

# Potential Citizens’ Rights: The Case for Permanent Resident Voting\*

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## Introduction

Currently, lawful permanent residents<sup>1</sup> living within the United States cannot vote for candidates for federal office,<sup>2</sup> and any who do vote in violation of this law can be deported.<sup>3</sup> Permanent residents are noncitizens that have satisfied one of the thirteen categories set forth in 8 U.S.C. § 1255,

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1. “[L]awfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant . . . .” 8 U.S.C. § 1101(a)(20) (2012).

2. 18 U.S.C. § 611(a) (2012).

3. 8 U.S.C. § 1227(a)(6)(A) (2012).

legally allowing them to remain within this community indefinitely.<sup>4</sup> To become a permanent resident, an immigrant must first qualify for an immigrant category, limited to family-based, employment-based, refugee- or asylum-based, or specific special categories.<sup>5</sup> However, because there is a five-year residency period required for naturalization,<sup>6</sup> and the application period for naturalization can take years more, this Note will advocate for the extension of voting rights in state and local elections to lawfully admitted permanent residents living in the United States.

Permanent residents do not have a direct effect on election outcomes through voting, even when the result of an election directly affects them, making them “especially vulnerable to exploitation by the majority.”<sup>7</sup> Many arguments against noncitizen voting focus on the idea that aliens are not a part of the political community simply because they are not citizens.<sup>8</sup> However, permanent residents are a part of the political community, distinct from other noncitizens, particularly because they have completed the legal process to remain in this country on the path to citizenship and generally have much stronger ties to the community.<sup>9</sup> Some critics argue that permanent residents’ rights are already protected and that permanent residents do not need to vote because they have at least some representation in the political system.<sup>10</sup> But virtual representation does not necessarily account for permanent residents’ interests, especially when legislators have no reason to listen to those who cannot vote.<sup>11</sup>

Specifically because they are a part of this community—on their way to becoming full citizens and affected by government policies in the same ways as citizens—permanent residents should be granted the right to vote. Voting is a “fundamental matter in a free and democratic society” because it “is preservative of other basic civil and political rights.”<sup>12</sup> Permanent residents should be given the right to vote in state and local elections<sup>13</sup> because

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4. 8 U.S.C. § 1255 (2012).

5. *Green Card Eligibility*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 30, 2011), <http://www.uscis.gov/green-card/green-card-processes-and-procedures/green-card-eligibility> [<https://perma.cc/72TL-GLED>].

6. 8 U.S.C. § 1427(a) (2012).

7. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1138 (2006).

8. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982) (“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 outside of this community.”).

9. Posner & Vermeule, *supra* note 7, at 1143.

10. *See, e.g., id.* at 1143–44 (arguing that resident aliens have several ways in which they can influence their host government and that these methods “may well be as good as [voting]”).

11. *See id.* at 1143 (acknowledging that “virtual representation” alone is insufficient to protect a resident alien’s interests).

12. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

13. This Note will not discuss the voting rights of felons or illegal aliens.

excluding “persons from the right to vote is often the equivalent, as a practical matter, of excluding them from (genuine) representation.”<sup>14</sup>

Part I of this Note will address the history and the current state of noncitizen voting in the United States. Part II focuses on distinguishing lawful permanent residents from noncitizens in general, laying the foundation for why permanent residents specifically should be granted suffrage. Part III describes how the current system of representation is inadequate for permanent residents and how legislative decisions affect permanent residents the same way as citizens, providing the need for permanent resident voting rights. Part IV analyzes the constitutional and historical arguments in favor of permanent resident voting and addresses counterarguments to this expansion of suffrage. Part V describes a proposal to extend suffrage to permanent residents while accounting for many opponents’ concerns with noncitizen voting. Part VI provides a conclusion summarizing the key arguments described in this Note.

### I. Modern Trends in Permanent Resident Voting Rights

The number of legal permanent residents admitted to the United States has been over one million every year since 2005—twice the number admitted each year three decades ago.<sup>15</sup> Recently, partly due to the increase of foreign-born permanent residents, many advocates within the United States have pushed to include resident aliens in local elections, including proposing legislation in several U.S. cities.<sup>16</sup> This revival of noncitizen voting is partly due to “a civil-rights and human-rights response to economic and cultural globalization and its consequences. Globalization has propelled mass migration . . . . Immigrants have reemerged as pivotal players in contemporary American politics, although their numbers exceed their political representation and clout.”<sup>17</sup>

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14. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1274 (2002).

15. Paul Taylor et al., *Recent Trends in Naturalization, 2000-2011*, PEW RES. CTR. (Nov. 14, 2012), <http://www.pewhispanic.org/2012/11/14/ii-recent-trends-in-naturalization-2000-2011> [<https://perma.cc/ZP2R-C8KZ>].

16. See, e.g., Jonah Bennett, *In Wake of Trump, DC Councilmembers Want to Give Non-citizens the Right to Vote*, DAILY CALLER (Jan. 26, 2017), <http://dailycaller.com/2017/01/26/in-wake-of-trump-dc-councilmembers-want-to-give-non-citizens-the-right-to-vote/> [<https://perma.cc/B777-YQJ9>]; Arelis R. Hernandez, *Hyattsville Will Allow Non-U.S. Citizens to Vote in City Elections*, WASH. POST (Dec. 7, 2016), [https://www.washingtonpost.com/local/md-politics/hyattsville-will-allow-non-us-citizens-to-vote-in-city-elections/2016/12/07/63bc87ae-bc8c-11e6-ac85-094a21c44abc\\_story.html?utm\\_term=.26e9148bdafe](https://www.washingtonpost.com/local/md-politics/hyattsville-will-allow-non-us-citizens-to-vote-in-city-elections/2016/12/07/63bc87ae-bc8c-11e6-ac85-094a21c44abc_story.html?utm_term=.26e9148bdafe) [<https://perma.cc/J7QK-2VAT>].

17. Ron Hayduk & Rodolfo O. de la Garza, *Immigrant Voting*, in DEBATES ON U.S. IMMIGRATION 91, 97 (Judith Gans et al. eds., 2012).

This globalization has “prompted many countries to reconsider the relationship between nationality and voting rights”<sup>18</sup> and has led to an increase of noncitizen voting throughout the world.<sup>19</sup>

A. *History of Noncitizen Voting in the United States*

Noncitizen voting was not always prohibited in the United States. There is a significant history of noncitizen voting where, from the founding to the 1920s, “noncitizens voted in forty states and federal territories in local, state, and even federal elections.”<sup>20</sup> Noncitizen voting began in the colonial era, when many colonies required inhabitants or residents to meet certain property requirements, but did not limit voting to only citizens.<sup>21</sup>

Noncitizen voting continued after the American Revolution, when many states gave foreigners state “citizenship.”<sup>22</sup> In 1789, Congress reenacted the Northwest Ordinance of 1787, giving noncitizens who had lived within a territory for two years the right to vote for the legislature of that territory.<sup>23</sup> Shortly after in 1809, the Supreme Court of Pennsylvania held that a resident alien who paid borough taxes was entitled to vote in a borough election.<sup>24</sup>

But the impact of the War of 1812 “reversed the spread of alien suffrage’ that dominated the political landscape up to that point by stimulating a ‘rise of national consciousness’ and producing ‘a militant nationalism and suspicion of foreigners.’”<sup>25</sup> Between 1830 and 1840, every state that joined the United States except Michigan restricted the right to vote to only citizens, and prior to 1840, many states amended their constitutions to do the same, including Maryland, Connecticut, New York, Massachusetts, Vermont, and Virginia.<sup>26</sup>

Shortly after, there was a movement in the opposite direction. In 1845, the Wisconsin Territory adopted a state constitution that gave the right to vote

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18. Miles E. Hawks, *Granting Permanent Resident Aliens the Right to Vote in Local Government: The New Komeitō Continues to Promote Alien Suffrage in Japan*, 17 PAC. RIM L. & POL’Y J. 369, 369 (2008).

19. See, e.g., Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1456–60 (1993) (discussing the relationship between globalization and local noncitizen voting).

20. Ron Hayduk, *Democracy for All?: The Case for Restoring Immigrant Voting in the United States*, IMMIGRANT MOVEMENT INT’L (2011), <http://immigrant-movement.us/wordpress/democracy-for-all-the-case-for-restoring-immigrant-voting-in-the-united-states/> [https://perma.cc/CNU4-KTA9].

21. See Raskin, *supra* note 19, at 1399 (acknowledging other “tests” including “race, religion, and gender”).

22. *Id.* at 1400.

23. *Id.* at 1402 (citing Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a) (1789)).

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

25. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 276 (2000).

26. *Id.* at 276 & n.36.

to noncitizens who declared their intention to apply for citizenship, and several other Northern states, including Ohio, Illinois, Michigan, and Indiana, followed this trend.<sup>27</sup> This trend was generally limited to Northern states, as many Southern states prior to the Civil War opposed granting noncitizens the right to vote because many immigrants were against the institution of slavery.<sup>28</sup>

Once the Civil War ended, thirteen states adopted noncitizen suffrage, rising to twenty-two states and territories by 1875.<sup>29</sup> In 1900, as anti-immigrant attitudes began to emerge in the United States, only eleven states retained noncitizen suffrage.<sup>30</sup> Noncitizen suffrage lasted only until shortly after World War I during the “frantic and overreactive days” of anti-immigrant sentiments.<sup>31</sup> Alabama eliminated noncitizen voting in 1901; Colorado in 1902; Wisconsin in 1908; Oregon in 1914; Kansas, Nebraska, Texas, and South Dakota in 1918; and Mississippi in 1924.<sup>32</sup> The final state to eliminate noncitizen voting was Arkansas in 1926.<sup>33</sup> This hostility towards noncitizens continued long after World War I, leading many states to restrict immigration altogether.<sup>34</sup> Noncitizen voting has only recently been revived, limited to local elections in a few municipalities.<sup>35</sup>

#### *B. Noncitizen Voting Internationally*

Prohibiting noncitizen voting is not universal. In fact, “[n]early 60 countries on nearly every continent allow resident noncitizens to vote at the local, regional, or national level, and most adopted such legislation during the past three decades.”<sup>36</sup> In Europe, every European Union (E.U.) citizen has the right to vote in municipal and European Parliament elections in whichever E.U. country the citizen resides, under the same conditions as nationals.<sup>37</sup> Ireland allows resident aliens of any nation to vote in local

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27. *Id.* at 276–78.

28. *See id.* at 279 (noting that “northerners and southerners agreed” that immigrants tended to repudiate slavery).

29. *Id.* at 281.

30. *Id.* at 282.

31. Raskin, *supra* note 19, at 1416 (quoting *Ambach v. Norwick*, 441 U.S. 68, 82 (1979) (Blackmun, J. dissenting)).

32. *Id.* at 1415–17; Harper-Ho, *supra* note 25, at 282 n.81.

33. Harper-Ho, *supra* note 25, at 282.

34. *See id.* at 282–83 (citing the enactment of immigration literacy requirements across the country).

35. *Id.* at 283 (highlighting local elections in Maryland and school board elections in New York and Chicago).

36. Hayduk & de la Garza, *supra* note 17, at 94.

37. Consolidated Version of the Treaty on the Functioning of the European Union art. 22, Oct. 26, 2012, 2012 O.J. (C 326) 57 [hereinafter TFEU].

elections after six months of residency.<sup>38</sup> New Zealand is one of four countries that allows noncitizens to vote in all local and national elections and has allowed this since 1975,<sup>39</sup> granting voting rights to permanent residents after only one year of residency.<sup>40</sup>

In support of noncitizen voting, “none of the countries with local voting rights have seen naturalization numbers decline.”<sup>41</sup> In fact, naturalizations in the Netherlands increased from 20,000 per year to 80,000 per year from 1986 to 1996, the decade following the grant of municipal voting rights.<sup>42</sup> Apparently, local voting rights “function as an incentive to become naturalized,”<sup>43</sup> and “[t]hese policy changes reveal much about the evolution of citizenship and the practice of democracy in the era of globalization.”<sup>44</sup> As our world becomes more international, more people have the ability to choose their desired country of residence. Those that choose this country and complete the legal steps to remain should be welcomed into this community.

### C. Current Noncitizen Voting Within the United States

Xenophobia is still a serious problem in the United States<sup>45</sup>—especially after the attacks on September 11, 2001, and the ISIS attacks in Paris on November 13, 2015. These attacks have led some citizens to view illegal immigrants as “potential terrorists,”<sup>46</sup> increasing immigrant discrimination, such as racial profiling.<sup>47</sup> During periods of “high unemployment, economic distress, and national security scares[,] the immigration issue . . . receives more negative attention,”<sup>48</sup> even leading to political campaigns run on

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38. David C. Earnest, *Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm* 12 (Aug. 29, 2003) (unpublished manuscript).

39. Kate McMillan, *National Voting Rights for Permanent Residents: New Zealand’s Experience* 1–2 (Apr. 24, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2449068](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2449068) [<https://perma.cc/2SJS-U2L6>].

40. *Id.*

41. KEES GROENENDIJK, *MIGRATION POLICY INST., LOCAL VOTING RIGHTS FOR NON-NATIONALS IN EUROPE: WHAT WE KNOW AND WHAT WE NEED TO LEARN* 14 (2008).

42. *Id.* When asked why they decided to naturalize, “two-thirds [of immigrants] said that secure legal status and full voting rights were important factors in their decision.” *Id.*

43. *Id.*

44. Hayduk & de la Garza, *supra* note 17, at 94.

45. See, e.g., Lilian Jiménez, *America’s Legacy of Xenophobia: The Curious Origins of Arizona Senate Bill 1070*, 48 CAL. W. L. REV. 279, 281 (2012) (arguing that state laws, such as Arizona S.B. 1070, are “coordinated responses to demographic changes in the [United States]” reflecting an animus towards immigrants).

46. Erick C. Laque, *Immigration Law and Policy: Before and After September 11, 2001*, 10 SOC. SCI. J. 25, 32–33 (2011).

47. See Bryant Yuan Fu Yang, Note, *Fighting for an Equal Voice: Past and Present Struggle for Noncitizen Enfranchisement*, 13 ASIAN AM. L.J. 57, 62, 65 (2006) (noting that immigration can lead to crime, violence, and delinquency).

48. Linda Bertling Meade, *Human Rights and the Current Immigration Debate: Legislative Proposals’ Effects on the Mexican Immigrant Population*, 3 S.C. J. INT’L L. & BUS. 107, 107 (2007).

“know-nothing xenophobia.”<sup>49</sup> Most opponents focus on the status of being an immigrant, claiming that noncitizens are a drain on government resources and that immigrants are unwilling to assimilate into American society.<sup>50</sup> Immigration was a contention at the very heart of the 2016 presidential election.<sup>51</sup> This dislike even amounted to some recent denials of U.S. birth certificates to children of immigrants born within the United States.<sup>52</sup> Yet this directly violates Section One and the purpose of the Fourteenth Amendment.<sup>53</sup> Such a denial functionally deprives citizenship to a child born in the United States<sup>54</sup> by requiring specific forms of identification—forms that noncitizen parents are unlikely to have—to obtain a birth certificate.<sup>55</sup> Even the Supreme Court has acknowledged that “federal immigration law has changed dramatically over the last 90 years,” expanding the number of deportable offenses while simultaneously limiting judicial power to mitigate these harms.<sup>56</sup>

In 2012, there were an estimated 13.3 million legal permanent residents in the United States.<sup>57</sup> Almost 8.8 million permanent residents were eligible to become naturalized citizens, and the number remains stable over time as those who naturalize are replaced by others who become permanent

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49. Andrew Soergel, *Does Donald Trump Tap Into America's Underlying Xenophobia?*, U.S. NEWS & WORLD REP. (July 1, 2015), <http://www.usnews.com/news/articles/2015/07/01/does-donald-trump-tap-into-americas-underlying-xenophobia> [<https://perma.cc/LKQ9-SBMP>].

50. Carolyn J. Craig, *Nativism*, in DEBATES ON U.S. IMMIGRATION, *supra* note 17, at 112, 117.

51. See Thomas M. Holbrook, *Here's a Close Look at How Immigrant Voters Could Affect the 2016 U.S. Election*, WASH. POST (June 26, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/26/heres-a-close-look-at-how-immigrant-voters-could-affect-the-2016-election/> [<https://perma.cc/DGV9-PK7Q>] (noting that foreign-born voters will be more pivotal in swing states); Sahil Kapur, *Party Conventions Highlight Growing U.S. Divide on Immigration*, BLOOMBERG (July 28, 2016), <http://www.bloomberg.com/politics/articles/2016-07-28/party-conventions-highlight-growing-u-s-divide-on-immigration> [<https://perma.cc/2YLC-7MDH>] (“The divergence reflected a widening national gulf on immigration, an issue that has taken center stage in the 2016 presidential election in a year marked by increasing political polarization and heightened racial tensions.”).

52. Fourth Amended Complaint at 4, *Serna v. Hellerstedt*, No. 1:15-cv-00446 (W.D. Tex. Feb. 15, 2016), 2016 WL 1321233.

53. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

54. 8 U.S.C. § 1401 (2012).

55. See Eyder Peralta, *Texas Fights Suit After Denying Birth Certificates To Children Of Illegal Immigrants*, NPR (July 23, 2015), <http://www.npr.org/sections/thetwo-way/2015/07/23/425568894/texas-fights-suit-after-denying-birth-certificates-to-children-of-illegal-immigr> [<https://perma.cc/N6HK-Q924>] (noting that “according to the complaint, Texas is refusing most forms of ID that undocumented immigrants would have access to,” including a “*matricula* or an ID card issued by a local Mexican consulate”).

56. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (detailing changes in immigration legislation).

57. Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2012*, OFF. OF IMMIGR. STATS., [http://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_pe\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf) [<https://perma.cc/63TR-TLHH>].

residents.<sup>58</sup> About 56% of legal, foreign-born residents have become naturalized citizens—the highest amount since the 1980s.<sup>59</sup> In 2014, 654,949 people were naturalized after completing residency and application requirements,<sup>60</sup> but some have not naturalized due to difficulties with language, administrative processes, or citizenship-test requirements.<sup>61</sup> Immigrants, including permanent residents, compose a significant portion of our country, including many of our major cities. Over 37% of people living in New York City were born in another country.<sup>62</sup> In 2014, 174,714 people obtained legal permanent resident status in New York, 80,527 in Los Angeles, 32,904 in San Francisco, 33,856 in Houston, and 28,780 in Dallas.<sup>63</sup>

Fortunately, there have been many recent movements toward extending voting rights to permanent residents. Currently, six towns in Maryland allow noncitizen voting in municipal elections,<sup>64</sup> and Takoma Park, Maryland, has allowed noncitizen voting in local elections since the early 1990s.<sup>65</sup> Chicago currently allows noncitizens to vote in local school-council elections,<sup>66</sup> and from 1968 to 2003, noncitizen parents of local schoolchildren could vote in New York School Board Elections.<sup>67</sup>

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58. *Id.*

59. Paul Taylor et al., *Recent Trends in Naturalization, 2000-2011*, PEW RES. CTR. (Nov. 14, 2012), <http://www.pewhispanic.org/2012/11/14/ii-recent-trends-in-naturalization-2000-2011/> [https://perma.cc/ZP2R-C8KZ].

60. *Naturalization Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 24, 2012), <http://www.uscis.gov/archive/archive-news/naturalization-fact-sheet> [https://perma.cc/3KZ8-34GH].

61. Paul Taylor et al., *Reasons for Not Naturalizing*, PEW RES. CTR. (Nov. 14, 2012), <http://www.pewhispanic.org/2012/11/14/iv-reasons-for-not-naturalizing/> [https://perma.cc/P9A5-5U32].

62. *More Foreign-Born Immigrants Live in NYC Than There Are People in Chicago*, HUFFINGTON POST (Dec. 19, 2013, 2:58 PM), [http://www.huffingtonpost.com/2013/12/19/new-york-city-immigrants\\_n\\_4475197.html](http://www.huffingtonpost.com/2013/12/19/new-york-city-immigrants_n_4475197.html) [https://perma.cc/5VUX-XQ6N].

63. *See Persons Obtaining Lawful Permanent Resident Status by Core Based Statistical Area (CBSA) of Residence: Fiscal Years 2005 to 2014*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2014/table5> [https://perma.cc/L2N3-S7XM] (noting the number of persons obtaining legal permanent resident status by metro areas).

64. Editorial, *Should Non-citizens in the U.S. Vote?*, L.A. TIMES (Dec. 21, 2014), <http://www.latimes.com/opinion/editorials/la-ed-citizenship-voting-20141221-story.html> [https://perma.cc/6GPA-BP77].

65. Scott Keyes, *Why You Have Nothing To Fear From Non-citizen Voting*, THINKPROGRESS (May 24, 2013), <https://thinkprogress.org/why-you-have-nothing-to-fear-from-non-citizen-voting-302eeb43d1cd#adh3hcfj> [https://perma.cc/76DP-K8BN]; *see also Register To Vote*, CITY TAKOMA PARK, <https://takomaparkmd.gov/register-to-vote/> [https://perma.cc/9CCS-9M58] (stating that non-U.S. citizens who are residents of Takoma Park may register and vote in municipal elections).

66. *Voting by Nonresidents and Noncitizens*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 27, 2015), <http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx> [https://perma.cc/FYE5-9U3D].

67. CITY COLL. OF N.Y., *NONCITIZEN VOTING IN NEW YORK CITY 11* (2014), <https://www.ccnyc.cuny.edu/sites/default/files/psm/upload/NonCitizenFinal.pdf>



No state currently extends suffrage to noncitizens, but several major cities are continuing to push for the expansion of suffrage. A bill in Washington, D.C., seeks to expand voting rights to permanent residents in local elections.<sup>68</sup> As residents of Washington, D.C., who have been effectively excluded from representation in Congress, they know “taxation without representation” fairly well.<sup>69</sup> The New York City Council also took up legislation to permit legal residents to vote in local elections, and because roughly one million permanent residents in New York City would become eligible to vote, this would significantly impact the political atmosphere of the city, giving noncitizens political representation denied to them for almost a century.<sup>70</sup> Our world is becoming more international, especially as people gain an increased ability to choose their country of residence, and noncitizens contribute tremendously to this country—they pay billions in taxes and provide significant social and scientific achievements.<sup>71</sup>

One major step to integrate immigrants into this country is the “Stand Stronger” initiative announced by President Obama in 2016. This proposal includes a task force intended to promote citizenship, aid legal permanent residents in obtaining citizenship, and integrate them into the American community.<sup>72</sup> “Nearly one out of every three eligible individuals obtained LPR status in 1990 or earlier, meaning that many have been part of our communities for decades. But they don’t yet enjoy all of the rights, benefits, and responsibilities that come with being a full American citizen.”<sup>73</sup>

## II. Inclusion in the American Political Community

Permanent residents are distinct from other classes of noncitizens because they have a significant long-term stake in this community.<sup>74</sup> Because

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[<https://perma.cc/SQF2-NYVP>]; Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 273 (2005).

68. Bennett, *supra* note 16.

69. See *Why DC Voting Rights Matter*, LEADERSHIP CONF., <http://www.civilrights.org/voting-rights/dc-voting-rights/why-dc-voting-rights.html> [<https://perma.cc/FQY7-YKDB>] (noting that “[t]he District’s only voice in Congress is a non-voting delegate . . . who serves in the House of Representatives but is not permitted to vote on the floor of Congress”).

70. Kanishk Tharoor, *Non-citizens in New York City Could Soon Be Given the Right to Vote*, GUARDIAN (Apr. 2, 2015), <http://www.theguardian.com/us-news/2015/apr/02/new-york-city-non-citizens-local-elections> [<https://perma.cc/HP83-HVAA>].

71. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (“The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.”); IMMIGRANT AND REFUGEE FAMILIES: GLOBAL PERSPECTIVES ON DISPLACEMENT AND RESETTLEMENT EXPERIENCES 9 (Jaime Ballad et al. eds., 2016).

72. *Fact Sheet: “Stand Stronger” Citizenship Awareness Campaign*, WHITE HOUSE (Sept. 17, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/17/fact-sheet-stand-stronger-citizenship-awareness-campaign> [<https://perma.cc/8228-V7KJ>].

73. *Id.*

74. See *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 291 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012) (explaining that “[l]awful permanent residents have a long-term stake in the

they are closer in status to citizens than to other immigrants, Congress generally provides more rights and protections to permanent residents—such as permitting them to make political contributions—than to other foreign nationals. Permanent residents can participate in the electoral process—for instance by contributing to political campaigns and using their right to free speech and association for political advocacy—making them a part of this political community. The United States has been traditionally hospitable to aliens, according “a generous and ascending scale of rights as he increases his identity with our society.”<sup>75</sup> Because permanent residents choose to be here, have satisfied the legal qualifications to remain indefinitely in this country, and have a significant stake in this community, they should be given the right to vote in local and state elections.

*A. Permanent Residents Are Separate from Other Immigrants*

In *Bluman v. Federal Election Commission*,<sup>76</sup> the court acknowledged that “minors, American corporations, and citizens of other states and municipalities are all members of the American political community” but reasoned that “[a]liens are by definition those outside of this community” because Congress has a compelling interest to prevent foreign influence over the government.<sup>77</sup> But the court, like Congress, also distinguished permanent residents from other aliens, explaining why Congress explicitly exempted permanent residents from this statute:

Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do. . . . [L]awful permanent residents share important rights and obligations with citizens . . . [for reasons such as] their indefinite residence in the United States and their eligibility for military service—lawful permanent residents can be viewed as more similar to citizens than they are to temporary visitors.<sup>78</sup>

Even the Immigration and Nationality Act separates lawful permanent residents from the general noncitizen population.<sup>79</sup> In other areas of the law, the Supreme Court groups permanent residents together with citizens, including in jurisdictional decisions, stating that “[c]itizens or *residents* deserve somewhat more deference than foreign plaintiffs”<sup>80</sup> and the “distinction between resident or citizen plaintiffs and foreign plaintiffs is

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flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community”).

75. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

76. 800 F. Supp. 2d 281 (D.D.C. 2011).

77. *Id.* at 290 (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982)).

78. *Id.* at 290–91.

79. See 8 U.S.C. § 1101(a)(15), (20) (2012) (creating a specific permanent resident status).

80. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 n.23 (1981) (emphasis added).

fully justified,”<sup>81</sup> supporting the idea that permanent residents are part of the community in which they live.

Recently, it appears that the Court has been moving towards a more “stake-based” theory of immigration, where the greater the stake the immigrant has in the country, the more constitutional protection she is provided.<sup>82</sup> This has created a substantial line of cases extending constitutional rights to immigrants,<sup>83</sup> where lawful permanent residents present in the United States who develop significant roots are given the broadest range of constitutional rights.<sup>84</sup> The Court has long held that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”<sup>85</sup>

Opponents of extending voting rights to permanent residents argue that voting is a right directly connected to being a citizen and extending suffrage would blur the line between citizens and noncitizens. Mark Krikorian asserted that “[e]xtending voting rights to noncitizens eliminates the last distinction between people who have accepted permanent membership in the American people and those who have not.”<sup>86</sup> However, the historical analysis discussed above shows that this idea is incorrect, as citizenship has not been directly connected to the right to vote. Furthermore, permanent residents would still be distinct from citizens, particularly because the most significant and stringent consequence of being a noncitizen is being subject to deportation at any time.<sup>87</sup> Deportation or removal is a “drastic measure and at times the equivalent of banishment of exile,”<sup>88</sup> but the government’s power to exclude and expel foreigners is broad.<sup>89</sup> However, a natural-born citizen

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81. *Id.* at 255.

82. Alyssa Markenson, *What’s at Stake?: Bluman v. Federal Election Commission and the Incompatibility of the Stake-Based Immigration Plenary Power and Freedom of Speech*, 109 NW. U. L. REV. 209, 222 (2014).

83. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270–71 (1990) (cataloging cases extending constitutional rights to aliens and ultimately declining to extend those rights to a nonresident alien because he “had no previous significant voluntary connection with the United States”).

84. *See* Markenson, *supra* note 78, at 218 (describing the Supreme Court’s use of a sliding scale which correlates the extent of aliens’ constitutional rights with their level of ties to the country).

85. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

86. Robert F. Worth, *Push Is On to Give Legal Immigrants a Vote in the City*, N.Y. TIMES (Apr. 8, 2004), <http://www.nytimes.com/2004/04/08/nyregion/push-is-on-to-give-legal-immigrants-a-vote-in-the-city.html?pagewanted=all> [<https://perma.cc/ZFN6-S4N4>].

87. 8 U.S.C. § 1227 (2012) (listing many grounds for deportation of resident aliens).

88. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

89. *See, e.g.*, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. . . . Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.”).

generally cannot have his citizenship taken away without his assent to relinquish it.<sup>90</sup>

*B. Permanent Residents and their First Amendment Right to Free Speech*

“Speech is an essential mechanism of democracy,”<sup>91</sup> and the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.”<sup>92</sup> Once again, the word “people” is not clearly defined, but it has been settled that permanent residents have this right of free speech and petition,<sup>93</sup> and the Court has “acknowledged the existence of a First Amendment interest in voting.”<sup>94</sup>

In 1990, the Supreme Court acknowledged that the First Amendment was designed to protect a class of people who “are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>95</sup> As discussed above, permanent residents are clearly distinguished from the rest of the immigrant class, particularly because “[l]awful 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.”<sup>96</sup> Under the First Amendment, both citizens and permanent residents have the right of political expression.<sup>97</sup>

Parallel to voting, there has been a history of immigrants exercising their First Amendment rights of speech and petition since the founding of the United States, particularly because, like voting, there is no direct relationship between citizenship and the First Amendment.<sup>98</sup> Opponents of the Alien and Sedition Act of 1798 looked to the “broad language of the Bill of Rights and

90. 8 U.S.C. § 1481 (2012) (listing acts that can cause a U.S. national to lose their citizenship if performed “voluntarily” and “with the intention of relinquishing United States nationality”); *Vance v. Terrazas*, 444 U.S. 252, 260–61 (1980) (holding that Congress does not have the power to take away an American citizen’s citizenship without his “assent”).

91. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

92. U.S. CONST. amend. I.

93. *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (“[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.”); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 n.5 (1970) (adopting Justice Murphy’s concurrence in *Bridges*).

94. *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring).

95. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

96. *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 291 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

97. *Cf. McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448 (2014) (affirming the right to participate in public debate and political expression, with no distinction made between citizens and resident aliens).

98. *See, e.g., Michael J. Wishnie, Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 691 (2003) (arguing that it is improbable that the framers intended to limit First Amendment protections to citizens because of the history of granting noncitizens the right to petition).

the legal obligations imposed on *all persons residing within our territory* as support for the notion that foreign nationals were entitled to the protection of the Bill of Rights.<sup>99</sup> Petitioning was a fundamental part of colonial America,<sup>100</sup> and members of all strata of society exercised the right to petition the government.<sup>101</sup> Furthermore, the First Amendment “protects political association as well as political expression,”<sup>102</sup> and the “right to associate with the political party of one’s choice.”<sup>103</sup> This appears to protect permanent residents’ right to become invested in the political community by joining a political party, subject to some limitations.<sup>104</sup>

Today, the First Amendment continues to protect permanent residents’ free speech rights, including political activism and political contributions.<sup>105</sup> The United States even provides protection from foreign judgments for defamation unless a U.S. court determines that the foreign court provided “at least as much protection for freedom of speech and press in that case as would be provided by the first amendment.”<sup>106</sup> The statute further defines “United States person” as including “an alien lawfully admitted for permanent residence to the United States.”<sup>107</sup> One of the motivations for Congress to enact this statute was that the freedom of speech and press is “necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.”<sup>108</sup>

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99. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 n.18 (2003) (emphasis added).

100. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 603–11 (1999).

101. Wishnie, *supra* note 98, at 688–89 (noting that “[d]isenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans, and even slaves” exercised this right of petition).

102. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam).

103. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

104. See 8 U.S.C. § 1182(a)(3)(D) (2012) (providing that “[a]ny immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible” unless participation was involuntary or terminated prior to application).

105. *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 285 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

106. 28 U.S.C. § 4102(a)(1)(A) (2012); see also *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 490 (5th Cir. 2013) (denying enforcement of Canadian judgment because “the law applied in the Nova Scotia proceeding did not provide at least as much protection for freedom of speech and press” as the First Amendment).

107. 28 U.S.C. § 4101(6)(B) (2012).

108. *Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act)*, Pub. L. No. 111-223, 124 Stat. 2380, 2380 (2010) (codified at 28 U.S.C. §§ 4101–4105 (2012)).

C. *Bluman v. FEC: Permanent Residents Can Make Political Contributions*

Permanent residents enjoy free speech rights and protections for political speech, while other noncitizens do not. The textual analysis in favor of granting legal permanent residents voting rights is strengthened by the recent decision in *Bluman*, which the Supreme Court affirmed without an opinion.<sup>109</sup> There, the district court held that, under 2 U.S.C. § 441e(a),<sup>110</sup> foreign nationals were barred “from contributing to candidates or political parties” and from making independent expenditures.<sup>111</sup> However, the statute defines “foreign national” to include all foreign citizens *except* lawful permanent residents.<sup>112</sup> Congress created a specific exemption for lawful permanent residents in this statute, granting them the ability to make political contributions,<sup>113</sup> which theoretically could be used to influence American policy. While this limited right to make political donations is not enough to protect permanent residents’ rights—especially when even corporations can make enormous expenditures<sup>114</sup>—it does indicate that permanent residents are a part of, and can participate in, this political community.

The holding in *Bluman* is actually more relevant because of its distinction from *Citizens United*,<sup>115</sup> decided a year before.<sup>116</sup> In *Citizens United*, the Supreme Court determined that identity-based “restrictions distinguishing among different speakers, allowing speech by some but not others,” are prohibited.<sup>117</sup> Prohibiting certain speakers from making independent expenditures interferes with the marketplace of ideas,<sup>118</sup> and the government cannot impose restrictions on “certain disfavored speakers” in the political speech context.<sup>119</sup> However, the Supreme Court in *Citizens United* did not decide whether the government may ban foreign-national

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109. *Bluman v. Fed. Election Comm’n*, 565 U.S. 1104 (2012).

110. Congress has recodified the statute since *Bluman*. It can now be found at 52 U.S.C. § 30121 (2012).

111. *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

112. 52 U.S.C. § 30121(b)(2) (2012).

113. Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL’Y 663, 692 (2011).

114. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and holding that corporate electioneering expenditures are protected by the First Amendment’s free speech right).

115. *Id.* at 340.

116. The discussion of *Citizens United* in this Note is not meant to evaluate whether that holding was correct; rather, it is meant only to show the distinction between that holding and *Bluman*’s, where the Court allowed identity-based distinctions in prohibiting political speech, thereby defining permanent residents as within the political community.

117. *Citizens United*, 558 U.S. at 340.

118. *Id.* at 354.

119. *Id.* at 341.

contributions,<sup>120</sup> leaving that issue until *Bluman*, where the Court affirmed these identity-based restrictions.<sup>121</sup> Congress and the lower court in *Bluman* allowed permanent residents to make political contributions but specifically excluded foreign nationals because of their identity as foreigners, suggesting and supporting the idea that permanent residents are included in our political community, unlike other noncitizens who are prohibited from making political contributions.<sup>122</sup>

A fundamental part of our political community is that it is limited to citizens of that community, and “foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”<sup>123</sup> Yet both Congress and the Judiciary have distinguished permanent residents from other foreign citizens,<sup>124</sup> instead showing that permanent residents are more similar to U.S. citizens. And lawful permanent residents are part of the American political community, deserving most, if not all, of the same protections as citizens.

Again, some argue that resident aliens cannot vote because they are not part of the political community and only those within the political community—citizens—can vote.<sup>125</sup> The *Bluman* court recognized the state’s interest in limiting participation in its government to those within “the basic conception of a political community.”<sup>126</sup> So when Congress passed the law allowing permanent residents to contribute to political campaigns and causes, or, in other words, to engage in political speech, and the Court upheld this law, they determined that permanent residents were included within this basic conception of a political community. Political contributions and express-advocacy expenditures are “integral” to how citizens elect officials to all government positions.<sup>127</sup> Because permanent residents are within this basic conception of our political community and possess First Amendment rights of free speech,<sup>128</sup> they can participate in politics, which should include voting.

The First Amendment “protects political speech”<sup>129</sup> and the freedom of assembly, including political activism, and congressional legislation upheld by *Bluman* allows permanent residents, but not other noncitizens, to make political donations. However, just because permanent residents have the

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120. *Id.* at 362.

121. *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 283–84 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

122. *Id.*

123. *Id.* at 288.

124. *Id.* at 290–91; 148 CONG. REC. 1400–02 (Feb. 13, 2002) (statements of Reps. Mink, Menendez, Reyes, Morella, and Solis).

125. *Cabell v. Chavez-Salido*, 454 U.S. 432, 438 (1982).

126. *Bluman*, 800 F. Supp. 2d at 288 (quoting *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978)).

127. *Id.*

128. *See supra* subpart II(B) (expounding the First Amendment’s application to permanent residents).

129. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371 (2010).

ability to contribute to campaigns does not mean they realistically can. Like the average citizen, they cannot compete with the campaign contributions of the wealthy and corporations, particularly after *Citizens United*.<sup>130</sup> This is why extending voting to permanent residents is so important: even though they potentially can donate money, they either may not have the funds to do so, or the effect would be minimal compared to other enormous campaign donations. Voting is fundamental because it “is preservative of other basic civil and political rights,”<sup>131</sup> and without the right to vote, permanent residents’ rights and protections—even their freedom of speech—could be taken away, as has repeatedly been done in the past.

### III. (Un)representative Democracy

One definition of a “representative democracy” is “[a] form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation.”<sup>132</sup> A democracy requires that those affected by legislative and political decisions be involved in that decision making,<sup>133</sup> and laws must have “the consent of the society, over whom no body can have a power to make laws, but by their own consent.”<sup>134</sup> But when groups are excluded from legislative and governmental decision making, their interests are “disregarded or marginalized precisely because their voices do not matter to decision makers.”<sup>135</sup> When this happens, permanent residents have little to no representation, disregarded by the very people elected to represent their community. But even if elected officials are not politically accountable to resident aliens within the community, those elected “should, nonetheless, treat them with an appropriate concern and respect that will assure that their interests are in fact taken into account in the making of public policy.”<sup>136</sup>

Legislators are elected to represent their constituents, advocating for issues relevant to the people within their district. Besides jury duty, there are no additional burdens to citizenship “not also shouldered by noncitizen

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130. See Johanna Kalb, *J. Skelly Wright’s Democratic First Amendment*, 61 LOY. L. REV. 107, 109 (2015) (discussing how America’s “system of elections [is] financed disproportionately by wealthy donors”).

131. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

132. WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, *THE CYCLOPEDIA OF LAW* 879 (2d ed. 1922).

133. April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L.J. 163, 164 (1996).

134. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 70 (C.B. Macpherson ed., 1980) (1690) (emphasis omitted).

135. Daniel Munro, *Integration Through Participation: Non-citizen Resident Voting Rights in an Era of Globalization*, 9 J. INT’L MIGRATION & INTEGRATION 63, 67 (2008) (emphasis omitted).

136. Levinson, *supra* note 14, at 1291.



residents.”<sup>137</sup> Permanent residents are governed every day by the same laws as citizens, but legislators do not have as much reason to listen to people who cannot vote.<sup>138</sup> This nonrepresentation, along with disenfranchisement, creates a political imbalance in many major cities, including Los Angeles and New York, which contain significant immigrant populations.<sup>139</sup> Permanent residents are a part of, and contribute to, our political, economic, and societal community, but because they have no representation, many argue that resident aliens should have the right to vote.<sup>140</sup>

A. *Permanent Residents Are Affected in the Same Ways as Citizens*

One of the strongest bases for this country’s independence was the idea that there should not be “taxation without representation,”<sup>141</sup> yet permanent residents within the United States are taxed on the same scale as citizens.<sup>142</sup> While there might not be an express constitutional right to “no taxation without representation,”<sup>143</sup> taxing permanent residents without affording them the right to vote creates an unfair system, taking advantage of people who have no direct political recourse but are striving to become a part of this country. Furthermore, many permanent residents own property within the United States and therefore pay property taxes to finance public services, including education, police protection, and sanitation.<sup>144</sup> An estimated \$25 billion was collected from Texas school district property taxes—55% of all

137. Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 899 (2013).

138. Cole, *supra* note 99, at 376.

139. See Paul Tiao, *Non-citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 172, 182 & n.52 (1994) (considering how “[l]arge minority communities, comprised primarily of LPRs . . . have little or no political power” and reporting demographic statistics about Los Angeles’s voting community).

140. See, e.g., Munro, *supra* note 132, at 65 (arguing that “non-citizen voting is not only compatible with, but [is] required by, principles of democratic legitimacy”).

141. See JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1764), [http://lf-oll.s3.amazonaws.com/titles/2335/Otis\\_RightsBritishColonies1556.pdf](http://lf-oll.s3.amazonaws.com/titles/2335/Otis_RightsBritishColonies1556.pdf) [<https://perma.cc/6VYJ-FAD6>]. Otis is often cited as the originator of the slogan “taxation without representation is tyranny” based on the wording in this pamphlet, which famously argues that taxation “without any consent or representation in Parliament” deprives British colonists “of one of their most essential rights, as freemen.” *Id.* at 57–58, 83; Grant Dorfman, Essay, *The Founders’ Legal Case: “No Taxation Without Representation” Versus Taxation No Tyranny*, 44 Hous. L. REV. 1377, 1378 (2008).

142. Resident aliens are taxed on the same income gradation and filing system as citizens. *Taxation of U.S. Resident Aliens*, INTERNAL REVENUE SERV. (Nov. 10, 2015), <http://www.irs.gov/Individuals/International-Taxpayers/Taxation-of-Resident-Aliens> [<https://perma.cc/2GC3-9WSB>].

143. See *Campbell v. Hilton Head No. 1 Pub. Serv. Dist.*, 580 S.E.2d 137, 140 (S.C. 2003) (finding no independent, federal right in the Guarantee Clause that prohibits taxation without representation).

144. *State and Local Taxes*, U.S. DEP’T TREASURY (Dec. 5, 2010), <http://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx> [<https://perma.cc/SDS6-WTVQ>].

property taxes in Texas in 2013.<sup>145</sup> Children of permanent residents are very likely to be citizens themselves, even attending these schools, but unlike the children of citizens, they “are also left unrepresented in the political process, because their parents are denied a vote.”<sup>146</sup>

As argued by Professor Sanford Levinson: “[C]itizenship . . . is a fatally underinclusive category because the universe of people whose interests are vitally affected by any given election is far larger than the universe of those who are allowed to participate in choosing public officials . . . . Noncitizens also may share what are thought to be the requisite values.”<sup>147</sup>

Resident aliens are significantly affected by electoral decisions in essentially the same way as citizens, yet they have no voice in those decisions. Everyone affected by governmental decisions should be able to participate in that government.<sup>148</sup> If the job of the legislators is truly to represent the people within their district, then each representative should be responsible for obtaining resources for that same number of people. Even nonvoting groups, such as permanent residents and children, need resources just as much as voters.<sup>149</sup> The foundation of all our rights is “an idea of justice and genius, the idea that the government derives its power from ‘the consent of the governed.’”<sup>150</sup> Permanent residents are part of that “governed” community and have all the local, political, social, and military<sup>151</sup> requirements as citizens. Permanent residents can even volunteer for military service to fight for this country, but they are not accorded the privilege of voting.

#### B. *Virtual Representation Does Not Protect Permanent Residents’ Rights*

The inadequacy of “virtual representation” has been used in previous arguments in favor of expansions of voting. Prior to the Revolutionary Period, American colonists argued that they were not represented in the British Parliament, and while the response of the British government was that

145. TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, BIENNIAL PROPERTY TAX REPORT: TAX YEARS 2012 AND 2013, at 7 (2014).

146. Kini, *supra* note 67, at 306.

147. Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545, 557 (1989).

148. Cf. ROBERT A. DAHL, *AFTER THE REVOLUTION?* 64 (rev. ed. 1990) (criticizing Rousseau’s historical conception of what constitutes “a people” in a democracy as underinclusive).

149. Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1907 (2012).

150. Richard Nixon, President of the United States, Radio Address on the Philosophy of Government (Oct. 21, 1972) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)), <http://www.presidency.ucsb.edu/ws/?pid=3637> [https://perma.cc/6CBP-XG6N].

151. Noncitizens can choose to enter the military, but permanent residents must also register for the Selective Service. 50 U.S.C. § 453(a) (2012) (“[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration [for the Selective Service].”) (emphasis added).

they were “virtually represented,” the founders vehemently rejected this answer.<sup>152</sup> Many regarded virtual representation as “‘too ridiculous to be regarded’ in the American colonies.”<sup>153</sup> Virtual representation arguments were again used when denying women the right to vote, claiming that because women were “naturally dependent” on their husbands, they were virtually represented by their husbands’ votes.<sup>154</sup> Years later, Martin Luther King, Jr. claimed that an “unjust law” is a “code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote.”<sup>155</sup>

As a theory, virtual representation assumes that there are communities of interests—that those who have the right to vote have the same interests as those unable to vote.<sup>156</sup> This argument continues today to deny suffrage to permanent residents, claiming that they are “virtually represented” in our political system.<sup>157</sup> In their book, Eric Posner and Adrien Vermeule claim that while permanent residents cannot vote themselves, their friends or family often can, and through virtual representation, aliens receive a degree of political influence.<sup>158</sup> But this is not enough protection by itself. As even Posner and Vermeule acknowledge, “the resident alien has numerous local ties (employers, friends, perhaps relatives) who will support the resident alien’s interests in the political arena,” but “[t]his kind of ‘virtual representation’ is not sufficient in itself.”<sup>159</sup> They go on to state that resident aliens have an “exit option” and the protection of foreign governments which are “weak instruments” for influencing the government that may actually match the ability to vote.<sup>160</sup> While this argument may apply to noncitizens in general, it is not applicable to permanent residents, as it does not take into account the reasons why permanent residents move here: to become a permanent part of this community and establish a foundation in this country. Permanent residents want to remain in this country, so having an exit option does not provide any protection because they have given up their foreign

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152. Joan R. Gundersen, *Independence, Citizenship, and the American Revolution*, 13 SIGNS: J. WOMEN CULTURE & SOC’Y 59, 63 (1987).

153. Jonathan R. Macey, *Representative Democracy*, 16 HARV. J.L. & PUB. POL’Y 49, 50 n.7 (1993) (quoting BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 161–75 (1967)).

154. Gunderson, *supra* note 152, at 65.

155. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.*, 289, 294 (James Melvin Washington ed., 1986).

156. Gunderson, *supra* note 152, at 63.

157. Noah Feldman, *‘One Man, One Vote’ Keeps Changing*, BLOOMBERGVIEW (May 27, 2015), <http://www.bloombergview.com/articles/2015-05-27/-one-man-one-vote-keeps-changing> [<https://perma.cc/9GJD-92N8>].

158. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 125 (2007).

159. Posner & Vermeule, *supra* note 7, at 1143–44.

160. *Id.*

communities to move to the United States. Some scholars even state that virtual representation is already “dead,” as suffrage has expanded to include many more groups than before.<sup>161</sup>

C. *Assimilating Permanent Residents into the American Community*

Not only would local and state voting rights protect permanent resident interests, but suffrage would aid in assimilating permanent residents into our society and even promote naturalization. The five-year residency period for permanent residents before naturalization is designed to help integrate noncitizens into the U.S. community. One view against noncitizen voting claims that “extending voting rights to non-citizens undermines one of the incentives that newcomers have to pursue citizenship.”<sup>162</sup> However, not only would permanent resident “voting . . . be a powerful tool to promote the assimilation of immigrants into American society,”<sup>163</sup> but there is also evidence that naturalizations would actually increase by extending voting rights.<sup>164</sup> Permanent resident voting would foster the participation that democracy requires and can familiarize permanent residents with U.S. political culture, creating a sense of belonging that could make naturalization more attractive.<sup>165</sup> Recognizing that permanent residents are a part of our community and demonstrating that we want them to be a part of American society as equal people, not as a lower class, would contribute to a mutual respect, showing that permanent residents are not outsiders, but potential citizens.<sup>166</sup>

Part of the naturalization process requires good moral character, necessitating that the permanent resident be “well disposed to the good order and happiness of the United States.”<sup>167</sup> Because permanent resident voting would promote political participation and encourage permanent residents to become more involved in their communities,<sup>168</sup> this would motivate and instill this notion of good moral character in permanent residents. Local voting rights for permanent residents would be a pathway to promote civic

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161. Fishkin, *supra* note 149, at 1903–04.

162. Munro, *supra* note 135, at 65.

163. Yang, *supra* note 47, at 62.

164. See GROENENDIJK, *supra* note 38, at 14 (showing empirically that in the European countries studied, there was no decrease in naturalization rates after immigrants were given the right to vote).

165. T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 119, 126–27 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000).

166. See Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 36–37 (Amy Gutmann ed., 1994) (emphasizing the importance of respect and equal recognition to the health of a democratic society).

167. 8 U.S.C. § 1427(a)(3) (2012).

168. Yang, *supra* note 47, at 62.

education and citizenship,<sup>169</sup> and in Alexander Hamilton’s view, this country needs “that temperate love of liberty, so essential to real republicanism.”<sup>170</sup> Naturalization would become something more than simply a difficult administrative process because permanent residents would actually feel part of their community by having a voice in their new society, increasing their “love of liberty.”

#### IV. Constitutional Analysis

While voting rights have been restricted to certain groups since the formation of this country, the U.S. Constitution does not preclude permanent residents from voting. As described above, there has been a long history of noncitizen voting in the United States. The argument that the Constitution actually does restrict voting to only citizens<sup>171</sup> ignores both the history of noncitizen voting, even continuing after the Fourteenth Amendment, and the literal reading of the amendments related to voting, which only prevents the government from denying or abridging voting rights of citizens on specific grounds.<sup>172</sup> “Undeniably the Constitution of the United States *protects* the right of all qualified citizens to vote,”<sup>173</sup> but it does not *restrict* the right to vote.

##### A. *The Constitution Does Not Preclude Permanent Residents from Voting*

Reading the text shows that the Constitution does not prohibit permanent resident voting. Several amendments, including the Fifth Amendment, use the terms “person” or “people.”<sup>174</sup> While many phrases in the Constitution are vague, the term “people” is broader than just “citizens.”<sup>175</sup> On analyzing a Second Amendment case brought by permanent residents, the court in *Fletcher v. Haas*<sup>176</sup> put forth that “[t]he terms ‘citizen’ and ‘the people’ have generally not been treated as synonymous for purposes

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169. Hayduk, *supra* note 20.

170. Alexander Hamilton, The Examination No. VII (Jan. 12, 1802), in 25 THE PAPERS OF ALEXANDER HAMILTON 495, 495–97 (Harold C. Syrett et al. eds., 1977).

171. See, e.g., Karen Nelson Moore, Madison Lecture, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 806–07, 806 n.16 (2013) (discussing the history of alien voting rights under the Constitution and Bill of Rights, and the break from the common law tradition in the United States prior to the Civil War that allowed for alien voting in various states).

172. See U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI (proscribing the denial or abridgment of the right to vote for citizens over the age of eighteen on the basis of race, color, sex, and failure to pay poll taxes).

173. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added).

174. See e.g., U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

175. For example, the Equal Protection Clause applies to all people residing in the United States, including aliens. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1329 (1980).

176. 851 F. Supp. 2d 287, 294 (D. Mass. 2012).

of constitutional usage,” and the only time the Supreme Court defined both terms as the same was in *Dred Scott v. Sandford*,<sup>177</sup> a case which the *Fletcher* court acknowledged was an “unfortunate aberration.”<sup>178</sup>

The Constitution’s language does not preclude permanent residents from being granted the right to vote. Section Two of the Fourteenth Amendment only creates a penalty when “the right to vote . . . is *denied* to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, *or in any way abridged*, except for participation in rebellion, or other crime.”<sup>179</sup> Similarly, the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments all use the same language: “[t]he right of citizens of the United States to vote *shall not be denied or abridged*.”<sup>180</sup>

The language of the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments specifies only that a state may not exclude citizens from voting on unconstitutional bases. There is nothing in the Constitution that restricts suffrage to only citizens, thereby preventing permanent residents from voting.<sup>181</sup> When the Declaration of Independence was signed, alien enfranchisement seemed “the logical thing to do . . . [; t]he key suffrage qualifications in the states centered on property ownership, race and gender, not on national citizenship.”<sup>182</sup> Citizenship has not been and still is not directly connected to voting: currently, neither minors<sup>183</sup> nor felons<sup>184</sup> are permitted to vote in numerous states, despite both groups containing many citizens.<sup>185</sup> The only right the Constitution expressly limits to citizens is the right to hold public office,<sup>186</sup> specifying that the President must be a native-born citizen, that senators must be citizens for at least nine years, and

177. 60 U.S. (19 How.) 393, 404 (1857), *superseded by* U.S. CONST. amend. XIV.

178. 851 F. Supp. 2d at 294.

179. U.S. CONST. amend. XIV, § 2 (emphasis added).

180. U.S. CONST. amends. XV, XIX, XXIV, XXVI (emphasis added).

181. Raskin, *supra* note 21, at 1425.

182. Jayanth K. Krishnan, *Mobilizing Immigrants*, 11 GEO. MASON L. REV. 695, 702 (2003) (quoting Jamin B. Raskin, *Time to Give Aliens the Right to Vote (Again)*, NATION, Apr. 1993, at 433, 433).

183. U.S. CONST. amend. XXVI, § 1.

184. *See* U.S. CONST. amend. XIV, § 2 (allowing the right to vote to be abridged on account of participation in a rebellion or other crimes).

185. Raskin, *supra* note 19, at 1429.

186. U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . .”); U.S. CONST. art. I, § 3, cl. 3 (“No Person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States . . . .”); U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the office of President . . . .”); U.S. CONST. amend. XII (“But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”); *see also* *Fletcher v. Haas*, 851 F. Supp. 2d 287, 295 (D. Mass. 2012) (noting that the right to hold federal public office is the only constitutional right that is exclusive to U.S. citizens). Notably, the word “citizen” is also stated in the Privileges and Immunities Clause, which provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2, cl. 1.

that representatives must be citizens for at least seven years.<sup>187</sup> While the Court has “upheld other citizens-only right-restrictions arising under state and federal statutes, [it] has never declared them to be mandated by the Constitution.”<sup>188</sup>

Voting does not grant citizenship,<sup>189</sup> and permanent resident voting does not conflict with Congress’s authority to establish naturalization laws.<sup>190</sup> This is especially true given that the federal government has plenary authority over immigration and foreign policy. If permanent resident voting were limited to state and local elections, this would prevent the appearance of a conflict when noncitizens vote on foreign policy.

### B. *Constitutional Support for Permanent Resident Voting*

Not only does the Constitution not prohibit noncitizens from voting, but there is support for this idea in its text. As the term “people” includes more than just “citizens,” this may be an indication that the framers intended to extend substantial rights to noncitizens—such as the right to free speech—shown by the absence of the word “citizen” within the Bill of Rights<sup>191</sup> and supported by the framers’ outside writings. Thomas Jefferson wrote to Edmund Pendleton in 1776: “I was for extending the right of suffrage (or in other words the rights of a citizen) to all who had a permanent intention of living in the country.”<sup>192</sup> In opposition to the Alien Act, James Madison asserted that:

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.<sup>193</sup>

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187. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 5.

188. 28 U.S.C. § 1865 (2012) (limiting jury service to citizens); *Fletcher*, 851 F. Supp. 2d at 295 (citing 18 U.S.C. § 611 (2012)).

189. Kini, *supra* note 67, at 281.

190. U.S. CONST. art. I, § 8, cl. 4; Kini, *supra* note 67, at 281 (asserting that Congress’s power “to ‘establish a uniform Rule of Naturalization’ is not threatened by granting noncitizens the right to vote” since voting does not grant citizenship).

191. *See generally* U.S. CONST. amends. I–X. “[T]he Bill of Rights makes no mention of citizens; instead, it focuses on persons (and specific categories of persons) and the people. . . . [The] conscious avoidance of the word ‘citizen’ conveys the drafters’ intention that the rights defined in the Bill of Rights extend beyond those with citizen status.” Moore, *supra* note 171, at 807.

192. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON: 1760-1776, at 503, 504 (Julian P. Boyd et al. eds., 1950).

193. James Madison, Report to the Committee on the Virginia Resolutions (1800), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 556 (Jonathan Elliot ed., 1836).

Furthermore, the Constitution provides for the specific exclusion of “Indians not taxed” from population counts for district representation.<sup>194</sup> By including this specific language, Congress must have thought and debated about whom to exclude from being counted for apportionment of federal representatives and determined that only “Indians not taxed” should be, but the representatives did not exclude permanent residents or even immigrants in general. During the debate over the Fourteenth Amendment, New York representative Robert Hale argued that by “reading the language in its grammatical and legal construction[,] it is a grant of the fullest and most ample power to Congress to make all laws ‘necessary and proper to secure to *all persons* in the several States protection in the rights of life, liberty, and property.’”<sup>195</sup>

Both Article I and the Fourteenth Amendment “exempt ‘Indians not taxed’ from population enumerations for congressional apportionment,”<sup>196</sup> but neither permanent residents nor immigrants were excluded in the text. For over a century, the Supreme Court has determined that Fourteenth Amendment rights “are universal in their application, to *all persons* within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”<sup>197</sup> This simply shows that the Constitution does not exclude permanent residents from voting, but because the framers intended to include every person within a district to be represented by legislators, there is textual support for including all people with a permanent intention of living in this country in the voting community.

Federal statutes bar permanent residents from voting in federal elections,<sup>198</sup> and many states preclude their voting as well.<sup>199</sup> However, states are free to allow permanent residents to vote in state and local elections, and federal law expressly permits such a choice.<sup>200</sup> Because of the numerous legal and practical obstacles lawful permanent residents face—the (present) inability to vote, the lack of resources to contribute to political campaigns, and sometimes, even the lack of a comfortable grasp of English<sup>201</sup>—they do

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194. Levinson, *supra* note 14, at 1283.

195. Honorable Robert S. Hale, N.Y. Representative, Speech in the United States House of Representatives: An Increase of the Powers of Congress Under the Constitution Not Desirable 3 (Feb. 27, 1866) (emphasis added).

196. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEXAS L. REV. 1, 26 (2002).

197. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added).

198. See 18 U.S.C. § 611(a) (2012) (proscribing alien voting in federal elections).

199. See, e.g., TEX. ELEC. CODE ANN. § 11.002 (West 2010) (restricting qualified voters to U.S. citizens).

200. See 18 U.S.C. § 611(a)(2) (2012) (authorizing aliens to vote in federal elections “under a State constitution or statute or a local ordinance”).

201. Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1099 (2013).



not possess the political power necessary to protect their central rights.<sup>202</sup> Allowing lawful permanent residents to vote in state and local elections would restore their political power, as state legislators would be forced to account for their interests while legislating or face repercussions at the ballot box.

### C. *Arguments Opposing Permanent Resident Voting Rights*

Many opponents of permanent resident voting argue “every vote cast by a noncitizen, whether an illegal alien or a resident alien legally in the country, dilutes or cancels the vote of a citizen, effectively disenfranchising that citizen.”<sup>203</sup> While there is evidence that many noncitizens favor the Democratic Party,<sup>204</sup> this argument is simply based on anti-immigrant sentiment and has been used before to oppose the expansion of suffrage to women because it would only “double or annul” their husband’s vote.<sup>205</sup> Each new expansion of suffrage may have an effect of diluting voting power, but the state cannot simply “[f]enc[e] out’ from the franchise a sector of the population because of the way they may vote.”<sup>206</sup> Just because a permanent resident may vote either the same or differently than a citizen does not support the argument that permanent residents should not be allowed to vote.

More importantly, permanent residents would not be represented at all if this assertion that they would vote differently than some citizens within their community is correct. The argument that noncitizens’ voting rights would dilute or cancel out a citizen’s vote actually strengthens the argument in favor of extending suffrage to permanent residents. Noncitizens are included in the census’s total population number, and districts are

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202. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (calling for a more “searching judicial inquiry” when there is “prejudice against discrete and insular minorities”).

203. Hans A. von Spakovsky, *The President’s Executive Actions on Immigration and Their Impact on Federal and State Elections*, HERITAGE FOUND. (Feb. 12, 2015), <http://www.heritage.org/research/testimony/2015/the-presidents-executive-actions-on-immigration-and-their-impact-on-federal-and-state-elections> [https://perma.cc/6S9R-DHWG] (testimony before the House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security, and the Subcommittee on Health Care, Benefits, and Administrative Rules).

204. See Jesse T. Richman et al., *Do Non-citizens Vote in U.S. Elections?*, 36 ELECTORAL STUD. 149, 153 (2014) (graphically illustrating the higher proportion of Democrat to Republican vote choice by noncitizens in recent elections).

205. See *Document Study Sheet: Pamphlet from the National Association Opposed to Woman Suffrage*, JEWISH WOMEN’S ARCHIVE (2003), <http://sblc.registereastconn.org/History/PrimarySourcePacket%20AntiSuffrage/HouseholdHints%20Transcription%20and%20%20StudySheet.pdf> [https://perma.cc/A97B-5S7K] (discussing the National Association Opposed to Woman Suffrage’s reasons against letting women vote, including that votes of married women “can only double or annul their husband’s votes”); Eleanor Barkhorn, *‘Vote No on Women’s Suffrage’: Bizarre Reasons For Not Letting Women Vote*, ATLANTIC (Nov. 6, 2012), <http://www.theatlantic.com/sexes/archive/2012/11/vote-no-on-womens-suffrage-bizarre-reasons-for-not-letting-women-vote/264639/> [https://perma.cc/U88F-V5N8] (same).

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

apportioned based on total population, so citizens' votes in areas with more noncitizens count for more than citizens' votes in areas with fewer noncitizens. This was the rationale the plaintiffs used in *Evenwel v. Abbott*<sup>207</sup> to argue for requiring states to exclude noncitizens from being counted in district apportionment,<sup>208</sup> which the Supreme Court unanimously rejected.<sup>209</sup> Permanent residents are included in the total population, but do not have the right to vote. This leaves permanent residents underrepresented and without a voice or protection in the political process.<sup>210</sup>

However, some claim that even if noncitizens were granted voting rights, the benefits gained from noncitizen voting would not actually occur because either the number of noncitizens in the community is too small or permanent residents would not vote even if they could.<sup>211</sup> But the existence of a right should not be conditioned on the amount of people that may actually use it. Only a small fraction of citizens actually contribute money to a candidate, party, or political action committee (PAC),<sup>212</sup> even though it is their right, and many citizens do not even exercise their right to vote.<sup>213</sup> Furthermore, there is no actual proof that permanent residents would not vote. One opponent cites a study of one specific region where noncitizens currently can vote in local elections,<sup>214</sup> but the history after the Fourteenth and Nineteenth Amendments can explain this low turnout. While these Amendments granted the right to vote to a large number of people, it took years before widespread turnout actually occurred, primarily due to social and political hurdles.<sup>215</sup> But, eventually, those movements were successful.

Some even argue that if permanent residents want to vote, they should simply become citizens, asserting: "It should only be for United States

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207. 136 S. Ct. 1120 (2016).

208. *See id.* at 1123 ("Voter-eligible population, not total population, [the plaintiffs] urge, must be used to ensure that their votes will not be devalued in relation to citizens' votes in other districts.").

209. *Id.* at 1133.

210. *See Harper-Ho, supra* note 25, at 304 (arguing that counting resident aliens for apportionment purposes while denying them the right to vote serves only to inflate the political influence of the voting population in their districts).

211. *See* STANLEY A. RENSHON, CTR. FOR IMMIGRATION STUDIES, ALLOWING NON-CITIZENS TO VOTE IN THE UNITED STATES? WHY NOT 23 (2008), [http://cis.org/sites/cis.org/files/articles/2008/renshon\\_08.pdf](http://cis.org/sites/cis.org/files/articles/2008/renshon_08.pdf) [<https://perma.cc/PV6P-EXDC>] (citing the small relative size of noncitizen populations and their low turnout in jurisdictions in which they can vote as evidence that the purported benefits of granting noncitizens the vote "ring hollow indeed").

212. For the 2013–2014 election cycle, only about 0.23% of citizens donated \$200 or more. *Donor Demographics*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/donordemographics.php> [<https://perma.cc/CS8W-7UVW>].

213. In the 2012 presidential election, voter turnout was 57.5% and 93 million eligible voters did not vote. *2012 Voter Turnout Report*, BIPARTISAN POL'Y CTR. (Nov. 8, 2012), <http://bipartisanpolicy.org/library/2012-voter-turnout/> [<https://perma.cc/PQM2-NSYT>].

214. *See* RENSHON, *supra* note 211, at 24 (examining noncitizen voting in Takoma Park, Maryland).

215. Krishnan, *supra* note 182, at 708.

citizens. . . . It's also a reason for people who are on a path to citizenship to aspire to citizenship. It's something for them to look forward to."<sup>216</sup> However, voting has not always been tied to citizenship and was not restricted to citizens alone at the time of the founding.<sup>217</sup> Voting became tied to citizenship shortly after World War I with the rise of anti-immigrant sentiment, and noncitizen voting has struggled to reemerge since.<sup>218</sup>

Furthermore, this argument does not account for the five years spent completing the residency requirement to become a citizen, the time after those five years for their application to be completed, or the time spent here prior to becoming a permanent resident. A permanent resident cannot simply become a citizen but must first complete their residency and then apply for citizenship. Even after completing the five-year-residency requirement, the application period alone can take months or even years.<sup>219</sup> Throughout this time, permanent residents are still directly affected by both state and local legislation and representatives, but they have no effect in even the most direct aspects of their communities.

One of the most prevalent arguments against granting noncitizen voting rights focuses on why voting rights should be expanded when the United States already has problems with its own citizens voting. Many citizens do not vote or cannot vote due to issues such as voter-ID laws or voter suppression.<sup>220</sup> However, we do not have to address only one issue or the other; problems with both citizen and permanent resident voting can be confronted simultaneously.

There are many problems in our current voting process, including some types of voter-ID laws. This past July, the Texas voter-ID law was struck down in the Fifth Circuit because the court held the law violated Section Two of the Voting Rights Act due to its discriminatory effects on minorities and the poor.<sup>221</sup> Prior to the bill (SB 14) being passed, a Texas voter could simply

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216. Matthew Chayes, *NYC Council to Decide on Letting Noncitizens Vote in Local Elections*, *NEWSDAY* (Mar. 22, 2015), <http://www.newsday.com/news/new-york/nyc-council-to-decide-on-letting-noncitizens-vote-in-local-elections-1.10100418> [<https://perma.cc/Z4CC-5E83>] (quoting Eric Ulrich, a Republican city councilmember from Queens).

217. *See supra* subpart I(B).

218. *Id.*

219. *A Guide to Naturalization: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/sites/default/files/files/article/chapter3.pdf> [<https://perma.cc/97J3-5P4R>].

220. Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes* 27 (2017) (unpublished manuscript), <http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsSuppressionofMinorityVoters.pdf> [<https://perma.cc/K4E6-FYDL>]; *see also* Christopher Ingraham, *New Evidence That Voter ID Laws 'Skew Democracy' in Favor of White Republicans*, *WASH. POST* (Feb. 4, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/> [<https://perma.cc/2EHJ-KF9B>] (arguing that voter-ID laws decrease voter turnout).

221. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016).

cast a ballot in person by presenting a registration certificate at the time of voting.<sup>222</sup> After SB 14 passed, Texas required certain forms of identification to vote, which resulted in roughly 534,512 voters being unable to vote because they lacked these forms of identification and did not qualify for a disability exemption.<sup>223</sup> The “district court . . . concluded that SB 14 disproportionately impacts the poor, who are disproportionately minorities,”<sup>224</sup> a decision the Fifth Circuit upheld.<sup>225</sup>

Problems in citizens’ voting rights such as these are constantly being addressed, and many groups continue to push citizens to get out and vote.<sup>226</sup> However, noncitizens do not have similar protections or equivalent support. In a time when there is much hostility toward immigrants and foreigners—many even calling for a border wall between Mexico and the United States,<sup>227</sup> and Britain leaving the European Union, which many claim was primarily because of immigration,<sup>228</sup>—immigrants’ protections are dwindling. Citizens are protected by their citizenship, which cannot be taken away except through a consensual act of expatriation.<sup>229</sup> By contrast, noncitizens are subject to deportation at any time,<sup>230</sup> and the government’s power to exclude and expel foreigners is broad.<sup>231</sup> Granting suffrage in local and state elections to permanent residents may not give noncitizens a voice in federal

222. *Id.* at 225.

223. *Id.* at 250.

224. *Id.* at 251.

225. *Id.* at 256.

226. *See, e.g.*, ROCK THE VOTE, <http://www.rockthevote.com/> [<https://perma.cc/5UE3-WW35>] (a nonprofit and nonpartisan organization that focuses on registering young voters, providing information about where and how to vote, and encouraging young voters to vote).

227. Jeremy Diamond, *Trump: Border Wall Will Cost \$8 Billion*, CNN (Feb. 9, 2016), <http://www.cnn.com/2016/02/09/politics/donald-trump-border-wall-cost-8-billion/> [<https://perma.cc/B49M-KXS2>].

228. *See, e.g.*, David Frum, *Why Britain Left*, ATLANTIC (June 24, 2016), <http://www.theatlantic.com/international/archive/2016/06/brexit-eu/488597/> [<https://perma.cc/HB7Q-39KH>] (“The force that turned Britain away from the European Union was the greatest mass migration since perhaps the Anglo-Saxon invasion. 630,000 foreign nationals settled in Britain in the single year 2015. Britain’s population has grown from 57 million in 1990 to 65 million in 2015 . . . .”); *see also* Krishnadev Calamur, *Will Brexit Actually Curb Immigration to the U.K.?*, ATLANTIC (June 29, 2016), <http://www.theatlantic.com/news/archive/2016/06/brexit-migration/489014/> [<https://perma.cc/LN28-BBGW>] (describing the results of Britain’s 2016 referendum on whether to leave the European Union as “a very clear message” for “more control over immigration”).

229. *See* 8 U.S.C. § 1481 (2012) (listing acts such as obtaining citizenship in or formally declaring allegiance to a foreign state or engaging in hostilities against the United States); *see also* *Vance v. Terrazas*, 444 U.S. 252, 252 (1980) (“Congress does not have any general power to take away an American citizen’s citizenship without his ‘assent’ . . . .”).

230. 8 U.S.C. § 1227 (2012) (listing many grounds for deportation of resident aliens).

231. *See, e.g.*, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (holding that the power of the federal government to exclude aliens from the United States if it concludes that doing so serves the country’s interests is an aspect of the government’s sovereignty).

immigration or national security issues, but it could provide some protection for permanent residents from discriminatory laws at the state and local levels. Immigrants, including permanent residents, are a major part of our nation, and because permanent residents have the same stake in their local community as citizens, they deserve similar protections.

#### V. Proposed Solution

Proposals for extending noncitizen voting rights range from voting in local or school board elections<sup>232</sup> to voting in all elections, including federal. But the “most common form of resident-alien voting rights today is a nondiscriminatory right to vote in local elections only.”<sup>233</sup>

I propose that permanent residents should be granted the right to vote in both state and local elections. These are the units of government that have the most direct effect on both citizens and noncitizens alike and would allow permanent residents to have a stronger connection to the immediate community. Because foreign policy and immigration are solely under federal control, this proposal would strike a balance for both citizens and permanent residents because it would provide permanent residents a voice in their immediate community while protecting the interests of citizens in national security and immigration. This would also allow for a more gradual process, integrating permanent residents into the voting community over a period of time. Once permanent residents become naturalized, they would be entitled to full voting rights, including in federal elections. Local voting rights would encourage naturalization and full integration into the political community<sup>234</sup> and could be combined with the “Stand Stronger” initiative.

There are generally two ways this proposal could be implemented: either through a federal constitutional amendment or individual state constitutional amendments or laws. Preferably, this change would be implemented by a federal constitutional amendment, which would provide a uniform grant of suffrage to all permanent residents throughout the United States. Because the Constitution already permits permanent resident voting,<sup>235</sup> the amendment would only prevent states from denying permanent residents state and local voting rights. While allowing the states and localities to choose to include permanent residents might be preferable to some, an amendment to the Constitution would be much quicker, more effective, and more permanent, as previous voting rights extensions have done through the amendment process. However, an amendment would be unlikely because of

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232. See Yang, *supra* note 47, at 58 (discussing a failed 2004 proposition in San Francisco, modeled after similar successful initiatives in Chicago and New York City, that would have given noncitizens voting rights in local school board elections).

233. Earnest, *supra* note 38, at 11.

234. GROENENDIJK, *supra* note 41, at 5.

235. See *supra* subpart II(A).

the difficulty in acquiring the high number of votes in both Congress and states needed to ratify an Amendment.<sup>236</sup>

The second option would be to have each individual state grant voting rights to permanent residents, given that the states have “broad power to define [their] political community.”<sup>237</sup> The first step would be to amend many state constitutions, including Texas’s<sup>238</sup> and California’s,<sup>239</sup> to permit voting by permanent residents. Each state would need to amend its constitution according to that state’s amendment process. For example, California can amend its state constitution either by legislative referendum, requiring a two-thirds vote in each house to approve the proposal and a majority vote of the state’s qualified electors for ratification,<sup>240</sup> or by direct initiative, requiring a petition signed by eight percent of the votes for all candidates for Governor at the last gubernatorial election and then submitted for a statewide election.<sup>241</sup> Similarly, amending the state constitution in Texas requires the proposed amendment to be approved by a vote of two-thirds in each house and a vote by the qualified voters in a statewide election.<sup>242</sup>

However, the amendment process in many states would face strong opposition. Anti-immigrant sentiment has risen recently in the United States and continues to be one of the most significant obstacles to extending suffrage to permanent residents.<sup>243</sup> While the proposal above would protect states’ rights in controlling the election process, some states would vehemently fight this voting extension. Furthermore, an amendment to each individual state constitution would not only face many hurdles in state legislatures even before voting but would most likely instigate many lawsuits opposing the amendments. Waiting for change state-by-state would be slow and arduous.

There may also be some administrative hurdles to enabling permanent residents to vote, and these issues would need to be addressed in any proposal. One such problem is preventing permanent residents from voting in federal elections, as all federal, state, and local elections are generally held

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236. See U.S. CONST. art. V (requiring a two-thirds congressional vote to propose an amendment and a three-fourths state vote to ratify an amendment).

237. *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973).

238. TEX. ELEC. CODE ANN. § 11.002 (West 2010) (“In this code, ‘qualified voter’ means a person who: . . . is a United States citizen.”).

239. CAL. ELEC. CODE § 2101 (West 2003) (“A person entitled to register to vote shall be a United States citizen . . .”).

240. CAL. CONST. art. XVIII, § 1.

241. *Id.* art. II, § 8.

242. TEX. CONST. art. XVII, § 1(a).

243. Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain’s Past*, 24 GA. J. INT’L & COMP. L. 567, 567 (1995) (noting that anti-immigrant policies and sentiments lead to anti-immigrant laws that may even be based on racial biases).

on the same day.<sup>244</sup> Takoma Park, the most looked-to example of noncitizen voting, holds local elections on odd-numbered years to prevent conflicts with state and federal elections.<sup>245</sup> While this is one way to solve the administrative problem, on a large scale it may not be possible to hold all local and state elections on odd-numbered years. A better solution would be to have all state and local election proposals on a separate ballot sheet from the federal ballot or a separate voting booth to ensure that permanent residents vote only in the state and local elections.

Even though state-by-state changes would be difficult, it is possible. States such as California, New York, and Maryland would most likely lead the way, as there is a strong push in all three states to include permanent residents in the voting process. Several cities, including Takoma Park and Chicago, have already granted limited voting rights to noncitizens.<sup>246</sup> Throughout the country, civil rights groups are pushing for noncitizen voting<sup>247</sup> and advocating for both cities and states to enfranchise noncitizens.

This proposal for state and local permanent resident voting would strike a balance between concerns on both sides. Permanent residents have shown a strong interest in wanting to be a part of this country and have a strong stake in this community. They have also completed the legal requirements needed to remain in this country indefinitely. Limiting voting rights to only permanent residents removes most of the concern of foreign influence, and permitting voting in only state and local elections prevents potential conflicts with noncitizens voting on immigration issues and foreign policy, which are solely under federal control.

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244. See, e.g., *November 8, 2016 Election Law Calendar*, TEX. SECRETARY ST., <http://www.sos.state.tx.us/elections/laws/november-8-election-calendar-2016.shtml#November8> [<https://perma.cc/GTB2-EEUB>] (showing that elections for federal, state, and county officers are held on the same day).

245. Keyes, *supra* note 65.

246. See *supra* subpart I(C).

247. See, e.g., Carl Campanile, *New Bill Could Give Illegal Aliens Voting Rights in New York City*, N.Y. POST (Feb. 22, 2016), <http://nypost.com/2016/02/22/new-bill-could-give-illegal-aliens-voting-rights-in-new-york-city/> [<https://perma.cc/7SR2-4C7M>] (discussing black and Hispanic activists' support for New York City legislation that would allow illegal aliens the right to vote in a future New York City election); Pamela Constable, *D.C., Other Cities Debate Whether Legal Immigrants Should Have Voting Rights*, WASH. POST (Feb. 9, 2015), [https://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rights/contentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6\\_story.html](https://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rights/contentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6_story.html) [<https://perma.cc/V7EP-PQ5V>] (comparing opposing opinions regarding a D.C. bill that would allow legal immigrants to vote locally); Sarah Stuteville, *Local Voting Rights for Noncitizens? Advocates Say Time Has Come*, SEATTLE TIMES (Sept. 18, 2015), <http://www.seattletimes.com/seattle-news/advocating-for-local-voting-rights-for-noncitizens/> [<https://perma.cc/U6KV-UGCP>] (explaining support for noncitizen voting rights in Washington by advocates for undocumented immigrants).

### Conclusion

Permanent residents are substantially more similar to citizens than to other immigrants, having direct connections to this country and a strong stake in this community. While the Constitution does not preclude permanent residents from voting in elections, the federal government and states prohibit voting through statutes, despite a significant history of noncitizen voting in the United States. Currently, there are an estimated 13.3 million permanent residents that are not adequately represented by this country's representatives or eligible voters. Extending the right to vote to noncitizens has not created problems in other countries, even in those that have allowed this right for years. And "as Madison articulated so long ago, there seems to be a deeply ingrained sense that the increasing closeness of an alien's ties with the United States should afford greater entitlement to the Constitution's protections."<sup>248</sup>

America is a nation of immigrants. Every American who ever lived, with the exception of the Native Americans, was either an immigrant or a descendent of immigrants, and there is "no part of our nation that has not been touched by our immigrant background."<sup>249</sup> As President Barack Obama declared: "We are a proud Nation of immigrants, home to a long line of aspiring citizens who contributed to their communities, founded businesses, or sacrificed their livelihoods so they could pass a brighter future on to their children."<sup>250</sup> Our world is more international than ever, and people choose to move to the United States to become a part of this community—especially permanent residents, as they have satisfied the legal process to remain indefinitely in this country. To protect permanent residents' rights and interests in the United States—their chosen country—permanent residents should be afforded the right to vote in local and state elections, prompting them to become integrated into this community and eventually naturalized citizens of the United States.

—David M. Howard

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248. Moore, *supra* note 171, at 887; *see also* Cole, *supra* note 99, at 371 (discussing Madison's argument that "those subject to the obligations of our legal system ought to be entitled to its protections").

249. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 2–3 (1964).

250. Barack Obama, *Presidential Proclamation—Constitution Day, Citizenship Day, and Constitution Week, 2013*, WHITE HOUSE (Sept. 16, 2013), <https://www.whitehouse.gov/the-press-office/2013/09/16/presidential-proclamation-constitution-day-citizenship-day-and-constitution-week> [https://perma.cc/9SLC-VJRX].