1994 Citizenship Law Amendments repealed a provision that candidates for U.S. citizenship had to declare they intended to reside permanently in the U.S. following naturalization.[147] Those who had lost citizenship on such grounds could regain it by simply taking the naturalization oath—an oath that had been rendered toothless.[148]

Taken together, these changes in naturalization laws constituted an upheaval of the traditional understanding of the body politic. No longer was

139. *See id.* at 265.

140. *Id.*; *see also* Rodriguez, *supra* note 15, at 37; United States v. Huitron-Guizar, 678 F.3d 1164, 1167–68 (citing *Verdugo-Urquidez* for the proposition that "the people" is a category broader than citizens and narrower than persons).

141. 1978 Citizenship Law Amendments, Pub. L. 95-432, 92 Stat. 1046.

142. *Id.*

143. Vance v. Terrazas, 444 U.S. 252, 261 (1980).

144. *Id.* at 258–59.

145. 1986 Citizenship Law Amendments, Pub. L. 99-653, 100 Stat. 3655. Sweeping changes in naturalization policy were also reflected in immigration policy during this time, including the removal of many ideological grounds for exclusion. *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

146. 1986 Citizenship Law Amendments, Pub. L. 99-653, § 18(d), 100 Stat. 3655, 3658 (codified as amended at 8 U.S.C. § 1481(a)(3) (1988)).

147. 1994 Citizenship Law Amendments, Pub. L. 103-416, 108 Stat. 4305.

148. *Id.*

national citizenship a surrogate for political literacy, cultural membership, undivided allegiance, and vested stake.[149] Instead, the liberalization of citizenship undercut those very rationales. As discussed in Part III, these changes are critical to understanding the increasing insignificance of citizenship as a necessary marker of the electorate. Instead, as will be discussed further, such perspectives rely at least in part on a pre-1960s nationalist notion of citizenship in its idealized form.

II.
COUNTING VOTES, COUNTING VOTERS

The trajectory of Court decisions concerning voting and democratic participation closely parallels changes in the traditional understanding of citizenship. From a simplified perspective, the theoretical underpinnings of the franchise have changed over two hundred years from a view of voting as a republican exercise in service of an independent common good to voting as a liberal, pluralistic exercise in being counted and counting on equal terms with others. Distilled, the republican model of voting posits an independent public interest and common good, where voting (like citizenship) serves as an instrument of that good.[150] The liberal model denies the existence of any universal common good and instead values the right to vote as a civil right, a fundamental expression of individual freedom and agency.[151]

Part II briefly analyzes the early conceptual foundations of American suffrage and the subsequent transformations that directly implicate the question of noncitizen voting. This examination demonstrates that prohibitions on noncitizen voting rely on an outdated conception of franchise rights—a conception that is increasingly without constitutional marrow or public policy logic.

A. Consent of the Governors

The idea of voting as a fundamental or natural right was not lost on the Constitution's framers. In the tradition of John Locke, some like Ben Franklin and Ethan Allen argued that the franchise should be broadly extended, keeping with the maxim of social contract theory that law must be assented to by all in order to bind all and suspended only in the most compelling of circumstances.[152] Such voices, however, quickly surrendered to the idea that the right to vote in federal elections should be tied to one's standing in the community.[153] As discussed in Part I, this early idea of standing included

149. *See* Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 23–24 (1990).

150. *Id.*; *see* Michelman, *supra* note 21, at 445–46; *see also* SHKLAR, *supra* note 13, at 5, 13.

151. *See* Michelman, *supra* note 21, at 445–46.

152. KEYSSAR, *supra* note 21, at 12.

153. *Id.* at 12–13.

factors like paying taxes, owning property, residency, gender, and race.[154] Most indicative of this thinking about the franchise was the idea that only property-owning white men had sufficient stake in the community to vote.[155] Indeed, in the first presidential election of 1789, only 6 percent of the population was enfranchised, with fewer than 2 percent casting ballots.[156]

The subsequent history of the nation's suffrage laws has been controlled by three distinct, but interrelated, questions that reflect the tension between republican and liberal theories: First, who is excluded from the polls? Second, who controls the decision, and what are the limits of state or federal control over the composition of the body politic? Third, what role does the Supreme Court have in regulating elections and enfranchising voters?

Instead of judicial or congressional intervention, the slow and painful expansion of suffrage has come largely as a result of popular movements, particularly in the wake of the Civil War and world wars.[157] The Fourteenth Amendment—despite using the words "right to vote" for the first time in Section 2 and penalizing Southern states that prevented African American citizens from exercising that right—tacitly recognized the right of states to erect racial barriers.[158] African Americans instead had to wait for the Fifteenth Amendment's promise of electoral equality, a promise still being fully realized, while women had to wait fifty years longer, until World War I, for enfranchisement through the Nineteenth Amendment.[159] As Alexander Keyssar explained, the reason the Fifteenth Amendment's framers chose to limit the right of suffrage to African Americans was because "[t]hey wanted to retain the power to limit the political participation of the Irish and Chinese, Native Americans, and the increasingly visible clusters of illiterate and semiliterate workers massing in the nation's cities."[160] Thus the promise of truly liberalized voting—the promise of a Fifteenth Amendment that could have enfranchised women and noncitizens—remained restricted by more republican limitations on the franchise.[161] Such limitations were imposed to instrumentally serve

154. *Supra* note 62 and accompanying text.

155. *See* KEYSSAR, *supra* note 21, at 11–12; Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337 (1989) (observing that property restrictions were part of "a self-contained scheme of understandings about the proper order of the polity which developed at a particular moment in American history").

156. *See Expansion of Rights and Liberties: The Right of Suffrage*, U.S. ARCHIVES, http://www.archives.gov/exhibits/charters/charters_of_freedom_13.html; Bonnie K. Goodman, *Overviews & Chronologies: 1789*, PRESIDENTIAL CAMPAIGNS & ELECTIONS REFERENCE, http://presidentialcampaignselectionsreference.wordpress.com/overviews/18th-century/1789-overviews.

157. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003); *see also* Raskin, *supra* note 13.

158. KEYSSAR, *supra* note 21, at 90–91.

159. U.S. CONST. amend. XV, XIX.

160. KEYSSAR, *supra* note 21, at 102.

161. *See id.* at 102–04 (describing competing proposals for a broader Fifteenth Amendment that would have eliminated voting restrictions based on classifications like nativity and gender).

common-good ends like social and political stability, moral values, and particular political philosophies.[162]

B. The Equal Protection Revolution in Voting

While the Burger Court used equal protection to extend broad social and economic rights for noncitizens, the Warren Court used it to reject republican constructions of the body politic that imposed limitations on the franchise.[163] The result, beginning in the late 1960s, was a dramatic shift in who could participate in the franchise and the Court's role as overseer and regulator of the electoral process to ensure the equality of voters.[164]

Three strands of the Supreme Court's jurisprudence are particularly relevant to the question of noncitizen voting: the "one person, one vote" apportionment cases, judicial challenges to state residency restrictions on voting, and challenges to the use of social or economic standing as voting requirements. The dramatic first step came in the 1962 case of *Baker v. Carr*, which held that a political malapportionment claim was justiciable—that a state's lopsided apportionment of legislative seats among the population could deny equal protection of the law to voters.[165] Considered in light of centuries of deference to state electoral decisions under the banner of state sovereignty, *Baker* was nothing less than tectonic in giving the courts a central role regulating the body politic. As with the decisions that followed, claims of broad state sovereignty in areas that raised equal protection concerns were recast as "antithetical to constitutional liberty."[166]

Two years after *Baker*, *Reynolds v. Sims* marked the Supreme Court's next step, holding that the "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature."[167] *Reynolds*'s holding was distilled and embalmed as "one person, one vote."[168] The equality of individual votes could only be achieved, the Court reasoned, through the creation of equipopulous districts (where the counted population included and continues to include noncitizens).[169] The explicit goal of such an electoral architecture was representation reflective of the will of the community, rather than a representation of interests.[170]

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162. *See* Karlan, *supra* note 157, at 1346 (describing the instrumental extensions of suffrage during and after wartime).

163. ALEINIKOFF, *supra* note 24, at 6.

164. *Id.* at 6, 41.

165. Baker v. Carr, 369 U.S. 186 (1962).

166. Michelman, *supra* note 21, at 472.

167. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

168. *See id.* at 558.

169. *Id.* at 567–68; *see also Question 16*, *supra* note 31 (providing a description of census policy regarding noncitizens).

170. *Reynolds*, 377 U.S. 579–80.

Baker and *Reynolds* swung open the door for judicial expeditions into the "political thicket."[171] In 1966, the Warren Court dealt another blow to state rights in *Harper v. Virginia Board of Elections*, holding that Virginia could not impose a poll tax under the Equal Protection Clause and thereby extending to states the Twenty-Fourth Amendment's prohibition against federal poll taxes.[172] *Harper*, like *Baker*, was a watershed moment, representing the first time the Court used the guarantee of equal protection to reject a state franchise law.[173] As scholar Frank Michelman noted, prior to *Harper*, the Supreme Court's approach to state franchise exclusions "suggest[ed] a judicial conception of states as solidaristically deliberative polities, entitled as such to regulate their [own] membership."[174] After *Harper*, the courts assumed a clear role in shaping that body politic.

The Supreme Court further expanded its reach into the question of who could vote by rejecting state residency requirements intended to ensure that voters had a sufficient stake in the community's affairs. In 1965, *Carrington v. Rash* invalidated a Texas law that excluded from the state's electorate residents who had initially moved to town on military duty.[175] Texas claimed "a valid interest in protecting the franchise from infiltration by transients" and preserving its right to shape the electorate.[176] The Court, however, held that equal protection mandated that the military members be allowed to vote in the town if they were bona fide residents.[177]

Seven years later in *Dunn v. Blumstein*, Tennessee tried to preserve its residency restrictions.[178] The state claimed that requiring voters to be residents for one year before voting ensured they were established members of the community, confirmed they had a common interest in the community's affairs, and created more intelligent constituencies.[179] The Court rejected each argument. In doing so, it further affirmed the status of voting as a "fundamental right"[180]—rejecting the republican model of voting rights in favor of a liberal vision of equal participation for those subject to the community's laws and taxes.

Finally, both the 1965 Voting Rights Act (VRA) and subsequent judicial opinions rejected a series of additional barriers to entry into the political community, such as literacy, financial status, and language. In 1966, the

171. *See* Colgrove v. Green, 328 U.S. 549, 556 (1946) (finding that a challenge to a political gerrymander was nonjusticiable and observing that "[c]ourts ought not to enter this political thicket").
172. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).
173. Michelman, *supra* note 21, at 458.
174. *Id.*
175. Carrington v. Rash, 380 U.S. 89 (1965).
176. *Id.* at 93.
177. *Id.* at 93–94.
178. Dunn v. Blumstein, 405 U.S. 330 (1972).
179. *Id.* at 354–56.
180. *See* KEYSSAR, *supra* note 21, at 304.

Supreme Court held in *South Carolina v. Katzenbach* that the VRA's suspension of "tests or devices," including both poll taxes and literacy tests, was constitutional.[181] Less than a year later in *Katzenbach v. Morgan*, a case framed in equal protection language, the Court upheld the VRA's requirement that no person with a sixth grade education be denied the franchise because of "his inability to read, write, understand, or interpret any matter in the English language."[182] The Court found such language "'plainly adapted' to furthering these aims of the Equal Protection Clause."[183] Still more dramatically, the 1975 VRA Amendments rejected English-only election materials in favor of bilingual ballots in areas with high concentrations of non-native speakers.[184]

In each case, the Supreme Court constructed constitutional fences around state power to regulate elections, rejecting the argument that Congress had impermissibly "encroach[ed] on an area reserved to the States by the Constitution."[185] Voting rights, once in faithful service of a shared common good, were now protected as individual civil rights, which in turn were part of broader constitutional mandates.[186] Thus in *Morgan*, the Court wrote that the VRA had permissibly enabled minority group members to "better . . . obtain perfect equality of civil rights and the equal protection of the laws."[187] Or, as Michelman wrote two decades later, "[i]nsofar as engagement in political self-government is deemed constitutive of personal freedom, a given person's political disenfranchisement is prima facie highly suspect, demanding justification."[188]

Combined with the citizenship jurisprudence and naturalization legislation discussed in Part II, the voting-rights cases fundamentally changed the composition of the body politic. Voters now included individuals born and raised in a foreign country, with American parents but no other domestic ties.[189] They could serve in foreign armies, vote in foreign elections, and spend the vast majority of their adult lives on foreign soil.[190] They did not need to speak English, demonstrate financial means, or have the slightest political literacy. Indeed, a 2011 *Newsweek* magazine survey showed that nearly 40 percent of U.S. citizens failed the official citizenship test, with 73 percent unaware of the

181. South Carolina v. Katzenbach, 383 U.S. 301 (1966).
182. Katzenbach v. Morgan, 384 U.S. 641, 643 n.1 (1966).
183. *Id.* at 652.
184. Voting Rights Act Amendments of 1975, Pub. L. 94-73, 89 Stat. 400.
185. *South Carolina v. Katzenbach*, 383 U.S. at 323.
186. *See* KEYSSAR, *supra* note 21, at 282.
187. *Morgan*, 384 U.S. at 653 (internal quotation marks omitted).
188. Michelman, *supra* note 21, at 457.
189. *See* 8 U.S.C. § 1401 (2012).
190. *See id.*; *supra* notes 112–15 and accompanying text.

reasons for the Cold War and 70 percent ignorant that the Constitution is the supreme law of the land.[191]

In just over two hundred years, America had travelled far from that first election where just 6 percent of residents were enfranchised.[192] And it had come a long way from embracing the "model citizen" as a marker of the political community. As Michelman noted looking back, "the solidaristic-republican world evoked by those past decisions has vanished from respectable American constitutional discourse."[193]

III.
JUSTIFICATIONS FOR DENYING THE FRANCHISE TO LAWFUL PERMANENT RESIDENTS

Despite the dilution of citizenship as a locus of constitutional rights and the rejection of requirements such as stake or standing to secure voting rights, prohibitions on noncitizen voting remain one of the few areas where a "solidaristic-republican" worldview survives.[194] Yet for three decades, there has been little judicial, political, or scholarly momentum to reconsider such restrictions.[195] Recent lower-court decisions may provide such impetus. Such decisions have distinguished between lawful permanent residents and other noncitizens for the purpose of campaign-finance restrictions and Second Amendment rights, among others, opening the door for more ambitious voting challenges.[196]

Opponents traditionally have made three arguments against expanding suffrage to noncitizens through the courts. These arguments draw their most forceful intellectual content from scholar Jamin Raskin.[197] First, opponents claim that mandatory voting by legal residents is foreclosed by the Supreme Court's equal protection decisions regarding "alienage" and democratic participation.[198] State control over questions of self-governance, they argue, either is a compelling interest that overcomes strict scrutiny, or, in the alternative, merits lesser constitutional scrutiny for alienage classifications.[199] Frequently, these arguments invoke state sovereignty canons that the Supreme

191. Rob Manker, *Newsweek Citizenship Test: Man, We're Stupid*, CHI. TRIB. (March 22, 2011), http://articles.chicagotribune.com/2011-03-22/news/ct-talk-small-talk-0323-20110322-16_1_citizenship-test-shoe-shopping-newsweek.

192. *See supra* note 156 and accompanying text.

193. Michelman, *supra* note 21, at 458.

194. *See* Raskin, *supra* note 13, at 1445–46.

195. *See supra* notes 14 & 15 and accompanying text; KEYSSAR, *supra* note 21, at 310–11.

196. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012); Bluman v. FEC, 800 F. Supp. 2d 281, 290–91 (D.D.C. 2011).

197. *See* Raskin, *supra* note 13.

198. *Id.* at 1432–33.

199. *Id.*; *see also* Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); Foley v. Connelie, 435 U.S. 291, 296–97 (1978); Sugarman v. Dougall, 413 U.S. 634, 647–48 (1973).

Court has rejected when protecting suspect classes and fundamental rights in other Fourteenth Amendment contexts.[200] Second, opponents argue that Section 2 of the Fourteenth Amendment explicitly or implicitly sanctions restrictions on noncitizen voting—analogizing to the legitimacy of felon disenfranchisement upheld in *Richardson v. Ramirez*.[201] Finally, they contend that demands of legitimacy and popular sovereignty require that suffrage expand through popular movements and political will—through the march of history instead of the gavel.[202]

A. The Equal Protection Argument

As previously discussed, the Burger Court sweepingly de-emphasized the rights of citizens in favor of the rights of persons, but explicitly carved out exceptions to equal treatment of noncitizens when dealing with restrictions on governmental and quasi-governmental participation.[203] In *Sugarman v. Dougall*, the Court struck down a New York civil service law that restricted lawful permanent residents from city employment.[204] But in so doing, it made a rare direct reference to noncitizen voting, citing the Tenth Amendment power to "preserve the basic conception of a political community"[205]:

> 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.[206]

To begin by stating the obvious, *Sugarman*'s dictum confirms that the Supreme Court has never explicitly considered the constitutionality of restrictions on noncitizen voting. It does nothing to precedentially foreclose a future challenge by lawful permanent residents. The language of *Sugarman*—"has never held" instead of "does not hold"—shows just how opaque the Supreme Court's opinions have been with regards to noncitizen enfranchisement.[207] And the cases the Supreme Court cites as "implicit" authority for its dicta—cases like *Kramer*, *Reynolds*, *Harper*, and *Carrington*—say nothing more convincing or

200. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (finding that the Equal Protection and Due Process Clauses "reach every exercise of state authority"); Baker v. Carr, 369 U.S. 186, 229 (1962) (deciding claims even when they reach "matters of state governmental organization"); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (striking down a drawing of municipal boundaries that discriminatorily impaired voting rights).

201. *See* Richardson v. Ramirez, 418 U.S. 24 (1974); Raskin, *supra* note 13, at 1435.

202. *See* Raskin, *supra* note 13, at 1439–40.

203. *See supra* note 131 and accompanying text.

204. *Sugarman*, 413 U.S. 634.

205. *Id.* at 647 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)) (internal quotation marks omitted).

206. *Id.* at 648–49.

207. *Id.*

precedential about the question.[208] Instead, the holdings of those cases restricted state sovereignty in defining political membership and affirmed the Supreme Court's newfound role as an equal protection electoral regulator.[209]

More substantively, it is unclear whether the Supreme Court believes that state restrictions on noncitizen voting should survive strict scrutiny because of compelling state interests or because a lower standard of scrutiny should be applied due to the state's prerogative to define its political community. Footnote nine in *Kramer v. Union School District* (1969) suggests the former approach (striking down property ownership requirements to vote in school district elections): "if the basis of classification is inherently suspect, such as race, [a] statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation."[210] However, the Supreme Court has suggested lower scrutiny in cases like *Foley*, *Sugarman*, and *Cabell.*[211]

What are the compelling state interests that may justify restrictions on noncitizen voting under a strict scrutiny standard? Frequently invoked candidates are state rights and state control of their body politics.[212] Such structural and textual arguments maintain that states by their very nature have broad power to define their voters.[213] The 1970 case of *Oregon v. Mitchell*—holding that Congress could not force states to reduce the voting age to eighteen for state and local elections—provides the strongest argument in favor of state prerogatives to define their political community.[214] There, the Supreme Court specifically recognized a state zone of autonomy over elections and voter qualifications, so long as state laws did not discriminate based on factors like race.[215]

In recent decades, the Supreme Court has repeatedly emphasized that such relative autonomy ends when it comes to electoral disenfranchisement or dilution of suspect classes, using either the Fourteenth Amendment or Section 5 of the Voting Rights Act to cabin state discretion.[216] To distinguish *Oregon*, what makes lawful noncitizen residents different from eighteen-year-olds is

208. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 625 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–67 (1966); Carrington v. Rash, 380 U.S. 89, 91, 93–94 (1965); Reynolds v. Sims, 377 U.S. 533, 567–68 (1964).

209. *See Kramer*, 395 U.S. at 621; *Harper*, 383 U.S. at 663; *Carrington*, 380 U.S. at 89; *Reynolds*, 377 U.S. at 533.

210. *Cf. Kramer*, 395 U.S. at 628 n.9.

211. Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); Foley v. Connelie, 435 U.S. 291, 296–97 (1978); *Sugarman*, 413 U.S. at 647–48.

212. These arguments are most commonly captured in the oft-repeated phrase "the State's broad power to define its political community." *See, e.g.*, *Sugarman*, 413 U.S. at 643.

213. *See id.*; *see also* ALEINIKOFF, *supra* note 24, at 131.

214. *See* Oregon v. Mitchell, 400 U.S. 112, 130 (1970).

215. *Id.* at 126–27.

216. *See supra* Parts I & II. The future of Section 5 of the Voting Rights Act was cast into doubt last year by *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013), which made the section's requirements inoperable.

precisely their long-recognized status as a suspect class (when subject to *state* discriminatory classifications) deserving of heightened judicial protection.[217] As discussed in the contexts of citizenship and voting rights, the Supreme Court's post-1965 jurisprudence—including the protection of suspect classes and voting as a fundamental right—has significantly curtailed state authority in elections and voter registration.[218] More recently, in *Romer v. Evans*, the Supreme Court observed that depriving certain groups (like polygamists and gays) of the right to vote because of their "status" must face strict scrutiny, with survival of that scrutiny "a most doubtful outcome."[219] The *Romer* Court specifically disavowed the 1890 case of *Davis v. Beason* that had upheld an Idaho statute "denying Mormons, polygamists, and advocates of polygamy the right to vote."[220]

Apart from state rights and state sovereignty, it is difficult to imagine other state interests that the Supreme Court would recognize as compelling. The candidates for such interests—often cited in conservative political treatises on the subject[221]—are those the Supreme Court long ago rejected as far less than compelling: loyalty, political literacy, stake, language competency, and length of residency.[222]

There is little reason why such arguments should have more sway in the context of voting by lawful permanent residents, particularly given the decades of naturalization rulings that created citizen voters who are explicitly allowed to have divided loyalties and little exposure to America at all.[223] Requirements of political and language literacy have been firmly rejected by the VRA and subsequent judicial interpretations.[224] And the fear that a flood of new voters into the system will destabilize the political order—a fear repeated throughout

217. *Compare* Graham v. Richardson, 403 U.S. 365, 374–75 (1971) ("[A]n alien as well as a citizen is a 'person' for equal protection purposes."), *with Oregon*, 400 U.S. at 125–26 (holding by implication states may discriminate between groups of people when they are not suspect classes).

218. *See supra* Parts I & II.

219. Romer v. Evans, 517 U.S. 620, 634 (1996).

220. *Id.*; *see also* Davis v. Beason, 133 U.S. 333, 346–47 (1890). In non-electoral contexts, the Supreme Court has further weakened state protections under the Tenth Amendment, finding generally that the Amendment no longer safeguards the sovereignty of states as abstract political entities, but instead offers more limited protection from forced participation in administering federal programs. *See generally* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

221. *See* RENSHON, *supra* note 22; STANLEY RENSHON, CENT. FOR IMMIGR. STUD., THE DEBATE OVER NONCITIZEN VOTING: A PRIMER (April 2008), *available at* http://www.cis.org/sites/cis.org/files/articles/2008/back408.pdf; Editorial, *A Citizen's Right*, N.Y. TIMES (Apr. 19, 2004), http://www.nytimes.com/2004/04/19/opinion/a-citizen-s-right.html ("Extending the most important benefits of citizenship to those who still hold their first allegiance to another country seems counterproductive.").

222. *See generally supra* Part II.

223. *See supra* notes 112–16 and accompanying text.

224. *See supra* note 184 and accompanying text.

history when new proposals for enfranchisement were announced—has little empirical basis.[225]

Given a world of increasingly permeable national borders, many new immigrants are already versed in "American" ways and civics knowledge. In the global information marketplace, citizens of other countries read about America daily and are inundated with American culture, politics, and economics. Strikingly, more than 92 percent of candidates for naturalization pass the citizenship test, a far higher percentage than citizens actually born here.[226] And unlike American-born citizens, who passively receive entrance into the political community through nothing more than the accident of birth, permanent residents have deliberately entered into a long-term relationship with the nation.

If prohibitions against voting by lawful permanent residents cannot overcome heightened scrutiny, should they instead be subject to a mere rational basis review under which a court merely assesses whether the restrictions are rationally related to a legitimate governmental interest? As *Sugarman* observed, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[227]

In 1982, nine years after *Sugarman*, the Supreme Court in dicta suggested that the demands of democratic self-governance may justify lower scrutiny for certain state restrictions based on alienage. *Cabell v. Chavez-Salido*, narrowly upholding a California law that restricted employment as a peace officer to citizens,[228] observed:

> The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.[229]

Two things are immediately conspicuous about the passage. First, the claim that the exclusion of noncitizens is a "necessary consequence" of a community's self-definition is historically untrue, evident in the decades of

225. *See* KEYSSAR, *supra* note 21, at 49, 311; ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 30 (1987).

226. *Applicant Performance on the Naturalization Test*, USCIS, http://www.uscis.gov/us-citizenship/naturalization-test/applicant-performance-naturalization-test (last updated Oct. 17, 2013). Of course, one reason for the discrepancy in performance between naturalization applicants and citizens is that the applicants had ample opportunity, and motivation, to study.

227. Sugarman v. Dougall, 413 U.S. 634, 648 (1973); *see also* Foley v. Connelie, 435 U.S. 291, 302 (1978) ("When the State is so acting, it need justify its discriminatory classifications only by showing some rational relationship between its interest in preserving the political community and the classification it employs.").

228. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

229. *Id.* at 439–40.

early state experiments with noncitizen enfranchisement,[230] in addition to contemporary examples of noncitizen voting in a host of other democratic countries.[231] Second, the statement that "[b]y definition, aliens are outsiders to the national community" is little more than linguistic sleight of hand. Indeed, framing the question in terms of "aliens" suggests necessary democratic alienation.[232] But framed in the context of *lawful permanent residents*—those with legal permission to be living, working, and studying inside the nation's borders with a path to citizenship—the Supreme Court's analysis merely begs the question.

Nor is it persuasive to suggest that a rational scheme that enfranchises lawful permanent residents meeting certain residency requirements would necessarily destroy the very meaning of a body politic, as *Cabell* suggests.[233] Even under such a regime—outlined in Part IV—states would be allowed to impose certain durational residency restrictions that could survive an equal protection analysis as narrowly tailored to compelling state interests. The result would not be universal suffrage but rational, constitutionally based suffrage.

Returning to the logic of the Supreme Court in *Foley*, which upheld citizenship restrictions for police officers, the strongest argument for applying lower scrutiny to prohibitions on resident voting is the rationale that only citizens should be in positions of *governance* or *authority* because of the power that such positions can entail.[234] But *Foley* and its progeny, like *Cabell*, concerned a particular kind of noncitizen involvement in the machinery of government as employees or office holders who wield direct "coercive" power.[235] In the case of teachers, police officers, and peace officers, the Supreme Court's concern was not with democratic participation in a vacuum, or with abstractions about the body politic, but with the type of influence that such positions entail in "exercising the functions of government"—the very same concerns that originally animated the Constitution's citizenship limitations on federal candidates for office.[236]

Although the Supreme Court's dicta in *Sugarman*, *Foley*, and *Cabell* often conflate these circumstances with voting, fundamental differences exist between activities like holding office and exercising the franchise to elect a citizen who will possess the power of representation.[237] Such differences lead to different state interests in excluding noncitizens. Enfranchisement protects

230. *See* Rosberg, *supra* note 15, at 1098.

231. *See* HAYDUK, *supra* note 39, at 5; KEYSSAR, *supra* note 21, at 310.

232. *See* Johnson, *supra* note 49, at 264.

233. *See generally Cabell*, 454 U.S. at 439–40.

234. *See id.* at 443–45.

235. *See id.* at 444 ("*Foley* made clear that a State may limit the exercise of the sovereign's coercive police powers over the members of the community to citizens.").

236. *See id.*; Ambach v. Norwick, 441 U.S. 68, 75 (concerning teachers); U.S. CONST. art. I, § 2; U.S. CONST. art. II, § 1.

237. *See supra* note 199.

the civil rights and dignitary interests of individuals to ensure they are counted in the democratic process of choosing representation.[238] More practically, it facilitates the construction of pluralistic coalitions and greater political accountability to protect the interests of noncitizens. But that remains conceptually and practically distinct from the direct and coercive power the Supreme Court has been explicitly concerned with in its "democratic participation" cases.[239] Moreover, the concerns with noncitizen participation must be counterbalanced with the constitutional demands of a marginalized and politically powerless group representing nearly 5 percent of voting age adults in America.[240]

Two final arguments merit attention in the equal protection context. First, a lower level of scrutiny may apply to federal franchise restrictions than to state controls. As the Supreme Court held in *Mathews v. Diaz*, an equal protection analysis based on alienage may differ when applied to federal rules because of Congress's "broad power over naturalization and immigration."[241] Thus, state limitations on the franchise may be rejected while restrictions in federal elections are upheld. But *Mathews*, upholding a law that imposed limited residency requirements on noncitizens to receive public benefits, did not concern the blanket restriction of a fundamental right like voting.[242] As Gerald Rosberg has observed, the primacy of the right to vote may arguably override the additional federal interest.[243] "We could, in other words, grant the right to vote to resident aliens and still leave them readily distinguishable from other citizens."[244]

Second, one may suggest that a less stringent scrutiny should apply to noncitizen voting restrictions because noncitizens are able to naturalize in five years and gain full voting rights.[245] That is, noncitizen status is not immutable, and noncitizens should not receive strict scrutiny as a "discrete and insular" class.[246] But immutability has never been required of "alienage" to receive strict scrutiny in other contexts, such as state restrictions on welfare benefits and the licensing of lawyers and engineers, among other discriminatory classifications.[247] And as a class, those here for fewer than five years possess an

238. *See* KEYSSAR, *supra* note 21, at 282.

239. *See generally Cabell*, 454 U.S. 432; Foley v. Connelie, 435 U.S. 291 (1978); Sugarman v. Dougall, 413 U.S. 634 (1973).

240. *See* HAYDUK, *supra* note 39, at 66; RYTINA, *supra* note 38.

241. Mathews v. Diaz, 426 U.S. 67, 79–80, 84–85 (1976).

242. *See id.* at 69.

243. *See* Rosberg, *supra* note 15, at 1134.

244. *Id.*

245. 8 U.S.C. § 1427 (2012).

246. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (declining to apply strict scrutiny to a statutory distinction between parents, children, and siblings who "do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group").

247. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (observing that "[a]liens as a class are a prime example of a 'discrete and insular' minority"); *supra* notes 124–27.

immutable status in the sense that there is nothing they can do to change their citizenship status during that time. Finally, as the Supreme Court has repeatedly observed, "aliens" remain a suspect class in large part due to their political powerlessness, demanding "extraordinary protection from the majoritarian political process."[248]

Despite the tenuous logic of the dicta in *Sugarman* and *Cabell*, lower courts have treated their suggestions as largely beyond reproach, even if such opinions have been rare.[249] Most notably, in 1973, the Colorado Supreme Court, citing *Sugarman*, rejected a lawful permanent resident's enfranchisement challenge while holding that "citizenship with respect to the franchise is not a suspect classification."[250] A year later, a California state appellate court rejected a similar claim, using categorical language that suggests the tenuousness of the underlying logic: "[I]t is not true that California is required to look behind the fact of alienage to determine the reason for it."[251]

But more recently, lower courts have suggested that a different level of scrutiny altogether may be appropriate for *lawful permanent residents* than other noncitizens such as undocumented immigrants and temporary non-immigrant visa holders like tourists and business visitors.[252] They suggest a sliding scale of noncitizen rights depending on the level of attachment to the national community and the nature of the right at stake.[253] Ironically, such cases invoke many of the concepts of loyalty, stake, and standing that were originally used to prohibit immigrants from the polls. The decisions have explicitly recognized that lawful permanent residents already participate in the social, economic, and political fabric of the nation. Thus, they may have more grounds to claim participatory and other constitutional rights.[254]

Bluman v. FEC, the D.C. District Court decision affirmed in 2012 by the Supreme Court, upheld a federal law that prohibited campaign contributions from *foreign nationals*. The district court panel cited the traditional arguments in *Sugarman* and *Cabell* for limiting democratic self-governance to citizens.[255] But critically, lawful permanent residents are excluded from the definition of

248. Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

249. *See* Skafte v. Rorex, 553 P.2d 830, 832 (Colo. 1976); Padilla v. Allison, 113 Cal. Rptr. 582 (Ct. App. 1974); People v. Rodriguez, 111 Cal. Rptr. 238 (Ct. App. 1973).

250. *Skafte*, 553 P.2d at 832.

251. *Padilla*, 113 Cal. Rptr. at 584.

252. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012); Fletcher v. Haas, 851 F. Supp. 2d 287, 299 (D. Mass. 2012) (striking down gun ownership restrictions on lawful permanent residents); Bluman v. FEC, 800 F. Supp. 2d 281, 290–91 (D.D.C. 2011); People v. Bounasri, 915 N.Y.S.2d 921, 924 (N.Y. City Ct. 2011) (using the Equal Protection Clause to invalidate gun ownership restrictions on lawful permanent residents and noting similar decisions in Michigan, Nevada, and California); KEYSSAR, *supra* note 21, at 310.

253. *See Huitron-Guizar*, 678 F.3d at 1166.

254. *See supra* note 252.

255. *Bluman*, 800 F. Supp. 2d 281, 286–87.

"foreign nationals" under the Federal Election Campaign Act Amendments of 1974.[256] Indeed, such residents have long been able to donate to campaigns directly.

Most interestingly, the D.C. court mused that congressional attempts to extend the ban to lawful permanent residents would "raise substantial questions" not present with other noncitizens.[257] It is worthwhile to present the court's language in detail:

> Lawful permanent residents have a long-term stake in the flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community . . . Temporary resident foreign citizens by definition have primary loyalty to other national political communities . . . . Apart from that, lawful permanent residents share important rights and obligations with citizens; for example, lawful permanent residents may—and do, in large numbers—serve in the United States military.[258]

As *Bluman* suggests, citizenship alone poorly captures the national ties that we care about in democratic participation—ties that are better expressed in a robust notion of residency.[259] Instead, heightened scrutiny should apply to restrictions on lawful permanent residents, even when those restrictions are imposed by the federal instead of state government.

It is also significant that instead of equal protection the *Bluman* court used a First Amendment strict scrutiny framework to uphold the contribution bans on foreign nationals. *Bluman* found a compelling state interest in limiting certain kinds of foreign money in politics.[260] This stands in contrast to the Supreme Court's approach in cases like *Sugarman* and *Cabell.*[261]

Could lawful permanent residents use a similar First Amendment approach to challenge their disenfranchisement based on their *expressive* right to vote? Here, a path forward may lie in Justice Kennedy's concurrence in *Vieth v. Jubelirer*, which held political gerrymandering claims to be non-justiciable.[262] Under Kennedy's First Amendment analysis, the Court asks whether a law burdens the representational right of voters for reasons of "ideology, beliefs, or political association."[263] Extended to the question of

256. *Id.* at 290–91.

257. *Id.* at 292.

258. *Id.* at 291.

259. *See generally* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 202 (2006) (arguing for an approach, including the extension of voting rights, that "treats new immigrants as if they will become citizens . . . [and] recognizes the line between us and them as a permeable border that many lawful immigrants will cross in the natural course of time").

260. *Bluman*, 800 F. Supp. 2d at 288.

261. *Id.* at 285.

262. Vieth v. Jubelirer, 541 U.S. 267, 305–06 (2004) (plurality holding); *id.* at 314 (Kennedy, J., concurring).

263. *Id.* at 315 (Kennedy, J. concurring).

prohibitions on voting itself (rather than mere restrictions on the power of an individual's vote), a court would ask whether the blanket exclusion of lawful permanent residents from the political process so burdens their expressive rights as to violate the First Amendment. At the very least, such a possibility represents a way around roadblocks facing equal protection claims.

As the *Bluman* court noted, little meaningful distinction exists under the First Amendment between democratic activities like political speech through campaign donations and voting.[264] The Supreme Court thus observed:

> [Plaintiffs] acknowledge that they do not have the right to vote in U.S. elections, but they contend that the right to speak about elections is different from the right to participate in elections. But in this case, that is not a clear dichotomy. When an expressive act is directly targeted at influencing the outcome of an election, it is both speech and participation in democratic self-government. Spending money to contribute to a candidate or party or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government.[265]

Bluman, while in tension with the Supreme Court's language in *Foley* and *Sugarman*, is consistent with the historical changes in the understanding of citizenship and voting discussed in Parts I and II. It suggests that lawful permanent residents may lay a constitutional claim to participation "in the process of democratic self-government," including voting. Regardless of whether such a claim is conceived under the First Amendment or Equal Protection Clause, *Bluman* shows just how wide open the judicial door may be for such residents to credibly challenge state and federal restrictions.[266]

B. The Fourteenth Amendment, Section 2

Even in the dicta discussed above, the Supreme Court has not invoked Section 2 of the Fourteenth Amendment to support limitations on noncitizen voting, instead limiting its discussion to the equal protection framework and state sovereignty concerns of Section 1.[267] Yet some commentators like Jamin Raskin have cogently argued that the language of Section 2 provides "constitutional permission for states to impose citizenship as a voting

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264. *Bluman*, 800 F. Supp. 2d at 289–90.

265. *Id.*

266. In addition to a challenge based on facial discrimination under the Equal Protection Clause or First Amendment, prohibitions against noncitizen enfranchisement come in tension with the Supreme Court's "one person, one vote" logic expressed in *Reynolds*. *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964). In noncitizen-heavy districts (where noncitizens are counted for apportionment purposes), far fewer citizen votes are required to win than in a citizen-heavy district. Such a reality cuts at the very foundation of the *Reynolds* framework.

267. *See supra* note 199.

qualification," similar to the permissibility of felon disenfranchisement.[268] The Section's relevant language reads:

> But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, *and* citizens of the United States, or 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.[269]

Raskin correctly observes that Section 2 tacitly recognizes a state's ability to exclude both citizens and noncitizens from the electorate, with different penalties depending on who is excluded.[270] There are, however, three problems with a conclusion that Section 2 allows for blanket prohibitions on noncitizen voting when such prohibitions would otherwise violate the equal protection precepts of Section 1 (or First Amendment rights).

First, such a conclusion conflicts with the most natural reading of the relationship between the two sections in light of the revolution in the Supreme Court's equal protection jurisprudence. In keeping with such jurisprudence, Section 2 recognizes situations when the exclusion of *certain* citizens and noncitizens may meet a strict scrutiny or rational basis review, depending on the type of individual excluded. When such exclusions are otherwise constitutionally permissible, Section 2 provides for an adjustment of representation.[271]

Cases decided before the Supreme Court's robust equal protection jurisprudence came to a very different conclusion. Thus, in *Minor v. Happersett*, the Supreme Court interpreted Section 2 as giving states the power to deny the vote to women.[272] It subsequently noted that the Fourteenth Amendment did not guarantee African Americans the right to vote, necessitating the Fifteenth Amendment's guarantees.[273] But recent decades of equal protection jurisprudence have fundamentally changed the relationship between the two clauses.[274] Few would argue that were a state to disenfranchise the disabled, homosexual citizens, or the poor, a constitutional amendment would be necessary to secure their rights.[275] Even if such state action were not necessarily discriminatory against suspect classes, it would be a prime

268. Raskin, *supra* note 13, at 1435.
269. U.S. CONST. amend. XIV, § 2 (emphasis added).
270. Raskin, *supra* note 13, at 1435–36.
271. *See id.*; Rosberg, *supra* note 15, at 1103.
272. Minor v. Happersett, 88 U.S. 162, 174 (1875).
273. *See id.* at 174–75.
274. *See* Rosberg, *supra* note 15, at 1103–04.
275. *See* Romer v. Evans, 517 U.S. 620, 634, 636–37 (1996).

candidate for enhanced equal protection scrutiny.[276] Indeed, a reliance on Section 2 to argue for broad state disenfranchisement powers—when such disenfranchisements would run afoul of Section 1—largely ignores the greater judicial role in securing electoral equality, beginning with the 1960s, when the Supreme Court deployed the Equal Protection Clause in a number of areas once left to state discretion.

Even in *Skafte*, upholding the disenfranchisement of a lawful permanent resident, the Colorado Supreme Court recognized the limitations of Section 2, finding the clause helpful historically but no longer controlling:

> [T]he implicit sanction of a citizenship requirement contained in section 2 for the elections there listed does not warrant a conclusion that the Equal Protection Clause is inapplicable in the instant case. Indeed, the United States Supreme Court has rejected the general proposition that section 2 was intended to supplant the Equal Protection Clause in the area of voting rights.[277]

Thus, under Section 1, a court asks whether the state interest claimed to justify the exclusion is "legitimate and substantial" and whether the means adopted are necessary and narrowly tailored to reach the goal.[278] If the requirements of Section 1 are met, Section 2 reduces the basis of representation accordingly. It is far different, however, to say that Section 2 gives states the unreviewable power for blanket disenfranchisement of entire classes of citizens or noncitizens. Even in the case of felon disenfranchisement laws discussed below, the Supreme Court has found that Section 2 does not permit racial discrimination that would otherwise violate precepts of Section 1.[279]

Second, Raskin's reading of Section 2 runs counter to the logic and history of the Fourteenth Amendment's drafting. Section 2 forms part of a scheme intended to enfranchise more, not less, than what was permissible at the time—designed specifically to force Southern states to enfranchise African American voters or pay a stiff penalty in the loss of representation.[280] To suggest that instead of limiting states, the section should be read to permit states broader powers than they otherwise had under Section 1 is difficult to fit within that framework. From as far back as the 1927 case of *Nixon v. Herndon*—which rejected restrictions that kept African Americans from voting in Texas primaries—the Supreme Court has recognized that the Fourteenth Amendment provides meaningful limits on state voting restrictions.[281] In

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276. *See id.* For another example, see the Supreme Court's application of heightened rational review used in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446–47 (1985).

277. *See* Skafte v. Rorex, 553 P.2d. 830, 832 (Colo. 1976).

278. *See, e.g.*, Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 605 (1976).

279. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985); *see also* KEYSSAR, *supra* note 21, at 306–07.

280. KEYSSAR, *supra* note 21, at 90–91.

281. Nixon v. Herndon, 273 U.S. 536, 537 (1927).

Nixon, the Supreme Court went so far as to write that it did not need to consider the Fifteenth Amendment at all, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."[282]

Third, Raskin argues that the Supreme Court's jurisprudence on felon disenfranchisement can be read to sanction prohibitions on noncitizen voting.[283] In *Richardson v. Ramirez*, the Supreme Court held that Section 2 permits states to withhold the franchise from convicted felons.[284] But *Richardson* did not imply a general grant of power to the states from the Section's language. Instead, the Supreme Court narrowly and exhaustively invoked the discreet and "express" language in Section 2 that references disenfranchisement "for participation in rebellion, or other crime."[285] Nowhere in *Richardson* does the Supreme Court suggest expansion of that analysis to other contexts or provide precedent for new voting restrictions not subject to Section 1 scrutiny.[286] Moreover, in *Hunter v. Underwood*, which rejected an Alabama felon disenfranchisement law as racially discriminatory under Section 1, the Supreme Court explicitly rejected the idea that Section 2 permits discrimination that would otherwise violate safeguards of Section 1.[287] Along similar lines, we should expect a court to give greater scrutiny to restrictions on noncitizen voters because of their status as a suspect or quasi-suspect class (a class inherently demanding more scrutiny than felons).

In the end, it is wise to remember the counsel of *Harper* when it comes to the inherent pliability of equal protection jurisprudence:

> [The] Equal Protection Clause is not shackled to the political theory of a particular political era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.[288]

C. The Inevitable March of Suffrage Through Non-Judicial Channels

Raskin's final argument against judicial intervention to enfranchise noncitizens is one of history and democratic legitimacy. Under this theory, the expansion of the body politic—played out through the abolition of property, race, and gender as conditions of voting—has been necessarily obtained through the march of democracy, prodded on by an organic, bottom-up

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282. *Id.* at 540–41; *see also* Gomillion v. Lightfoot, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring).

283. *See* Raskin, *supra* note 13, at 1437–38.

284. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

285. *Id.* at 43.

286. *See generally id.*

287. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

288. Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966).

struggle.[289] "The pathway to political membership taken by disenfranchised groups in the American community," Raskin writes, "has been constitutional politics and amendment, not constitutional litigation and interpretation."[290] Raskin's analysis has both a descriptive and normative element. He suggests that "[t]he very democratic logic which argues for alien suffrage—that the governed should be able to participate in decision making over them—strongly suggests that it is the existing electorate which should determine the shape of the electorate to come."[291] Such an analytical framework relies heavily on the view of the history of American suffrage as necessarily one of continual, albeit fitful, expansion through social and political struggle instead of judicial activism.[292]

There are, however, persuasive historical and jurisprudential objections to Raskin's argument in the context of noncitizen voting. Historically, it appears to suffer from both wistful optimism and the human instinct to view the exigencies of the past with the mark of inevitability, as though they heeded some preordained logic and the "political imperative of 'universal suffrage.'"[293] The extension of the vote to groups like African Americans and women was anything but inevitable in its occurrence, scope, or timing.[294] If not for the Civil War, the extension of voting rights to African Americans would likely have taken decades longer to achieve.[295] And were it not for World War I, it is difficult to imagine the necessary momentum for the ratification of the Nineteenth Amendment.[296] Indeed, as multiple scholars have noted, expansions of suffrage have been intimately tied to wars and perhaps impossible without them.[297]

Equally important, the position of noncitizens in society is radically different from that of African Americans and women. History shows that instead of a gradual expansion of voting rights, noncitizen enfranchisement has been marked by a profound contraction from the early days of the nation when noncitizens could vote in twenty-two states and territories.[298] And since Arkansas became the last state to prohibit noncitizen voting in 1926, there has been little momentum for a popular revival of the practice.[299] Writing shortly after the city of Takoma Park, Maryland, approved of noncitizen voting for municipal elections, Raskin predicted that the town could be "an early

289. *See* Raskin, *supra* note 13, at 1440.
290. *Id.* at 1438.
291. *Id.* at 1440.
292. *See id.* at 1470.
293. *See id.* at 1392.
294. Karlan, *supra* note 157, at 1348–60.
295. *See id.* at 1348–51.
296. *See id.* at 1353.
297. *See, e.g.*, *id.*; *see also* KEYSSAR, *supra* note 21, at 169–70.
298. KEYSSAR, *supra* note 21, at 138; Neuman, *supra* note 20, at 311.
299. *See supra* note 72 and accompanying text.

precedent for grass-roots constitutional politics in the twenty-first century."[300] The fact that resident aliens remain no closer to greater municipal, state, or federal voting twenty years after Raskin's article points to a failure of political solutions and the spirit of history.

Significant differences exist between the challenges facing noncitizen voting movements and the challenges that confronted women and African Americans. Rather than forming a readily identifiable group, the universe of noncitizens is an invisible one, constantly changing as some naturalize and others leave. Citizenship status is an invisible badge unlike race and gender. Noncitizens, who mostly arrive without pre-established advocacy networks, are also constrained by profound forces like the fear of deportation and the threat of nativist state immigration laws in places like Arizona.[301] Such forces underscore the very condition of powerlessness that the Equal Protection Clause is supposed to protect against. Notwithstanding that noncitizens serve in the armed forces,[302] it is difficult to imagine a mass popular movement on behalf of such residents. As Rosberg noted more than thirty years ago, "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."[303] Such words remain equally true today.

Still more troubling is the jurisprudential implication and consequence of Raskin's position that expansions of voting rights should be left largely to politics.[304] Under such a framework, the Supreme Court was correct in upholding the disenfranchisement of women in *Minor v. Happersett* and in not guaranteeing equal voting rights for African Americans, rights that were instead secured through bloodshed, suffering, and constitutional amendment.[305] There is, of course, something to be said for judicial prudence and restraint in these contexts, for acting in recognition of the alchemy of politics, history, culture, and dominant social values. But beginning with cases like *Brown v. Board of Education*, the Supreme Court has reconceptualized its role in society, specifically in electoral politics.[306] If contemporary judicial attitudes about

300. Raskin, *supra* note 13, at 1396–97.

301. *See, e.g.*, Arizona Senate Bill 1070, Ariz. Rev. Stat. Ann. § 11-1051 (2010) (allowing law enforcement officers to stop an individual when a "reasonable suspicion exists that the person is an alien who is unlawfully present in the United States"). Moreover, several states incorporated suffrage restrictions into their constitutions, creating an especially high burden for those seeking the vote through state-level popular initiatives. *See* Harper-Ho, *supra* note 73, at 520–21.

302. *See, e.g.*, *Joining the U.S. Navy by Non-U.S. Citizens*, *supra* note 33.

303. Rosberg, *supra* note 15, at 1100.

304. *See* Raskin, *supra* note 13, at 1439.

305. *See* Minor v. Happersett, 88 U.S. 162, 174–75 (1875).

306. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993) (holding that race-based redistricting must survive strict scrutiny); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (forcing private businesses to comply with the Civil Rights Act of 1964); Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (rejecting segregation in public schools).

equal protection and First Amendment rights existed during the late nineteenth and early twentieth centuries, it is doubtful that the electoral fate of women and African Americans would have been left to politics—saving countless lives and preventing countless indignities.

IV.
TOWARD A RATIONAL ENFRANCHISEMENT OF LAWFUL PERMANENT RESIDENTS

Doctrinally, there thus exist strong arguments for use of the First Amendment or Equal Protection Clause to invalidate facially discriminatory state laws prohibiting voting by lawful permanent residents. Before turning to what a new voting regime could look like, it is useful to delve deeper into a question with a seemingly obvious but surprisingly problematic answer: Why does the right to vote matter and how does it matter? Two competing responses emerge from the history of judicial and political answers. On the one hand, voting has been described as the most important in an inextricably interrelated package of political rights and privileges that constitute self-government—activities like holding office, making campaign contributions, and working in certain federal jobs.[307] That is, with voting necessarily comes full and unqualified membership in the political community and the ability to participate in all of its levels.[308] Under this view, it makes little sense conceptually to confer suffrage without the larger bundle. Thus—in cases like *Cabell*, *Sugarman*, and *Foley*—the question of noncitizen voting is described as part and parcel of other rights of governance and is seemingly unseverable from them.[309]

But a second more recent interpretation understands voting as an entry-level political right. Under this framework, voting serves as training wheels for full democratic participation, and it need not imply other rights like holding office or working as a police officer. This view is most plainly evident in the Twenty-Sixth Amendment, which grants eighteen-year-olds the right to vote even though they would not qualify for other forms of participation.[310] It is also latent in cases discussed above that describe the right to vote as a foundational right that can be stripped only in the most extraordinary of circumstances.[311] For example, the Supreme Court has rejected residency restrictions on voting while such restrictions have gone unchallenged for activities like running for

307. This is how the U.S. Supreme Court has most often referenced noncitizen voting. *See supra* note 199.

308. *See* KEYSSAR, *supra* note 21, at 93–104 (describing the genesis of the Fifteenth Amendment as a debate about broader democratic participation); SHKLAR, *supra* note 13, at 2–4.

309. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982); Foley v. Connelie, 435 U.S. 291, 302 (1978); Sugarman v. Dougall, 413 U.S. 634, 647–48 (1973).

310. U.S. CONST. amend. XXVI.

311. *See supra* note 180 and accompanying text.

office or holding certain federal jobs.[312] Indeed, the idea of voting as a first entry into the body politic has become the dominant model in such jurisprudence.

Even under a training-wheels view of voting, enfranchisement serves both constitutive and instrumental ends.[313] In the former category fall the intrinsic psychological and descriptive benefits of self-determination: individual dignity, freedom, and agency.[314] The intangible harms caused by exclusion from the political community are loosely analogous to those recognized in *Brown v. Board of Education*'s finding of the deleterious social-psychological effects of a sense of inferiority and not belonging among segregated school children, with a practical result of hampered learning and development.[315] Similarly, the sense of statelessness and second-class membership in the American political community can have a profound effect on noncitizen community members.[316]

Indeed, there are few more powerless human conditions than that of estrangement in a land distant from one's birth.[317] The vote's ability to confer a sense of dignity and agency should not be undervalued.[318] On this most fundamental level, the franchise is about belonging and mattering in an ordered democracy. It is about the human right of self-determination.[319]

Among the instrumental ends served are the assimilation of new Americans, more robust democratic participation, better public policy, and the protection of minority interests through political responsiveness and accountability.[320] The public policy case for enfranchisement of lawful permanent residents is particularly convincing. Given the nativist political and social tides of the last decade, recent immigrants are more vulnerable than ever to a wide range of majoritarian discrimination, including employment abuses, housing discrimination, and education inequity.[321] Enfranchisement would serve as a forceful protection for those interests by forcing politicians to pay attention under an accountability model of politics. This change would result in public policies that explicitly include the currently underrepresented concerns

312. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (rejecting a Tennessee law that required voters to be residents for a year before becoming eligible to vote); Carrington v. Rash, 380 U.S. 89 (1965) (rejecting a Texas law that excluded from the state's electorate those residents who had initially moved to town on military duty).

313. *See* Michelman, *supra* note 21, at 451.

314. *See id.*; KEYSSAR, *supra* note 21, at 9–14.

315. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

316. *See* SHKLAR, *supra* note 13, at 1–3.

317. *See id.* at 4.

318. *See id.* at 2–3.

319. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 55 (Dec. 16, 1966); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 21 (Dec. 10, 1948); RENSHON, *supra* note 13, at 14; Raskin, *supra* note 13, at 1458.

320. *See* HAYDUK, *supra* note 39, at 58–86; Bedolla, *supra* note 43, at 65, 67.

321. *See* HAYDUK, *supra* note 39, at 65–66.

of millions of adult residents.[322] Indeed, such was the very logic for treating noncitizens as a discrete and insular minority deserving of the highest level of equal protection scrutiny.[323] As Michelman wrote: "Virtual representation of interests may be conceivable. Vicarious self-government is not."[324] Yet today lawful permanent residents must rely on vicarious representation for their unique interests and concerns.

A third reason for extending the franchise to lawful permanent residents is democratic legitimacy; namely, the need for a body politic that reflects the tectonic demographic changes in the American populace where one in ten residents are now noncitizens, residency is more transient, and borders are more economically, socially, and culturally porous.[325] In the face of such changes, the longer state prohibitions on noncitizen voting are allowed to remain, the less reflective of America the voting population will be, particularly in states like California where a quarter of the population is foreign born.

A. Ways to Extend the Franchise

What would such enfranchisement look like in practice? I can envision three alternatives the Supreme Court could use to confer the vote on lawful permanent residents while maintaining rational, narrowly tailored residency requirements as allowed by *Dunn*.[326] On the least ambitious end of the spectrum, the Supreme Court could mandate enfranchisement of lawful permanent residents after they complete five years of residency, regardless of whether or not each individual has naturalized. Of the 13.1 million lawful permanent residents living in America, approximately eight million are authorized to naturalize because they have met residency requirements but have not done so.[327] The myriad and still poorly understood reasons why some immigrants delay or forgo naturalization—including economic, psychological, linguistic, and cultural factors—are outside the scope of this inquiry.[328] Such individuals, however, have met all other prerequisites for membership in the political community and have a long-term stake in the affairs of the country.

A second alternative would allow voting after a shorter length of residency, in keeping with noncitizen voting regimes used in many European countries where durational residency requirements are imposed in lieu of

322. *See id.* at 58–86; *see also* Rosberg, *supra* note 15, at 1106–07.

323. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

324. Michelman, *supra* note 21, at 457.

325. *See generally* SPIRO, *supra* note 44; Jacoby, *supra* note 46.

326. *See* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (rejecting Tennessee's residency requirement but suggesting that durational residency restrictions may be constitutional if narrowly tailored to the compelling governmental interest).

327. *See* RYTINA, *supra* note 38.

328. *See generally* Alan Hyde, Why Don't They Naturalize? (2009) (unpublished paper), *available at* lawprofessors.typepad.com/files/why-dont-they-naturalize.doc.

naturalization.[329] A court, using the strict scrutiny framework that *Dunn* and *Carrington* applied to durational residency restrictions on the franchise, would look to whether the residency requirement imposed by a state is well tailored to advance the goal of sufficiently knowledgeable voters.[330] Admittedly, the fact that noncitizens must assimilate to cultural, social, and political norms gives residency requirements greater jurisprudential sway. But given the availability of modern media communications and political outreach tools, a one to three year requirement would realistically put such residents on equal footing with citizen voters.

A third alternative is a bifurcated approach to local, state, and federal elections—enfranchising lawful permanent residents at a local and state level while reserving the vote at the federal level for citizens.[331] Indeed, voting at each level may reflect a different type of membership in a local, state, and national community; a voter in a local school board election will have a different attachment and interests than in federal elections. Such a proposal, however, is difficult to justify without relying on arguments of loyalty, stake, or standing as justifications for voting rights. The Supreme Court's voting and naturalization decisions have routinely rejected those arguments. Those decisions recognize that voters, including dual citizens, may have divided national allegiances and limited exposure to the United States.[332] Moreover, state administrability concerns counsel against a dual voting system. States would be forced to maintain two sets of voting registries, similar to problems encountered after *Oregon* when eighteen-year-olds were allowed to vote in federal but not state elections.[333]

Why not go even further and extend the vote to undocumented immigrants as well? In addition to the arguments established by *Bluman* and other arguments discussed above, state and federal interests may be more practically compelling for undocumented residents. These interests include the prevention of fraud (quick hops across the border to cast a vote) and the difficulty in administering residency requirements for undocumented immigrants. They also include the risk of subverting congressional power over immigration by legally recognizing such a right.[334] Moreover, the Supreme Court has long established that lesser constitutional scrutiny extends to undocumented residents. As observed in *Mathews v. Diaz*, the "illegal entrant . . . [cannot] advance even a colorable constitutional claim to a share in the bounty that a conscientious

329. *See* KEYSSAR, *supra* note 21, at 310; RENSHON, *supra* note 13, at 79 (describing varying approaches to length of residency requirements and noncitizen voting regimes in other countries).

330. *See Dunn*, 405 U.S. 330; Carrington v. Rash, 380 U.S. 89 (1965).

331. *See* Raskin, *supra* note 13, at 1441 (making the public policy case for noncitizen voting in local elections).

332. *See supra* notes 112–15, 186–87 and accompanying text.

333. *See* Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1193–94 (2012).

334. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982); Cole, *supra* note 129, at 384–85.

sovereign makes available to its own citizens and *some* of its guests."[335] But when it comes to constitutional protections afforded to residents who are lawfully sanctioned to be in the United States and have a long-term stake in the nation, the Supreme Court has repeatedly extended more exacting scrutiny.[336]

B. Expanding the Franchise in the Current Political Climate

What is the feasibility of such a voting regime in the current political and judicial climate? Curiously, even as citizenship has waned in constitutional importance, it has remained centrally divisive in our political and social discourse. Examples are ubiquitous, from the bitter rhetoric over immigration reform that would create new pathways to citizenship,[337] to the veto of recent legislation that would have made California the first state to allow noncitizens to serve on juries.[338] State legislation, most notably in Arizona, has directly targeted noncitizens, deploying the familiar themes of loyalty, political literacy, economic nationalism, and language ability.[339] Like a handful of other states, Arizona has passed laws requiring proof of citizenship in order to register to vote. The Supreme Court recently rejected these laws as incompatible with the National Voter Registration Act.[340] Such state actions recall similar fervor in the mid-1990s when a series of initiatives sought to keep undocumented immigrants from attending public schools, receiving prenatal care, or enjoying most other government benefits.[341]

On the federal level, the USA PATRIOT Act and its progeny have subjected foreign nationals to a new intensity of scrutiny and procedures under the banner of homeland security.[342] Conceptually more dramatic has been the Republican movement in Congress to deny the Fourteenth Amendment's grant of birthright citizenship to the children of undocumented immigrants. This movement, while unlikely to succeed, reflects a striking departure from liberal attitudes toward citizenship and a return to republican overtones of citizenship as a common good reflecting shared values.[343]

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335. Mathews v. Diaz, 426 U.S. 67, 80 (1976).

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

337. *See supra* note 12 and accompanying text.

338. *See* Jennifer Medina, *Veto Halts Bill for Jury Duty by Noncitizens in California*, N.Y. TIMES, Oct. 8, 2013, at A1.

339. *See, e.g.*, Arizona Senate Bill 1070, Ariz. Rev. Stat. Ann. § 11-1051 (2010) (allowing law enforcement officers to stop an individual when a "reasonable suspicion exists that the person is an alien who is unlawfully present in the United States"); *State Anti-Immigrant Laws*, ACLU, https://www.aclu.org/immigrants-rights/state-anti-immigrant-laws (last visited Dec. 28, 2013).

340. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2257 (2013).

341. For a snapshot of this period embodied in debates over electoral districting and apportionment, see Goldfarb, *supra* note 31.

342. *See* Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 445 (2011).

343. *See* Julia Preston, *Citizenship from Birth Is Challenged on the Right*, N.Y. TIMES, Aug. 7, 2010, at A8.

In the courts, the question of noncitizen rights has taken center stage in cases like *Demore v. Kim*, where the Supreme Court upheld detention of legal immigrants convicted of certain crimes without bail or any individualized hearing before detention.[344] Following *Mathews v. Diaz*, the Supreme Court wrote that congressional power over immigration and nationality allows it to "regularly make[] rules that would be unacceptable if applied to citizens."[345]

But instead of counseling against judicial intervention, the ongoing political antipathy toward noncitizens reveals precisely why they require heightened constitutional safeguards. Such is what it means to be a discrete and insular class, subject to majoritarian will and popular prejudice, but without the political power to respond effectively. If the Equal Protection Clause is to continue to serve as a constitutional guardian, extending constitutional protection to the politically marginalized is essential. Moreover, the contemporary climate shows just how unlikely the prospects are for a political extension of the franchise to noncitizen residents.

CONCLUSION

Nearly twenty years ago, Raskin wrote: "As a marker at the perimeter of the American body politic, the citizenship qualification carries the aura of inevitability that once attached to property, race, and gender qualifications."[346] And, like property, race, and gender requirements that have been rejected, the use of citizenship as a voting qualification conforms to many of the same republican ideals of loyalty, political literacy, common national good, and state control over the electorate.

Decisions about who can participate in our democracy have always held a mirror up to our better and worse national selves, with the Fourteenth, Fifteenth, and Nineteenth Amendments occupying lofty places in our national mythology and self-image. The history of restrictions on noncitizens, however, is fundamentally different from those levied against African Americans and women. The intensity of violence, invidiousness of discrimination, and immutability of the individual characteristics targeted with regards to these populations—while disconcertingly present with noncitizens and episodic nativism—have been less pronounced and sustained.

But the democratic implications are much the same—a growing disconnect between those who reside within our borders and those vested with

344. *See* Demore v. Kim, 538 U.S. 510, 521 (2003). Notably, the Ninth Circuit in *Rodriguez v. Robbins* recently upheld a preliminary injunction requiring that pre-final order detainees, held under 236(c) (mandatory detention), be given individual bond hearings before an immigration judge after six months. Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013).

345. *Demore*, 538 U.S. at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

346. *See* Raskin, *supra* note 13, at 1394.

power to choose representation.[347] In 1970, seven years before Rosberg first challenged state prohibitions, fewer than ten million foreign-born individuals lived in the United States, including those who had naturalized.[348] In 2010, that number hit a record forty million, including thirteen million lawful permanent residents.[349]

Such changes carry profound implications for democratic legitimacy, the representation of minority interests, and the assimilation of new Americans in an increasingly globalized international order.[350] At the same time, they harken back to debates at the nation's founding about how broadly to extend the franchise. The case for enfranchising lawful permanent residents seeks a middle ground. It is neither a call for universal suffrage nor radical egalitarianism, but instead for rational, constitutionally-based suffrage.

What it is to be a citizen today is in fact a surprisingly difficult question to give meaningful constitutional content to. As Alexander Bickel wrote more than three decades ago, "[c]itizenship is at best a simple idea for a simple government," unsuited for the complex world of fading borders and multinational identities in which we live.[351]

347. *See* Bedolla, *supra* note 43, at 61 (noting the challenges of representative democracy inherent in political districts that are majority noncitizen).

348. *America's Foreign Born in the Last 50 Years*, U.S. CENSUS BUREAU, http://www.census.gov/how/infographics/foreign_born.html.

349. *Id.*

350. *See* RENSHON, *supra* note 13, at 13 (describing the imperative of more successfully integrating immigrants into the American national community).

351. BICKEL, *supra* note 24, at 54.