

NOTES & COMMENTS

NONCITIZEN VOTING: A CASE STUDY OF OREGON

by
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Using the State of Oregon as a case study, this Article proposes that states and municipalities may and should extend the right to vote to noncitizens. The Article’s analysis, rooted in national history and the U.S. Constitution, is applicable to other states across the country. The Article situates the practice of noncitizen voting within the larger historical context of both the United States and Oregon. It also provides the legal framework that demonstrates state and municipal power to set voter qualifications for their respective elections. Finally, the Article suggests reasons why states should allow for noncitizen voting.

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I. INTRODUCTION

In order to more accurately reflect those who hold membership, stake, and an investment in the community and to promote a more inclusive democracy, the Oregon state legislature should amend the state constitution to permit noncitizen voting and should repeal the state statute that establishes citizenship as a voting requirement. Noncitizens in Oregon who have resided in the state during the 6 months immediately preceding the election, who are at least 18 years old, and who are registered at least 20 calendar days before the election should be included in the vote. If the state legislators fail to act, municipalities should lead by example and implement noncitizen voting for local government positions.

Allowing noncitizen voting where noncitizens have stake in their respective communities is not only fair, but it would demonstrate a return to founding principles of democracy. Racist movements throughout U.S. history have obfuscated this fundamental truth from the public, which now believes that citizenship is a requisite characteristic to vote. However, voting has never been constitutionally tied to citizenship. History indicates, instead, that the right to vote in state and local elections was primarily tied to residence.¹ Additionally, many local governments have taken steps to rectify historic disenfranchisement by expanding voting rights to include noncitizens.² Noncitizen voting in state and local elections is inherent in the United States' federalist system.

Since the beginning of the United States, states have had the power to set voter qualifications.³ As it stands, Oregon residents who do not hold the right to vote are being deliberately excluded by the community and the state legislature, both of which have the power to act. The Oregon state legislators have the authority to repeal the state statute and amend the state constitution to erase citizenship as a voter qualification.⁴ Noncitizen residents of Oregon should be granted the vote because they have a stake in and a commitment to the local community—noncitizens have chosen Oregon as their established residence, pay taxes, make purchases that contribute to the economy, and have children attending local schools, among other activities. Additionally, municipalities have the ability to implement their own local voter qualifications.⁵ Expanding noncitizen voting across the state

¹ Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–98 (1993).

² See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1063–64 (2017).

³ U.S. CONST. art. 1, § 2; Lyle Denniston, *Constitution Check: Who Decides Who Gets to Vote?*, NAT'L CONST. CTR. (Aug. 28, 2014), <https://constitutioncenter.org/blog/constitution-check-who-decides-who-gets-to-vote/>.

⁴ See OR. CONST. art. XVII, § 1; Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 L. & INEQ. 271, 314 (2000).

⁵ See Kimia Pakdaman, *Noncitizen Voting Rights in the United States*, BERKELEY PUB. POL'Y

will more accurately reflect current membership and stake in the communities.

Section II of this Article will begin by putting forth a proposal for the State of Oregon to extend voting rights to noncitizens in its state and local elections. Alternatively, if Oregon fails to take action, municipalities across the state should take the lead in working towards true democratic inclusion. Next, Section III of this Article will situate the practice of noncitizen voting within its larger historical context. Starting with the colonial period, and ending in the mid to late twentieth century, this Section will demonstrate that noncitizen voting was commonplace throughout U.S. history until it was defeated by white supremacist voter restrictions in 1926.⁶ Section IV will provide the legal framework that demonstrates state and municipal power to set voter qualifications for their respective elections. Section V of the Article will discuss why states should allow for noncitizen voting. It argues that including noncitizens in state and local elections is fair because it more accurately represents those who have membership, stake, and investment in their communities. In this way, true democratic results may be achieved when all members of the community are able to have their voices heard and when communities are able to receive input from all interested parties on their pressing political questions. Section VI will briefly conclude the Article.

II. PROPOSAL FOR EXTENDING THE RIGHT TO VOTE TO NONCITIZENS IN THE STATE OF OREGON (AND OTHER STATES AND LOCALITIES THAT FOLLOW)

The Oregon state legislators should repeal ORS 247.171(3)(e) and amend the Oregon Constitution Article II, Section 2 to remove the citizenship requirement for Oregon voters.⁷ The constitutional qualification for electors in Oregon currently establishes “[e]very citizen of the United States is entitled to vote” who (a) is 18 years old or older, (b) has resided in Oregon for 6 months immediately preceding the election, and (c) is registered at least 20 days before the election.⁸ The section should instead include “every person who” meets criteria (a) through (c) in the vote.⁹ There should be no additional requirement added for length of time residing in the United States for noncitizens because Oregon has already set six months as a sufficient length of residency for newcomers to establish themselves with stake,

J., Spring 2019, at 33, 36.

⁶ Harper-Ho, *supra* note 4, at 273–74, 282.

⁷ Alternatively, Oregon voters could amend the constitution through a voter-proposed ballot measure. OR. REV. STAT. § 247.171(3)(e) (2019); *see infra* note 86 and accompanying text.

⁸ OR. CONST. art. II, § 2, cl. 1.

⁹ For an example of language including “every person,” *see Voter Registration, TOWN OF GARRETT PARK*, <https://www.garrettparkmd.gov/government/elections-and-voter-registration/voter-registration> (last visited Feb. 23, 2021).

economic contributions, and investment in the state.¹⁰ Similarly, ORS 247.171 requires that each prospective voter attest “that the person is a citizen of the United States.”¹¹ This provision should be struck from the statute, leaving the remaining requirements intact.

These changes will allow all Oregonians with a stake in their community to vote for the Office of the Governor, Secretary of State, State Treasurer, Attorney General, Commissioner of Labor & Industries, State Senators, and State Representatives, as well as for state ballot measures.¹² All other requirements for voting would remain the same.¹³

Even if the state legislators do not act, noncitizen voting should be implemented at the local level. Counties and cities have the ability and opportunity to implement noncitizen voting for positions on the school board, City Commissioners, the Office of the Mayor, and local ballot measures.¹⁴ The City of Portland should establish its own voter registration process and include in the electorate every person who resides within city limits for at least 6 months preceding the election, is at least 18 years old, and is registered with either the state or the city.¹⁵ The history of noncitizen voting in the United States, the U.S. Constitution,

¹⁰ OR. CONST. art. II, § 2. In *Dunn v. Blumstein*, the Supreme Court analyzed a Tennessee law imposing a residency requirement of one year for voting in state elections. 405 U.S. 330, 331 (1972). The Court held that people have a constitutionally protected right to travel, so durational residency requirements are analyzed under a strict equal protection test. The Court found that the state had not provided a strong enough reason for imposing the restrictive requirement, hampering the rights of voters. *Id.* at 360. It follows that a residency requirement on noncitizens above and beyond the existing six-month requirement for Oregon voters would be inappropriate. For factors determining residence in Oregon, see OR. REV. STAT. § 247.035 (2019).

¹¹ OR. REV. STAT. § 247.171(3)(e)–(f) (2019).

¹² See OREGON BLUE BOOK 248 (Oregon Secretary of State ed., 2019); *Federal and State Elected Officials*, MULTNOMAH COUNTY, <https://multco.us/elections/federal-and-state-elected-officials> (last visited Feb. 3, 2021) (listing Oregon’s state vs. federal elected officials).

¹³ See *Oregon Online Voter Registration*, OR. SECRETARY ST., <https://sos.oregon.gov/voting/Pages/registration.aspx?lang=en> (last visited Feb. 3, 2021) (listing voter age and residency requirements).

¹⁴ Cf. *All Items on the Ballot: May 2020 Primary Election*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/auditor/article/755841> (last visited Feb. 3, 2021); *Candidate Filing Requirements: Special Districts*, MULTNOMAH COUNTY, <https://sos.oregon.gov/blue-book/Pages/state/elections/history-introduction.aspx> (last visited Feb. 3, 2021); *Information for Candidates, Campaigns & Jurisdictions in Multnomah County*, MULTNOMAH COUNTY, <https://multco.us/elections/information-candidates-campaigns-jurisdictions-multnomah-county#mi> (last visited Feb. 3, 2021); *Candidate Filing Requirements: Multnomah County*, MULTNOMAH COUNTY, <https://multco.us/elections/candidate-filing-requirements-multnomah-county> (last visited Feb. 3, 2021).

¹⁵ For an example of implementing voter registration at the city level, see *Registration and Voting Information*, CITY OF TAKOMA PARK, <https://takomaparkmd.gov/register-to-vote/> (last visited Feb. 3, 2021). In other municipalities, noncitizens may register to vote with either the city

and the power that states and localities have to set and implement voter qualifications support and propel this proposal. The current recommendation will give a voice to all members of the community and will have a profound impact on the representation of all.

III. HISTORICAL BACKGROUND

A. The Extension of Voting Rights Has Always Been a Process of Community Building, Defining Who Is Eligible to Participate in Local Affairs and Which Interests Are Represented in Achieving “Democratic” Results

Analysis of American history reveals that the fundamental criteria required to exercise the right to vote include: (1) residence in one’s community; (2) an attestation of their intent to become a U.S. citizen; and (3) service on behalf of, or contribution to, the community (often conceptualized through taxes prior to Reconstruction).¹⁶ Although these requirements have mutated over time, U.S. citizenship was rarely required in order for an individual to vote throughout the vast majority of American history.¹⁷ Instead, factors that demonstrated that one had sufficient stake in their community were thought to be determinative.¹⁸

In the earliest periods of American history, characteristics such as whiteness, maleness, property-holding status, and residence in the locale were necessary to gain entry into the political community and to practice the right to vote.¹⁹ Even in federal elections, U.S. citizenship had never been required until approximately 30 years after the founding; and even then, many states and territories permitted noncitizen voting in their elections.²⁰ In fact, states and territories often utilized noncitizen voting in order to encourage immigration to their new developments and foster political communities of white, property-holding men during this early period of colonial expansion.²¹ Additionally, many states believed that noncitizen voting was a natural characteristic of American democracy.²²

Once the vote could no longer be limited to white men, the practice of noncitizen voting disappeared because white men did not want nonwhite noncitizens to be able to vote. This justification is impermissible not only because of its white supremacist underpinnings, but also because it denies the legitimate

or the county. *Voter Registration*, *supra* note 9.

¹⁶ See, e.g., Raskin, *supra* note 1, at 1399–1406, 1414–15.

¹⁷ Harper-Ho, *supra* note 4, at 273–75.

¹⁸ See *id.* at 275.

¹⁹ Douglas, *supra* note 2, at 1046; Raskin, *supra* note 1, at 1401.

²⁰ Douglas, *supra* note 2, at 1063; Raskin, *supra* note 1, at 1400.

²¹ Harper-Ho, *supra* note 4, at 276–77; Raskin, *supra* note 1, at 1401–02.

²² See Raskin, *supra* note 1, at 1398.

stake that noncitizens have in their local communities and distorts truly democratic results. History reveals that the real requirement for voting in state and local elections is not citizenship, but stake, demonstrated by the factors enumerated above.

B. Noncitizen Voting Was Commonplace Throughout Early American History

1. The North American Colonial Period (1504–1776)

America's colonies did not require British citizenship in order for their inhabitants to vote.²³ Much like the states today, each colony could make citizens of its own and give them the right to vote according to its own laws.²⁴ The right to vote was granted to any "inhabitants or residents" of the colony who were white, property-owning males.²⁵ Following the laws of Great Britain, ownership of property in a particular state or locality was the guiding talisman for voter qualifications throughout the 13 colonies.²⁶

In his letter to James Sullivan, John Adams provided important revelations on why holding property was thought to qualify an individual to vote.²⁷ He argued that persons without property were not qualified to vote because they were ignorant, dependent on others, and without free will.²⁸ As a result of this presumed dependence on propertied men, the non-propertied voter class would be susceptible to undue influence from wealthy individuals seeking to align poorer voters' interests with their own. Ironically, Mr. Adams' solution to the wealthy's coercion of the poor was to have total control of the electorate by the wealthy. This paternalistic

²³ *Id.* at 1399.

²⁴ Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1037 (2009).

²⁵ Raskin, *supra* note 1, at 1399.

²⁶ Most often, real property in the locality in question was necessary to demonstrate sufficient stake in the community, but sometimes, a sufficient amount of value in property would suffice. In Virginia, for example, "a half acre of land carried the vote until 1736, then the requirement was raised to 100 acres of wild land, twenty-five acres of improved land, or a house and lot in town. In the boroughs of Norfolk and Williamsburg, men with £50 of property could vote, as could also anyone who had served a five-year apprenticeship to a trade." Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87, 95 n.40 (2017) (quoting Robert E. Brown, *Reinterpretation of the Formation of the American Constitution*, 42 B.U. L. REV. 412, 422 (1962)).

²⁷ John Adams, *Letter to James Sullivan (May 26, 1776)*, MASS. HIST. SOC'Y., <http://www.masshist.org/publications/adams-papers/index.php/view/ADMS-06-04-02-0091> (database updated 2020).

²⁸ *Id.* ("Men . . . who are wholly destitute of Property, are also too little acquainted with public Affairs to form a Right Judgment, and too dependent upon other Men to have a Will of their own? . . . They talk and vote as they are directed by Some Man of Property, who has attached their Minds to his Interest.").

approach served to exclude women and the young from the polls as well.²⁹

Despite these and other limitations on voter qualifications during the colonial period, it was generally thought that voter requirements were extremely easy to satisfy for any resident of the community, whether or not they were a British citizen. Some colonies did not even require a specific period of residence for noncitizens voting in their elections.³⁰ Very subtle changes occurred in these systems and logics after the United States gained its independence.

2. *The Founding (1776–1809)*

At the time of the founding, citizens and noncitizens alike who had been residents of a state for a sufficient period of time were able to vote.³¹ The Founding Fathers condemned the notion of federal regulation of state voter qualifications because it violated core federalist principles of preserving state power.³² The Founders also established in the Constitution that Congress had the power to determine naturalization requirements for the conferral of U.S. citizenship, but Congress had refrained from doing so for a period of 30 years after the Nation's founding.³³ This led some states to create their own laws of naturalization and conferral of state citizenship.³⁴

In creating those laws, U.S. citizenship simply could not have been used as a voter qualification in state and local elections. Furthermore, states often didn't even require residents to be locally naturalized in order to vote, so long as they had resided

²⁹ *Id.* (“[Y]ou must fix upon Some Period in Life, when the Understanding and Will of Men in general is fit to be trusted by the Public. Will not the Same Reason justify the State in fixing upon Some certain Quantity of Property, as a Qualification. The Same Reasoning, which will induce you to admit all Men, who have no Property, to vote, with those who have, for those Laws, which affect the Person will prove that you ought to admit Women and Children: for generally Speaking, Women and Children, have as good Judgment, and as independent Minds as those Men who are wholly destitute of Property: these last being to all Intents and Purposes as much dependent upon others, who will please to feed, cloath [sic], and employ them, as Women are upon their Husbands, or Children on their Parents.”).

³⁰ Raskin, *supra* note 1, at 1400 (“In Pennsylvania, for example, the large ‘German population evidently voted and held local office, with or without benefit of either private acts of naturalization or the special provincial statute passed in 1742, two years after the imperial Parliament provided for naturalization in the empire as a whole.’”) (citing CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760–1860*, at 52 (1960)).

³¹ *Id.*

³² THE FEDERALIST NO. 59, at 395 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment.”).

³³ Raskin, *supra* note 1, at 1400.

³⁴ *See id.*

in the area for a sufficient period of time.³⁵ Naturalization is the lengthy and demanding process an immigrant must go through in order to gain citizenship, here, state citizenship. Despite the passage of these naturalization laws, states did not require noncitizens to be state citizens in order to exercise the right to vote.³⁶ Instead, noncitizen residence in a locale was thought to be sufficient.³⁷ For example, in order to vote in Pennsylvania, noncitizens first had to reside within Pennsylvania for a period of two years.³⁸ States such as Vermont endorsed the practice for noncitizen voting in its constitution while others, such as Virginia, legislated for noncitizen voting.³⁹

During early efforts to colonize the West, states extended political suffrage to noncitizens because it served to encourage immigration into these newly founded territories.⁴⁰ Even though these folks were not citizens of the United States, it was well understood that their presence in and contributions to the community had earned them the right to vote and help develop fully democratic solutions to the issues confronting the locality. In 1789, the first Congress convened under the Constitution reenacted the Northwest Ordinance of 1787.⁴¹ The ordinance governed six territories established beyond the Ohio River, and it gave “freehold aliens” who had been residents for two years the right to vote in territorial elections.⁴² When these territories became states, they themselves chose to include noncitizen voting in their laws and constitutions.⁴³

States considered a period of residence to be an important factor because it would allow for taxation of the potential noncitizen voter.⁴⁴ Taxation and residence are explicitly linked in the Pennsylvania Supreme Court’s decision to uphold noncitizen voting in 1809, when it declared “aliens of a certain description, who from length of residence, and payment of taxes, might be supposed to have a common interest with the other inhabitants, were indulged with the right of voting.”⁴⁵ This kind of logic heralds the familiar adage, “no taxation without representation,” recognizing that all economic participants in a locale are subject to local taxes and thus responsible for the production of the community. According to democratic principles, it would be highly unethical to simultaneously excise a tax

³⁵ *Id.*

³⁶ *Id.* at 1397.

³⁷ *See id.* at 1400.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1402.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1402–03.

⁴⁴ *See id.* at 1444–45.

⁴⁵ *Stewart v. Foster*, 2 Binn. 110, 118 (Pa. 1809).

from an individual, deny them equal access to representation while granting it to others, and subject them to the civil and criminal laws of the state. Given this concern, taxes and voting rights might be thought of as a quid-pro-quo exchange between the government and the noncitizen, where taxes represent the noncitizen's commitment to the community and a willingness to subject themselves to local laws, and voting rights demonstrate the sovereign's respect of its democratic promises to its subjects. By denying noncitizens the right to vote, the whole community suffers because it loses essential perspective on issues affecting the locale. Despite obvious examples of hypocrisy underlying our story, this notion did work to allow noncitizens to vote in state, local, and sometimes even federal elections—at least for some time.

At this point in U.S. history, noncitizen voting was ideologically consistent with white supremacist exclusions of other groups from the right to vote.⁴⁶ The political ruling class could not use citizenship as the decisive criterion for voting rights since many women and non-property-holding individuals who were also citizens were nonetheless disallowed the right to vote. Although noncitizens could vote, voting was restricted to white, property-owning men who had contributed to and resided within the community for some period of time.⁴⁷ Similar notions from the colonial era of poor folks and women lacking free will were employed to justify their exclusion.⁴⁸ These requirements have been stripped away over time as our society began to understand their legal and ethical impermissibility. The only legitimate, remaining factor in determining voting rights in state and local elections was an individual's residence in the community.

3. *Further Colonization of the West (1809–1850)*

Many of the newly admitted territories chose not to extend the vote to

⁴⁶ Raskin, *supra* note 1, at 1401 (“To exclude aliens from voting would have given rise to the dangerous inference that U.S. citizenship was the decisive criterion for suffrage at a time when the majority of U.S. citizens, including almost all women and substantial percentages of men without property, were categorically excluded from the franchise. On the other hand, alien enfranchisement reflected the assumption that the propertied white male alien voter would be sufficiently similar to other electors so as not to threaten fundamental cultural and political norms.”).

⁴⁷ *Id.*

⁴⁸ Ellis, *supra* note 24, at 1038 (“The rationale for the property requirement in the eighteenth and nineteenth centuries was that ‘[o]nly men with property . . . were deemed to be sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting.’ Underlying this view was the belief that ‘[t]he interests of the propertyless . . . could be represented effectively by wise, fair-minded, wealthy white men.’ Further, this barrier served to maintain order in society. The view was if the propertyless were allowed to have the vote, they would prove to be ‘a menace to the maintenance of a well-ordered community.’”) (citing ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 9 (2000)).

noncitizens. Additionally, many states that previously allowed the practice revoked it.⁴⁹ Scholars point to two principle movements that explain this phenomenon: (1) the rise of nationalism and xenophobia during the War of 1812, and (2) the movement to eliminate property-holding status as a requisite voter qualification.⁵⁰

Peaks in United States' xenophobia have been accompanied by efforts to restrict voting rights, and certain elements of the noncitizen class were deemed unworthy of the vote.⁵¹ Xenophobia and nationalism were on the rise during the War of 1812 when the United States was seeking to expand its borders into Native American and British territories.⁵² Racism against Native Americans was rampant during this period, and assessments of Native American culture at the time make clear that white supremacists did not believe they were worthy of the vote.⁵³ Additionally, Native Americans resisting the colonial assault on their lands and ways of life were seen as enemy combatants during the war.⁵⁴ Accordingly, Congress chose not to extend noncitizen voting to the territories won in the Mexican-American war because substantial numbers of Native Americans remained there. Noncitizens were also perceived as enemy combatants during this time depending on their national ties; citizenship requirements were frequently implemented and relied upon to maintain community and social order.⁵⁵

As previously suggested, political efforts building towards delinking voting rights from property-holding status also resulted in the removal of state noncitizen voting provisions. These efforts were made on behalf of what was perceived as a large population of poor, white men being unable to vote.⁵⁶ Despite the removal of classist barriers to voting for white men, those in control feared that their move would advance the vote to those it deemed unworthy of accessing the ballot.⁵⁷ These fears were driven by ideas of racial and national difference. Noncitizens who owned

⁴⁹ Raskin, *supra* note 1, at 1404.

⁵⁰ *Id.* at 1403–04.

⁵¹ *Id.* at 1403–04, 1415–16.

⁵² *Id.* at 1403–04; Peter J. Kastor, “What are the Advantages of the Acquisition?": *Inventing Expansion in the Early American Republic*, 60 AM. Q. 1003, 1019, 1022 (2008).

⁵³ See Patrick Mingos, *Beneath the Underdog: Race, Religion, and the Trail of Tears*, 25 AM. INDIAN Q. 453, 453–54 (2001); Becky Little, *Native Americans Weren't Guaranteed the Right to Vote in Every State Until 1962*, HISTORY (Aug. 20, 2019), <https://www.history.com/news/native-american-voting-rights-citizenship>.

⁵⁴ KARIM M. TIRO, *THE PEOPLE OF THE STANDING STONE* 123–27 (2011).

⁵⁵ See *id.* at 124; Mingos, *supra* note 53, at 454.

⁵⁶ Ellis, *supra* note 24, at 1038–39 (“[T]he wealth qualifications had the effect of excluding white male voters who had an otherwise sufficient ‘stake’ to participate in elections, even though they did not meet the property qualifications. In some Southern states, the median yearly income did not equal the property qualification.”).

⁵⁷ Raskin, *supra* note 1, at 1404.

property during these times disproportionately came from European countries.⁵⁸ The idea of noncitizens without property voting, who potentially included persons not of “English stock,” threatened white supremacist notions of democratic order.⁵⁹ Accordingly, efforts to preserve white male privilege included restrictions on noncitizen voting. This way, white men, regardless of class status, could vote, while potentially undesirable immigrants were cut from participation. The imposition of citizenship requirements in state and local elections was simply the product of the racist and xenophobic urges of the time.

Some states resisted this xenophobic urge in favor of more inclusive and traditional notions of democracy.⁶⁰ In 1848, the State of Wisconsin continued the practice of noncitizen voting, though with some new requirements not previously seen in U.S. history.⁶¹ Wisconsin extended full voting rights to noncitizen “declarant aliens,” or white persons of foreign birth who had declared under oath their intention to become citizens of the United States and conform to its laws of naturalization.⁶² While this requirement arguably strengthened the ties between voting and citizenship, the oath did not require aliens to complete the naturalization process, so a noncitizen could have voted in state and local elections indefinitely under this system.⁶³ Congress extended declarant alien suffrage in the enabling acts of the territories of Dakota, Kansas, Nebraska, Nevada, Oklahoma, Washington, and Wyoming; other states adopted the practice as well.⁶⁴ While “declarant alien” provisions have fallen out of vogue in modern times, this history reveals that localities were concerned about its voters’ commitment to the community. By declaring this intent, states, territories and various localities had some assurance that the noncitizen voter would remain committed to developing and sustaining the locale. Furthermore, this history confirms that noncitizen voting continued to be used as a way to encourage migration and the influx of resources and labor into these newly admitted territories.

⁵⁸ See Harper-Ho, *supra* note 4, at 282; Monica W. Varsanyi, *The Rise and Fall (and Rise?) of Non-Citizen Voting: Immigration and the Shifting Scales of Citizenship and Suffrage in the United States*, 9 SPACE & POLITY 113, 116–17 (2005).

⁵⁹ See Raskin, *supra* note 1, at 1404.

⁶⁰ In 1840, the question of whether to allow noncitizen voting was squarely before the Illinois Supreme Court. The court found some support for noncitizen voting based on the State’s history, finding that early efforts to induce immigration to the State meant that the practice of noncitizen voting was deeply embraced at the State’s founding. The court found support for noncitizen voting in its general preference for democratic inclusion. Sadly, it also placed some of its reliance on the fact that many noncitizens who had stake in their community came from France and Canada. *Id.* at 1404–05.

⁶¹ *Id.* at 1406.

⁶² *Id.*

⁶³ See *id.*

⁶⁴ *Id.* at 1407–08.

4. *The Antebellum South and Reconstruction (1850–1877)*

As new states and territories were admitted to the union, Northern and Southern states fought hard over whether the locale would allow for slavery. Accompanying these efforts were discussions surrounding noncitizen voting. Southern states prohibited the practice and advocated that new states should require U.S. citizenship in order to vote because the noncitizen voting bloc overwhelmingly decried the practice of slavery.⁶⁵ Southern states stripped noncitizens of their voting rights strictly to protect their hideous institution.

Northern states advocated for the allowance of noncitizen voting, hoping that noncitizens in these new communities would vote to prevent such practices and maintain loyalty to the Union.⁶⁶ Additionally, many noncitizens fought for the Union army after the war broke out.⁶⁷ Amidst reconstruction, it was seen as only fair that noncitizens who had contributed to their community by fighting to save the Union deserved the right to vote.

Accordingly, “declarant alien” noncitizen voting was implemented in the former Confederate states. The South desperately needed an influx of resources and cheap labor after the war and, once again, the practice of noncitizen voting was utilized to entice folks to immigrate to the area.⁶⁸ This period reveals that noncitizens who (1) resided in the community for a sufficient period of time, (2) contributed to the creation of the community, and (3) declared their intent to become citizens of the United States could vote in state and local elections.

5. *Jim Crow, World War I, and Early Twentieth-Century Restrictions on Noncitizen Voting (1877–1928)*

Xenophobia was on the rise once again in the periods leading up to and following World War I; racist and xenophobic voter requirements were implemented in an effort to curb minority and noncitizen participation at the polls. By the end of this period, states had wholly eliminated the practice of noncitizen voting.⁶⁹ This choice was due in part to the war, but it may also have been brought about by shifts in the women’s suffrage movement. During this period, wealthy

⁶⁵ *Id.* at 1409.

⁶⁶ *See id.*

⁶⁷ *Id.* at 1409–10.

⁶⁸ *Id.* at 1414–15 (“A number of the former Confederate states formed part of this trend as the Reconstruction governments of Alabama, Florida, Georgia, South Carolina, and Texas included provisions for declarant alien suffrage in their Constitutions.”).

⁶⁹ *Id.* at 1415–16 (“Alabama stopped allowing aliens to vote by way of a constitutional change in 1901, followed by Colorado in 1902, Wisconsin in 1908, and Oregon in 1914. . . . In 1918, Kansas, Nebraska, and South Dakota all changed their constitutions to purge alien suffrage, and Texas ended the practice of noncitizen voting in primary elections by statute. . . . The momentum for cleansing state law of alien suffrage provisions continued as Indiana and Texas joined the trend in 1921, followed by Mississippi in 1924 and, finally, Arkansas in 1926.”).

white women suffragists sought to alleviate white supremacist anxieties surrounding impending advancements of voting rights by advocating that only educated, wealthy, white women should be able to vote.⁷⁰ These suffragists included efforts to demonize voting by noncitizens and African Americans in their successful strategy to gain voting rights for white women.⁷¹ In light of festering anti-immigrant and nationalist sentiments due to the war, these appeals to racism by white suffragists seemed to carry the day.

6. *Realizing Democratic Values (1928–Present)*

Twentieth-century discourse surrounding voting rights was rife with constitutional contradictions. While all women and people of color were supposedly able to vote at this time due to the passage of the Fifteenth and Nineteenth Amendments,⁷² in reality, the legal and structural barriers to the exercise of minority rights to franchise were abundant. Qualifications on English literacy and poll taxes were strategically implemented by white supremacists to exploit the class inequality created by Jim Crow racism.⁷³ Strategies such as these had devastating impacts on the abilities of people of color and noncitizens to access the vote. Additionally, while Native Americans had been made citizens by the Indian Citizenship Act and theoretically should have had the constitutional right to vote under the Fifteenth Amendment, since the states determined the privileges of citizenship, many Native Americans were actually without it.⁷⁴

In 1987 the late Supreme Court Justice Thurgood Marshall, speaking on the infirmities of the Constitution at the time of the founding, declared that “slavery has been abolished and the right to vote has been granted [to] blacks and women, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality’ and who strived to better them.”⁷⁵ Fortunately, according to Justice Marshall, the Constitution is dynamic, and it allowed for the hard work of the people within this country to change it to reflect our collective notions of democracy and justice.⁷⁶

As white supremacist power diminished in this realm, the efforts of voting

⁷⁰ Rosalyn Terborg-Penn, *African American Women and the Vote: An Overview*, in *AFRICAN AMERICAN WOMEN AND THE VOTE 1837–1965*, at 10, 17 (Ann D. Gordon et al. eds., 1997).

⁷¹ Kimberly Jensen, *From Citizens to Enemy Aliens: Oregon Women, Marriage, and the Surveillance State During the First World War*, 114 *OR. HIST. Q.* 453, 455, 467 (2013); *For Stanton, All Women Were Not Created Equal*, NPR (July 13, 2011, 12:01 AM), <https://www.npr.org/2011/07/13/137681070/for-stanton-all-women-were-not-created-equal>.

⁷² See U.S. CONST. amend. XV; U.S. CONST. amend. XIX.

⁷³ See KEVIN J. COLEMAN, CONG. RESEARCH SERV., R43626, *THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW* 10 (2015).

⁷⁴ Little, *supra* note 53.

⁷⁵ Terborg-Penn, *supra* note 70, at 21.

⁷⁶ See *id.*

rights activists succeeded in many respects, and the federal government began to take steps to give meaning to its democratic promise. The Twenty-Fourth Amendment abolished poll taxes in federal elections,⁷⁷ and the Twenty-Sixth Amendment prevented disenfranchisement based on age for those at least eighteen years old.⁷⁸ These amendments, in addition to the Enforcement Act and Voting Rights Act,⁷⁹ demonstrate the federal government's interest in making the right to vote more inclusive.

C. Oregon Allowed for Noncitizen Voting at Its Founding: Racism, Classism, and Nationalism During the Early Twentieth Century Motivated the State to Remove the Practice

At the founding of Oregon, it was widely debated whether or not to extend the vote to noncitizens.⁸⁰ Proponents of noncitizen voting proffered values of democratic inclusion and incentivized immigration into the state, while critics wanted to shield the right to vote to those deemed worthy of political inclusion in society at the time.⁸¹ Ultimately, when the Oregon Constitution was approved in 1857, noncitizens were granted the right to vote.⁸² The factors that governed noncitizen voting in other states were substantially similar to those found in the Oregon Constitution. All white men of foreign birth who had resided in the state for a period of six months prior to election and declared their intention to become citizens of the United States were entitled to vote.⁸³ Contribution to the community was established simply through residence and the prospect of taxation in the locale.⁸⁴ Additionally, Oregon required that persons of foreign birth reside in the United States for a period of one year preceding the election, but United States or local citizenship were not used as voting requirements at the time of Oregon's founding.⁸⁵

⁷⁷ U.S. CONST. amend. XXIV; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (interpreting the Fourteenth Amendment to prohibit wealth-based voter qualifications and poll taxes in state elections).

⁷⁸ U.S. CONST. amend. XXVI.

⁷⁹ Enforcement Act of 1870, ch. 114, 16 Stat. 140 (enforcing the right to vote); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 et. seq. (2012 & Supp. II 2015)) (enforcing the Fifteenth Amendment).

⁸⁰ THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 318–20 (Charles Henry Carey ed., 1984).

⁸¹ *Id.*; *see also* OREGON BLUE BOOK, *supra* note 12, at 248–51; William U'Ren Biography, OR. HIST. SOC'Y (Mar. 17, 2018), <https://www.oregonhistoryproject.org/articles/biographies/william-u39renbiography/#.X4psbJNKi3I>.

⁸² OR. CONST. art. II, § 2 (amended 1912); Exhibit # 1: Original Oregon Constitution.

⁸³ *See* Exhibit # 1: Original Oregon Constitution.

⁸⁴ Amy E. Platt & Laura Cray, "Out of Order": *Pasting Together the Slavery Debate in the Oregon Constitution*, 120 OR. HIST. Q. 74, 88 (2019).

⁸⁵ OR. CONST. art. II, § 2 (amended 1912); Exhibit # 1.

In 1914, Oregon's legislature referred to the public a measure to amend the state constitution so that voting would be limited to U.S. citizens.⁸⁶ The public body voted overwhelmingly to end the practice of noncitizen voting, with 164,879 votes for the citizenship restriction, and 39,847 votes against it.⁸⁷ Accordingly, the state legislature acted to restrict voting in its elections to U.S. citizens who had resided in Oregon for a sufficient period of time.⁸⁸

Legislative records from this period are impossible to obtain, but looking at the results of other ballot measures at the time, racism and xenophobia become the only explanations for why the state chose to eliminate noncitizen voting.⁸⁹ Interestingly, the citizens of Oregon have the power to amend the constitution to allow for noncitizen voting through the use of a ballot measure.⁹⁰ Oregon could extend voting rights to noncitizens based on the remaining acceptable criteria that have been developed throughout the history of the United States. These include: (1) residence in one's community; (2) an attestation of their intent to become a U.S. citizen; and (3) service on behalf of, or contribution to the community (often conceptualized through taxes).⁹¹

⁸⁶ OREGON BLUE BOOK, *supra* note 12, at 251. The Oregon Constitution now reads:
 (1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:
 (a) Is 18 years of age or older;
 (b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and
 (c) Is registered not less than 20 calendar days immediately preceding any election in the manner provided by law.

OR. CONST. art. II, § 2.

⁸⁷ OREGON BLUE BOOK, *supra* note 12, at 251.

⁸⁸ OR. REV. STAT. § 247.171(3)(e) (2019) currently reads:

(3) Each voter registration card designed or approved by the Secretary of State shall describe the penalties for knowingly supplying false information on the registration card and shall contain space for a person to provide the following information:
 . . .

(e) An indication that the person is a citizen of the United States; and
 (f) A signature attesting to the fact that the person is qualified to be an elector.

⁸⁹ The legislative records on the Secretary of State's website begin in the 1920s, and earlier legislative records and reports have proven difficult to find. Nonetheless, the restrictionist motive may be inferred by the fact that just two years later, in 1916, Oregon also voted to continue to deny suffrage to African, Asian, and Native Americans. See OREGON BLUE BOOK, *supra* note 12, at 251. This was so despite the fact that the Fourteenth and Fifteenth Amendments made this ballot measure moot and unenforceable.

⁹⁰ *Id.* at 248.

⁹¹ Raskin, *supra* note 1, at 1399–1406, 1414–15.

IV. LEGAL FRAMEWORK

A. Local Governments, Not the Federal Government, Have the Legal Authority to Set and Adjust Voter Qualifications, and Oregon Municipalities Should Follow the National Trend to Return to Noncitizens the Right to Vote

The Oregon state legislature should amend the state constitution—Article II, Section 2, clause 1—and repeal ORS 247.171 Section 3, subsection (e) in order to include noncitizen Oregon residents in the vote. States have the constitutionally mandated responsibility to set voter qualifications.⁹² As previously discussed, the state of Oregon used this authority in 1914 to deny noncitizens the right to vote.⁹³ Now, the state should reverse this exclusionary measure. The legislature should amend the Oregon constitution to replace the citizenship requirement with the requirement that a qualified voter is “every person who” is at least 18 years old, has resided in Oregon for at least the preceding 6 months, and who is registered 20 days or more before the election.⁹⁴ The legislature should also strike Section 3, subsection (e) from ORS 247.171 to remove the citizenship requirement for state voter registration. These changes would allow all Oregonians to vote for the Office of the Governor, Secretary of State, State Treasurer, Attorney General, Commissioner of Labor & Industries, State Senators, and State Representatives, as well as for state ballot measures.⁹⁵

Even if the state legislature chooses to continue to exclude noncitizen Oregonians from voting, municipalities have the power to and should step in to include noncitizens in local voting, so the electorate more truthfully aligns with those who have membership, stake, and investment in the local community. Around the nation, local governments are taking action to include noncitizen electors. In recent years, a new wave of municipalities has extended the right to vote to noncitizens. A local decision to allow noncitizens to vote would include their voices in the elections of City Commissioners, the Office of the Mayor, the school board, and local ballot measures.⁹⁶ If Oregon’s state-elected leaders do not act, the City of

⁹² See U.S. CONST. art. I, § 2.

⁹³ *Supra* notes 80–88 and accompanying text.

⁹⁴ See OR. CONST. art. II, § 2 (existing Oregon voter qualifications are “[e]very citizen of the United States” who is at least 18 years old, has resided in Oregon for at least the preceding 6 months, and who is registered 20 days or more before the election); *Voter Registration*, *supra* note 9 (showing a municipality setting requirements to “every person” who is at least “eighteen years of age,” and “resides within” the relevant voting jurisdiction).

⁹⁵ *Federal and State Elected Officials*, *supra* note 12; see also OREGON BLUE BOOK, *supra* note 12, at 248.

⁹⁶ See *Candidate Filing Requirements: Special Districts*, *supra* note 14; *Information for Candidates, Campaigns & Jurisdictions in Multnomah County*, *supra* note 14; *Candidate Filing Requirements: Multnomah County*, *supra* note 14.

Portland should establish its own voter registration process and include in the electorate every person who resides within city limits for at least 6 months preceding the election, is at least 18 years old, and is registered with either the state or the city.

B. States Have the Constitutionally Mandated Power to Set Voter Qualifications and Should Use This Authority to Include Noncitizens in the Vote

Because the U.S. Constitution not only permits local control over voter qualifications but requires it, states must make decisions about who fits local criteria to participate in voting and should expand the electorate to include noncitizens.⁹⁷ States have the authority to propose adjustments and adopt changes to voter requirements as social norms and local sentiments evolve. The ability to set voter qualifications has always been a local power.⁹⁸ Today, the assumption that the federal government controls and prescribes who may and may not vote is widespread. However, the modern understanding that the federal government, through an inherent or express federal power, controls who may vote is a myth.

Congress and the federal government do not have a role in determining *who* may vote.⁹⁹ This power is left to the states.¹⁰⁰ The power held by state governments to control voter qualifications derives from the U.S. Constitution and aligns with the original intentions of the Founding Fathers.¹⁰¹ As history shows, the Founding Fathers recognized the danger of the federal government seeking to regulate voter qualifications.¹⁰² To restrain state power to the contrary would be an overreach of federal power. From the beginning, then, the Constitution implemented strong boundaries to protect federalism and the power of the states to control voting.

The states are constitutionally mandated to make substantive determinations of voter qualifications.¹⁰³ The U.S. Constitution addresses voting in the Elections Clause, the Voter Qualification Clause, and the Seventeenth Amendment.¹⁰⁴ In each clause, the states retain the duty to set voter qualifications. The Constitution

⁹⁷ See *supra* notes 31–39 and accompanying text.

⁹⁸ See Douglas, *supra* note 2, at 1045; Harper-Ho, *supra* note 4, at 287–88.

⁹⁹ Harper-Ho, *supra* note 4, at 287–88.

¹⁰⁰ *Id.*

¹⁰¹ See *id.*; see also Denniston, *supra* note 3 (noting the gesture towards states' rights made by the Founding Fathers).

¹⁰² See *supra* notes 31–32 and accompanying text; THE FEDERALIST NO. 59, *supra* note 32, at 395 (“Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it . . .”).

¹⁰³ See Harper-Ho, *supra* note 4, at 287–88.

¹⁰⁴ U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII. The Constitution additionally addresses the expansion of the right to vote in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. See U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; U.S. CONST. amend. XXVI.

only reserves a minimal role for Congress in procedural oversight, which is the only exception to the Constitution's general grant of power over voting to the states.¹⁰⁵

Voting procedure is not federally determined; instead, the power falls first and foremost to the states to determine *how* elections are carried out.¹⁰⁶ The Elections Clause of the Federal Constitution delegates to the states the power to determine election procedures with a reserved right for Congress to intervene if necessary.¹⁰⁷ The Elections Clause establishes that the time, place, and manner of electing representatives “shall be prescribed in each State.”¹⁰⁸ While the Elections Clause leaves to Congress the ability to intervene in voting procedure when deemed necessary, Congress may not intervene when determining *who* may vote.¹⁰⁹ The Supreme Court affirmed that “[p]rescribing voting qualifications, therefore, ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause.”¹¹⁰ Instead, the role of Congress “is ‘expressly restricted to the regulation of the times, the places, and the manner of elections.’”¹¹¹

The Voter Qualification Clause delegates to the states the power to determine the qualifications required to vote for members of the state legislature, and thus, the same power to determine the qualifications required to vote for federal representatives.¹¹² While the Clause sets a timeline for qualified voters to elect representatives,¹¹³ the Voter Qualification Clause itself does not set any minimum voter qualifications. The Clause expressly grants to the states the power to set “Qualifications requisite for Electors,”¹¹⁴ thus reserving substantive determinations of voter qualifications for the states.

Similarly, the Seventeenth Amendment extends power to regulate state

¹⁰⁵ U.S. CONST. art. I, § 4, cl. 1.

¹⁰⁶ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1875) (“The power of the State in this particular is certainly supreme until Congress acts.”).

¹⁰⁷ “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (“[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.”).

¹¹⁰ *Id.* at 17 (citing THE FEDERALIST NO. 60, *supra* note 32, at 402).

¹¹¹ *Id.* (emphasis omitted).

¹¹² “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2, cl. 1.

¹¹³ “Members chosen every second Year.” *Id.*

¹¹⁴ “[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” *Id.*

elections to the states.¹¹⁵ The Amendment demands, “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.”¹¹⁶ The clause reinforces the original intention that states regulate their own elections without intervention from the federal government.¹¹⁷ According to the Supreme Court, “[n]o provision of the Federal Constitution expressly mandates the procedures that a state . . . must follow in filling vacancies in its own legislature.”¹¹⁸ Clearly, local governments retain autonomy and independent judgment over all aspects of state voting.

Hence, states hold the unique power of determining *who* may vote, particularly in state and local elections and need not match local qualifications with federal voter requirements. The U.S. Constitution itself originally did not confer voting rights to anyone.¹¹⁹ As a result, the Supreme Court has noted that “the right to vote, *per se*, is not a constitutionally protected right.”¹²⁰ Thus, all voting rights have been established over time, developed by local governments pursuant to their express constitutional power over voting procedures and qualifications. It follows that voter qualifications are not uniform across states, and states frequently impose their own qualifications for voting. For instance, states have the authority to permit or deny felons the vote in local elections, the choice of which differs state-by-state.¹²¹ State requirements for local voting do not have to match the federal requirements for voting in federal elections.¹²² In fact, state-implemented changing and morphing requirements work to push the federal government to expand federal voting rights. Historically, the federal government has eventually responded to state and local efforts to expand voting rights.¹²³

¹¹⁵ “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” U.S. CONST. art. II, § 1, cl. 2.

¹¹⁶ *Id.*

¹¹⁷ See *supra* notes 31–34 and accompanying text.

¹¹⁸ *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

¹¹⁹ The right to vote has now been extended to certain groups by constitutional amendment through the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

¹²⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

¹²¹ *Felon Voting Rights*, NAT’L CONF. ST. LEGISLATURES (Oct. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>; *Voting Rights in Oregon for Person Convicted of a Felony—Frequently Asked Questions*, MULTNOMAH COUNTY, <https://multco.us/elections/voting-rights-oregon-person-convicted-felony-frequently-asked-questions> (last visited Feb. 3, 2021).

¹²² See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 229 (1986) (“[T]hese provisions do not require a perfect symmetry of voter qualifications in state and federal legislative elections.”).

¹²³ Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting*

Nothing in the U.S. Constitution binds citizenship status to voting. The Supreme Court has long held that “the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage.”¹²⁴ For instance, as previously discussed, in early U.S. history, women and non-property-holding citizens were denied the vote.¹²⁵ Additionally, the Supreme Court found that noncitizens may, in fact, vote.¹²⁶ Because the Constitution neither demands nor precludes the right to vote based on citizenship, as discussed in Section III of this Article, who may vote has ebbed and flowed state-by-state throughout U.S. history and has both included and excluded noncitizens.¹²⁷

Because there is no constitutional link between citizenship and voting, the modern citizenship voting requirement is state imposed. The Supreme Court explained that the current citizenship requirement has been enacted pursuant to state law: “[t]o be eligible to vote *under Arizona law*, a person must be a citizen of the United States.”¹²⁸ The states have the ability to include noncitizens in the voting process under the same power that permits states to exclude noncitizens. Specifically, the state of Oregon has the power to establish citizenship as a requirement for voting because of the constitutional grant of power from the Elections Clause.¹²⁹ In the same way that Oregon intentionally denied noncitizens the right to vote, the state may again reinstate noncitizens as members of the electorate. State representatives should take action, amend the state constitution and repeal the statute, and exercise their legal authority to determine who may vote in state elections.

C. The Federal Government Does Not Have the Power to Limit the Voter Criteria Set by the States

Because the states hold the unique, independent authority to set and adjust

and Congressionally-Imposed Voter Qualifications, 63 LOY. L. REV. 447, 461 (2017) (“For instance, women’s suffrage became protected nationally by the Nineteenth Amendment only after fifteen state legislatures abolished state-imposed gender voter qualifications.”); *Map: States Grant Women the Right to Vote*, NAT’L CONST. CTR., https://constitutioncenter.org/timeline/html/cw08_12159.html (last visited Feb. 3, 2021); *see also* Douglas, *supra* note 2, at 1047–48 (noting that the first laws “decoupling property ownership and voting” were enacted at the local level).

¹²⁴ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1874).

¹²⁵ *Supra* notes 25–26, 46–48 and accompanying text.

¹²⁶ *Minor*, 88 U.S. at 177 (“[C]itizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage.”).

¹²⁷ *Supra* notes 23–68 and accompanying text.

¹²⁸ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 6 (2013) (emphasis added).

¹²⁹ *Nearman v. Rosenblum*, 371 P.3d 1186, 1189 (Or. 2016) (“According to the Attorney General, the Elections Clause authorizes the State of Oregon to specify—as it has done—that only United States citizens may vote.”).

voter qualifications, Congress has no role in limiting the criteria set by the states.¹³⁰ However, Congress has, on occasion, intervened in determining voter qualification. In 1970, Congress enacted amendments to the Voting Rights Act and, in a split decision, the Supreme Court upheld it as constitutional and found that Congress can dictate voter qualifications for federal elections but not state elections.¹³¹ The Court held that “Congress can fix the age of voters in national elections, such as congressional, senatorial, vice-presidential and presidential elections, but cannot set the voting age in state and local elections.”¹³² The nation has generally followed this decision, allowing federal intervention in federal elections and leaving the power to determine local voter qualifications with the states.

Following the Court’s decision, the federal government has meddled with the state’s authority to set voter qualifications and has criminalized noncitizen voting in federal elections. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹³³ IIRIRA included the Federal Noncitizen Voting Ban, barring noncitizens from voting in federal elections.¹³⁴ Before IIRIRA,

¹³⁰ *Supra* notes 97–129 and accompanying text.

¹³¹ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; *Oregon v. Mitchell*, 400 U.S. 112, 117–19 (1970).

¹³² *Mitchell*, 400 U.S. at 117–18 (“[T]he 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.”); *see also* Voting Rights Act Amendments § 301, 84 Stat. at 318.

¹³³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

¹³⁴ Voting by aliens, 18 U.S.C. § 611 (2018). The statute reads:

(a) It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, unless—

- (1) the election is held partly for some other purpose;
- (2) aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and
- (3) voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.

(b) Any person who violates this section shall be fined under this title, imprisoned not more than one year, or both.

(c) Subsection (a) does not apply to an alien if—

- (1) each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization);
- (2) the alien permanently resided in the United States prior to attaining the age of 16; and
- (3) the alien reasonably believed at the time of voting in violation of such subsection that he or she was a citizen of the United States.

no such federal law existed.¹³⁵ Most notably, IIRIRA attached a criminal offense to noncitizen voting in federal elections. Punishment for violation of the Federal Noncitizen Voting Ban can include deportation.¹³⁶ An additional statute criminalizes making “any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum).”¹³⁷ By criminalizing noncitizen voting in federal elections, Congress commandeered the role of the states.

With the passing of IIRIRA, Congress unconstitutionally acted to regulate voter qualifications. The U.S. Constitution clearly reserved the power to set voter qualifications for the states. The Supreme Court explained:

One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. “It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.”¹³⁸

The federal Constitution and the intentions of the Founding Fathers make clear that Congress has no role in setting voter qualifications.

However, notwithstanding the apparent incongruity between the Constitution, judicial precedent, and the criminalization of noncitizen voting in federal elections by IIRIRA, even if the Federal Noncitizen Voting Ban stands, IIRIRA does not preclude noncitizens from voting in state and local elections. States may implement noncitizen voting on the local level. IIRIRA includes an enumerated list of positions that noncitizens cannot vote for: “President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner.”¹³⁹ The list does not include any prohibition on noncitizen voting for state officials, such as the Office of the Governor, Secretary of State, State Senators, or State Representatives, or in other local elections, such as for school board members, City Commissioners, or the Office of the Mayor.¹⁴⁰ Thus, Congress’s passage of IIRIRA does not affect the states’ authority to set voter qualifications for state and local elections.

Even though Congress has unconstitutionally intervened by making

¹³⁵ Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 469–70 (2017).

¹³⁶ Fitzpatrick, 26 I. & N. Dec. 559, 559–60 (B.I.A. 2015).

¹³⁷ 18 U.S.C. § 1015(f) (2018).

¹³⁸ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (citing *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)).

¹³⁹ 18 U.S.C. § 611(a).

¹⁴⁰ See *Federal and State Elected Officials*, *supra* note 12 (listing Oregon’s state vs. federal elected officials).

substantive determinations of federal voter qualifications, states still maintain the explicit constitutional power to determine who is included in the state electorate and may include noncitizens in the vote. Congress's passage of IIRIRA in no way limits the states' power to authorize noncitizen voting in local elections and, accordingly, state legislators should take action.

D. When State Legislators Fail to Take Action in Line with Current Membership, Stake, and Investment in Communities, Municipalities Around the Country Are Acting to Include Noncitizens in Local Voting

When states fail to exercise their constitutionally mandated authority to adjust voter qualifications to include noncitizens in the electorate, localities across the country have taken action to include the voices of noncitizens in community decision making through voting initiatives.¹⁴¹ Oregon municipalities should follow. The City of Portland should extend the vote to every person who has resided within city limits for the past 6 months or more, who is at least 18 years old, and who is registered with either the state or the city.¹⁴² Various localities nationwide have reintroduced the historic right of noncitizen voting, most prominently in the state of Maryland. As the public discourse shifts away from the myth that citizenship is tied to suffrage, even if the Oregon state legislators do not act, municipalities should lead the way.

A wave of cities across the country have implemented voting for their noncitizen residents.¹⁴³ The measures extending local voting rights to noncitizens look slightly different city by city, have varying requirements for participation, and have been met with varying degrees of success. Some localities permit noncitizens to vote for all local positions. For instance, in 1992, the city of Takoma Park, Maryland extended to noncitizens the right to vote for any local measure or city official, such as the office of mayor and the city council positions.¹⁴⁴ Currently, New York City

¹⁴¹ See Pakdaman, *supra* note 5, at 36.

¹⁴² The city of Portland does not currently have its own voter registration system. This initiative would require the city to set up its own system where residents, both citizens and noncitizens, could register to vote. See, e.g., *Voter Registration*, *supra* note 9.

¹⁴³ Pakdaman, *supra* note 5, at 37 tbl.1. Cities with noncitizen voting include Barnesville, Maryland; Chevy Chase, Maryland; Chicago, Illinois; Garrett Park, Maryland; Glen Echo, Maryland; Hyattsville, Maryland; Martin's Additions, Maryland; Mount Rainier, Maryland; Riverdale Park, Maryland; San Francisco, California; Somerset, Maryland; and Takoma Park, Maryland. See *id.*; *Laws Permitting Noncitizens to Vote in the United States*, BALLOTPEDIA, https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States (last visited Feb. 23, 2021).

¹⁴⁴ PG Sentinel, *Mt. Rainier Extends Vote to Non-citizens*, SENTINEL (Jan. 18, 2017) https://www.thesentinel.com/communities/prince_george/news/local/mt-rainier-extends-vote-to-non-citizens/article_9460617a-8157-516b-aa08-fbc675b483a2.html. For other examples of cities extending the vote for all municipal elections, see College Park, Maryland; Garrett Park,

has a similar noncitizen voting proposal pending that would amend the city charter to extend to noncitizens the right to vote in all municipal elections.¹⁴⁵

Other municipalities have only included noncitizens in school board elections. For instance, the city of San Francisco recently extended voting in school board elections to noncitizens who have children under the age of 19 enrolled in public schools.¹⁴⁶ Similarly, in Chicago, noncitizens may vote in school board elections.¹⁴⁷ Recently, the city of Los Angeles also began discussing a noncitizen voting proposal for school board elections.¹⁴⁸ While some localities have chosen this more limited approach, there is no reason not to include noncitizens in all local decisions, such as the election of the Mayor or City Commissioners, in light of noncitizens' membership, stake, and investment in the local community and the impacts these choices have on the day-to-day lives of all city residents.

The various municipalities that recognize noncitizen voting rights have each established their own set of local voter qualifications, generally applying the same standards to both citizens and noncitizens. Many municipalities require the voter reside within city limits, not claim the right to vote elsewhere, have no convictions of buying or selling votes, and not be under guardianship for mental disability.¹⁴⁹ However, additional voter requirements differ in regards to the length of the residency requirement, age requirement, and immigration-status requirement,

Maryland; and Mount Rainier, Maryland. *Id.*; Esther Yu Hsi Lee, *Non-Citizens Now Allowed to Vote in Maryland City's Local Elections*, THINK PROGRESS (Sept. 13, 2017, 12:41 PM), <https://thinkprogress.org/college-park-md-local-elections-ffc7accd7ab0/>; *Voter Registration*, *supra* note 9.

¹⁴⁵ See Kelly Mena, *NYC Councilman Renews Effort to Give Noncitizens Right to Vote in Local Elections*, CNN (Jan. 23, 2020, 4:17 PM), <https://www.cnn.com/2020/01/23/politics/nyc-noncitizen-voting-rights-bill/index.html>; *Non-Citizen Voting*, GOTHAM GAZETTE, <https://www.gothamgazette.com/index.php/about/2821-non-citizen-voting> (last visited Feb. 3, 2021).

¹⁴⁶ *Compare Non-Citizen Registration and Voting*, S.F. DEP'T ELECTIONS, <https://sfelections.sfgov.org/non-citizen-registration-and-voting> (last visited Feb. 3, 2021) with Rachel Chason, *Non-Citizens Can Now Vote in College Park, Md.*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/local/md-politics/college-park-decides-to-allow-noncitizens-to-vote-in-local-elections/2017/09/13/2b7adb4a-987b-11e7-87fc-c3f7ee4035c9_story.html.

¹⁴⁷ Eric Zorn, *Jesse White's Blunder Makes Me Want to Ask, What's So Terrible About Allowing Noncitizens to Vote?*, CHI. TRIB. (Jan. 23, 2020), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-non-citizen-voting-zorn-20200123-weyxtvhldzvbvzg26ruzcc3ecmi-story.html>.

¹⁴⁸ Michael Burke, *Should Non-Citizens Vote in Los Angeles School Board Elections?*, EDSOURCE (Nov. 4, 2019), <https://edsources.org/2019/should-non-citizens-vote-in-los-angeles-school-board-elections/619387>.

¹⁴⁹ *E.g.*, *Voter Registration Application*, CITY OF TAKOMA PARK MD., <https://cityclerk-takomapark.s3.amazonaws.com/election/TP-noncitizen-Voter-Registration-Application-rev.09-26-2016-fillable.pdf> (last visited Feb. 3, 2021); *City of Hyattsville 2019 Voting Guide*, HYATTSVILLE LIFE & TIMES (Apr. 12, 2019), <https://hyattsvillelife.com/city-of-hyattsville-2019-voting-guide/>.

depending on local preference.¹⁵⁰

Residency requirements to register to vote vary city-by-city, likely reflecting the amount of time municipalities perceive it takes for new arrivals to establish sufficient stake and membership in the community.¹⁵¹ None of the municipalities set separate residency requirements for noncitizen voters, as compared to citizen voters. The current New York City proposal suggests a 6-month-residency requirement,¹⁵² Hyattsville, Maryland has a 30-day-residency requirement,¹⁵³ while Garrett Park, Maryland only requires a voter “legally resides within the corporate limits of the town on the day he or she registers to vote and continuously thereafter until casting his or her vote in any Garrett Park election.”¹⁵⁴

Additionally, the age of voters differs. Garrett Park includes voters at least 18 years of age,¹⁵⁵ while Hyattsville allows 16-year-olds to vote.¹⁵⁶ A minority of cities have set separate immigration status requirements. In 2018, a Maryland city, Chevy Chase, passed a town charter amendment extending the right to vote to “adults with green cards, those in the country for diplomatic purposes or those working toward U.S. citizenship.”¹⁵⁷ Additionally, Chicago has permitted green-card and visa holders to vote in school board elections since 1988.¹⁵⁸ The majority of cities, though, do not require any particular immigration status to participate in the vote.

Finally, the various extensions of the vote have had varying degrees of documented success. While data about noncitizen voter registration and ballot casting is often not available,¹⁵⁹ the city of Takoma Park reports active participation by noncitizen voters. Of a total of 2,581 residents who cast a vote in the 2017 city election, 72 of them were noncitizens.¹⁶⁰ Around 360 non-citizens were registered

¹⁵⁰ Compare Caitlynn Peetz, *Chevy Chase Town Council Approves Plan Allowing Non-Citizens to Vote in Local Elections*, BETHESDA MAG. (Dec. 11, 2018, 5:19 PM), <https://bethesdamagazine.com/bethesda-beat/government/chevy-chase-town-council-votes-unanimously-to-allow-non-us-citizens-to-vote-in-local-elections/>, with *Registration and Voting Information*, *supra* note 15.

¹⁵¹ See *Stewart v. Foster*, 2 Binn. 110, 118–19 (Pa. 1809).

¹⁵² *Non-Citizen Voting*, *supra* note 145.

¹⁵³ *City of Hyattsville 2019 Voting Guide*, *supra* note 149.

¹⁵⁴ *Voter Registration*, *supra* note 9.

¹⁵⁵ *Id.*

¹⁵⁶ *City of Hyattsville 2019 Voting Guide*, *supra* note 149. Similarly, the state of Oregon has considered a proposal to lower the voting age to 16. Douglas Perry, *Oregon Lawmakers Seek to Lower Voting Age in State to 16, So Teens Can ‘Protect Their Future’*, OREGONIAN (Feb. 20, 2019) <https://www.oregonlive.com/politics/2019/02/oregon-lawmakers-seek-to-lower-voting-age-in-state-to-16-so-teens-can-protect-their-future.html>.

¹⁵⁷ Peetz, *supra* note 150.

¹⁵⁸ Pakdaman, *supra* note 5, at 36.

¹⁵⁹ *Id.* at 37 tbl.1; see Exhibit 2.

¹⁶⁰ TAKOMA PARK BD. OF ELECTIONS, CITY ELECTION, NOVEMBER 7, 2017 ELECTION REPORT 3 (2018), <https://documents.takomaparkmd.gov/government/boards-commissions-and->

to vote.¹⁶¹ Additionally, the city of San Francisco saw a quick response following its recent adoption of noncitizen voting in school board elections in 2016, with 30 votes cast out of the 81 noncitizens who registered for the 2018 election.¹⁶² On the other hand, Chevy Chase Section Three only reports up to three noncitizen votes in any given election.¹⁶³ However, the low noncitizen voter turnout may partially result from the fact that only 34 residents in Chevy Chase Section Three are “foreign-born.”¹⁶⁴

Opponents to noncitizen voting argue that extending the vote is not worth it if the number of voters will not increase by a significant enough amount to offset any cost of implementing a local voter registration process.¹⁶⁵ As noted with Chevy Chase Section Three, the number of noncitizens who register to vote and those who actually cast a ballot may be slow to rise.¹⁶⁶ However, this may be further explained by the strong national public discourse condemning noncitizen voting and because of the recency of the extension of the vote.¹⁶⁷ As more and more localities adopt noncitizen voting, the conversation will change, noncitizen voting will normalize, and more noncitizens may choose to cast their vote at the polls.

Municipalities in Oregon should follow suit and change city policy to include noncitizen voters. Cities in Oregon should extend the right to vote for all local positions and measures to noncitizens with 6 months of Oregon residency and who are over the age of 18—consistent with Oregon’s current residency and age qualifications—and should not impose any additional immigration-status requirements.¹⁶⁸ In Oregon, approximately 10% of residents are immigrants.¹⁶⁹ Approximately 12% of the population of Hood River County, 10% of Washington County, and 7% of Multnomah County are noncitizens.¹⁷⁰ Over 6,000 businesses

committees/BOE/Reports/BOE-Report_November-2017.pdf.

¹⁶¹ *Id.*; see also Pakdaman, *supra* note 5, at 37 tbl.1.

¹⁶² Pakdaman, *supra* note 5, at 37 tbl.1.

¹⁶³ *Id.* at 37, tbl.1, 47 n.11.

¹⁶⁴ *Id.* at 37, tbl.1.

¹⁶⁵ Spenser Mestel, *Non-Citizens Used to Vote Regularly in America. Should More Elections be Open to Them Today?*, PAC. STANDARD (July 10, 2019), <https://psmag.com/social-justice/non-citizens-used-to-vote-regularly-in-america-should-more-elections-be-open-to-them-today>.

¹⁶⁶ Pakdaman, *supra* note 5, at 36 (indicating zero noncitizen voter registrations and zero votes cast by noncitizens in Chevy Chase Section Three in 2018).

¹⁶⁷ See Madison Gesiotto, *The Truth About Illegal Voting*, HILL (Nov. 12, 2018, 12:00 PM), <https://thehill.com/opinion/judiciary/416225-the-truth-about-illegal-voting>.

¹⁶⁸ See *Oregon Online Voter Registration*, *supra* note 13 (noting current residency and age requirements in Oregon).

¹⁶⁹ AM. IMMIGR. COUNCIL, IMMIGRANTS IN OREGON (2020), <https://www.americanimmigrationcouncil.org/research/immigrants-oregon>.

¹⁷⁰ *Multnomah County, Oregon Demographics Data*, TOWNCHARTS, <https://www.towncharts.com/Oregon/Demographics/Multnomah-County-OR-Demographics-data.html> (last

across Oregon are owned and operated by immigrants and refugees.¹⁷¹ These families have children in Oregon's public schools and are members of their local communities. Further, noncitizens pay taxes, which has often served as an indicator of contribution and involvement in a community.¹⁷² The historic factors of physical presence, stake in the community, and involvement that have traditionally influenced who may vote in the United States all point towards inclusion of noncitizen Oregonians in the electorate.

Oregon's constitutional bar on noncitizen voting does not ban noncitizen voting at the local level.¹⁷³ The state of Maryland also has a provision in their state constitution, similar to Oregon's, requiring citizenship for state voter registration.¹⁷⁴ However, at least 11 cities within Maryland have extended the right to vote to noncitizens.¹⁷⁵ Noncitizens in these Maryland cities do not vote in state-wide elections, but do have the right to vote in local elections. The cities implement separate processes for city voter registration. Anyone, even U.S. citizens, may utilize this option if they wish to avoid state voter registration requirements and only participate in local elections.

Localities extending the right to vote to noncitizens is widespread.¹⁷⁶ Counties and cities in Oregon have the opportunity to follow the national trend and expand the right to vote. For instance, in the City of Portland, noncitizen voting should be extended in the election for the Mayor, City Commissioners, the school board, and for local ballot measures to every person who has been a bona fide resident of the

visited Feb. 3, 2021).

¹⁷¹ *See Significant Share of Small Business Owners in Oregon and Portland Are Immigrants*, OR. CTR. FOR PUB. POL'Y (June 14, 2012), <https://www.ocpp.org/2012/06/14/nr20120614-share-small-business-owners-oregon-and/>. In 2014, immigrant and refugee businesses generated \$473.8 million in income and provided over 70,000 jobs. Emily Green, *Website Connects Immigrant Entrepreneurs with Portland Communities*, STREET ROOTS (Mar. 23, 2017), <https://news.streetroots.org/2017/03/23/website-connects-immigrant-entrepreneurs-portland-communities>.

¹⁷² *See supra* Section III.A.

¹⁷³ *Cf.* OR. CONST. art. II, § 2.

¹⁷⁴ "Except as provided in Section 2A or Section 3 of this article, every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State." MD. CONST. art. I, § 1.

¹⁷⁵ Maggie Astor, *Maryland City May Let Noncitizens Vote, a Proposal with Precedent*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/us/college-park-immigrant-voting-rights.html>.

¹⁷⁶ Following an increase in local initiatives to extend voting rights to noncitizens, conservative House members responded by passing a House Resolution "[r]ecogniz[ing] that allowing illegal immigrants the right to vote devalues the franchise and diminishes the voting power of United States citizens." H.R. Res. 1071, 115th Cong. (2018).

City of Portland for 6 months and who is at least 18 years of age.¹⁷⁷

V. LOCAL GOVERNMENTS SHOULD REEVALUATE VOTER QUALIFICATIONS AND ADJUST THEM TO INCLUDE THOSE WHO HAVE MEMBERSHIP, STAKE, AND AN INVESTMENT IN THEIR COMMUNITIES AND TO REFLECT DEMOCRATIC VALUES BY INCLUDING NONCITIZENS

The states and localities should reevaluate locally established voter qualifications and move towards expansion instead of exclusion. Voters should include people who are members of the community, have stake where they live, and have an investment in the community. When the federal government has intervened over the years to set voter qualifications for federal elections, it has largely moved to expand voting rights to reflect membership, stake, and investment.¹⁷⁸ Local governments should similarly act to include noncitizens in the electorate. Additionally, including noncitizens in the vote aligns with the commitment of sanctuary cities and will more accurately reflect democratic values.

A. States and Localities Should Follow the Federal Government's Lead and Expand and Extend Voting Rights to Align with Current Concepts of Membership, Stake, and Investment

When the federal government has intervened to set federal voter qualifications, it has generally been to expand and extend voting rights to align with current concepts of membership, stake, and investment. As the country has progressed and societal norms have changed, the federal government has sought to walk back structural discrimination by extending voting rights. States should follow the federal trend of expansion of voting rights in order to more accurately align voter qualifications with current cultural norms and with the criteria that has historically driven who may vote.¹⁷⁹

Historically, the federal government has, on occasion, involved itself in amending and expanding voter qualifications to further enfranchise voters.¹⁸⁰ As Section III of this Article makes clear, initially, only white, property-holding men could vote.¹⁸¹ However, little by little, the federal government has expanded voting

¹⁷⁷ See *Oregon Online Voter Registration*, *supra* note 13.

¹⁷⁸ See Harper-Ho, *supra* note 4, at 302–03.

¹⁷⁹ See *supra* Section III.A.

¹⁸⁰ The historic renunciation of the right of noncitizen voting and the criminalization through IIRIRA remains one exception where the government has redacted voting rights. Anne Parsons, *A Fraudulent Sense of Belonging: The Case for Removing the 'False Claim to Citizenship' Bar for Noncitizen Voting*, MODERN AM., Spring 2011, at 4, 5.

¹⁸¹ *Supra* notes 19, 21, 25–26 and accompanying text.

and prevented discrimination based on certain protected classes.¹⁸² The Fifteenth,¹⁸³ Nineteenth,¹⁸⁴ Twenty-Fourth,¹⁸⁵ and Twenty-Sixth Amendments enlarged voting rights.¹⁸⁶ These amendments, in addition to the Enforcement Act and Voting Rights Act,¹⁸⁷ demonstrate the federal government's interest in making the right to vote more inclusive. The federal government has taken steps to more accurately reflect those represented in society in voting. The same approach of expansion and inclusion should apply to noncitizen voting.

At each phase of expansion of suffrage, opposition has resisted extending the right to vote to a new group of people. After the Fifteenth Amendment passed, Southern states passed laws designed to prohibit black men from voting, such as requirements to demonstrate literacy, good character, or payment of voting taxes.¹⁸⁸ When women sought the right to vote, the opposition feared that extending the opportunity to vote would interfere with women's responsibilities in the household, believed women did not want to vote nor knew enough about politics to vote, and worried about the monetary cost resulting in little to no apparent benefit.¹⁸⁹

History has shown, though, the importance of the vote in the democratic system and the importance of participation by members of the community. Over time, the original aversions to expanding voting rights lessened. Early white Americans believed property-owning men had earned the right to vote and that granting the vote to those without property or education would dilute the vote with ignorant opinions.¹⁹⁰ This belief is now generally seen as false.¹⁹¹ Further, the

¹⁸² Mortellaro, *supra* note 123, at 447–50 (“To the extent the federal government involved itself in voting rights historically, it was to enfranchise voters, such as people of color, women, and young adults.”); *supra* notes 69–79 and accompanying text.

¹⁸³ U.S. CONST. amend. XV.

¹⁸⁴ U.S. CONST. amend. XIX.

¹⁸⁵ U.S. CONST. amend. XXIV; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 664–70 (1966) (interpreting the Fourteenth Amendment to prohibit wealth-based voter qualifications and poll taxes in state elections).

¹⁸⁶ U.S. CONST. amend. XXVI; *supra* notes 69–79 and accompanying text.

¹⁸⁷ Enforcement Act of 1870, ch. 114, 16 Stat. 140 (enforcing the right to vote); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 et. seq. (2012 & Supp. II 2015)) (enforcing the Fifteenth Amendment).

¹⁸⁸ Richard H. Pildes & Bradley A. Smith, *The Fifteenth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xv/interps/141> (last visited Feb. 23, 2021); *supra* notes 73–74 and accompanying text.

¹⁸⁹ Allison Lange, *National Association Opposed to Woman Suffrage*, NAT'L WOMEN'S HIST. MUSEUM (Fall 2015), <http://www.crusadeforthetvote.org/naows-opposition>; JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 181–82 (1994); J.B. Sanford, *Argument Against Women's Suffrage, 1911*, S.F. PUB. LIBR., <https://sfpl.org/pdf/libraries/main/sfhistory/suffrageagainst.pdf> (last visited Feb. 23, 2021).

¹⁹⁰ *See supra* notes 23–29 and accompanying text.

¹⁹¹ *See* Pildes & Smith, *supra* note 188.

benefits to the democratic system have proven to far outweigh the financial cost of printing more ballots and expanding the vote.

Similarly, opponents to noncitizen voting worry that extending the opportunity to vote will devalue the efforts that foreign-born noncitizens have taken to naturalize and become citizens, or that noncitizen votes will somehow devalue the votes of citizens.¹⁹² However, as history has proven, extending the right to vote will not devalue the vote of others in any way. Additionally, including noncitizens in the vote may come with a monetary cost of changing the current system and providing more ballots, and opponents of noncitizen voting fear that the benefits may not be worth it if only a small number of additional community members register or vote.¹⁹³ However, the furtherance of democracy will outweigh the financial expense.

While the federal government has amended the U.S. Constitution and passed Acts to enfranchise more voters and many cities in other states have extended the vote to noncitizens, the state of Oregon has fallen behind and has taken the opposite approach.¹⁹⁴ Oregon barred noncitizens from voting by a state constitutional amendment in 1914 and has since taken no action to reverse this disenfranchisement.¹⁹⁵ Oregon state legislators have the power and authority to strike the citizenship requirement from the state statute or amend the state constitution to erase citizenship as a voter qualification, following the federal trend towards further enfranchisement. Thus, the state of Oregon and local cities should reevaluate voter qualifications and take into consideration current concepts of membership, stake, and investment. A realignment of the voting population is long past due and is appropriate in light of the national trend towards inclusion and enfranchisement.

¹⁹² Astor, *supra* note 175.

¹⁹³ Mestel, *supra* note 165.

¹⁹⁴ In 2017, conservative groups proposed a ballot initiative to require additional proof of citizenship for voting in Oregon. While this measure would have moved away from inclusion and instead would have made registering to vote harder, the proposal demonstrates an acknowledgement of the state's power to depart from federal standards. The proposal would have added state requirements similar to the law implemented in Arizona and analyzed by the Supreme Court in *Arizona v. Inter Tribal Council of Arizona, Inc.* See 570 U.S. 1, 6 (2013); Nigel Jaquiss, *A New Ballot Initiative Would Require Oregon Voters to Prove Their Citizenship Before Voting*, WILLAMETTE WK. (Feb. 15, 2017), <https://www.wweek.com/news/2017/02/15/a-new-ballot-initiative-would-require-oregon-voters-to-prove-their-citizenship-before-voting/>.

¹⁹⁵ See *supra* notes 86–88 and accompanying text.

B. Extension of Voting to Noncitizens Aligns with Democratic Values and Promotes the Commitment of Sanctuary Cities to Stand Up Against Structural Discrimination

Extending voting rights to noncitizens will serve to demonstrate the state's commitment to undo structural barriers that bar access to the democratic system, will work against discrimination, and will align with the commitment of sanctuary cities. Since the founding of the Oregon territory, proponents have advocated for noncitizen voting because it aligns with inclusive democratic values.¹⁹⁶ The state and localities should now take structural action to implement inclusivity.

Granting voting rights to noncitizens corroborates and supports the sanctuary city status. In 2017, the Portland City Council declared Portland a sanctuary city.¹⁹⁷ The city has sometimes been criticized for only being a sanctuary in name but not always protecting or empowering the noncitizen population in reality.¹⁹⁸ For instance, a news report suggests:

A sanctuary city does not mean the community has become a refuge for people who are not living there legally. It does not provide more homes for people, nor does it guarantee shelter. And some cities, like Portland, have declared themselves sanctuary cities without enacting any laws to back up that claim.¹⁹⁹

While the city of Portland has taken steps to implement the sanctuary city status, the extension of the vote will be a concrete measure aligned with the values and goals of the city to protect noncitizens and to treat them as members of the community. Expanding the right to vote is an opportunity to be on the forefront of the ongoing fight against discrimination.

Expansion of suffrage will formally recognize the stake each noncitizen has in the community where they reside. Without noncitizen voting, election results do not indicate the true opinions and needs of the community. For example, the campaign for noncitizen voting in the city of Cambridge, Massachusetts arose from advocacy for affordable housing, with 15% of the population unable to vote because of their citizenship status.²⁰⁰ Including noncitizens in the vote leads to a true reflection of community needs and also promotes the involvement of all to create change. For instance, by including noncitizens in the school board vote and “involving more parents in decisions about their schools, officials hope to improve student outcomes, something urgently needed in the academically underperforming

¹⁹⁶ See *supra* notes 80–85 and accompanying text.

¹⁹⁷ Jessica Floum, *City Council to Declare Portland a 'Sanctuary City'*, OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/politics/2017/03/city_council_to_declare_portla.html.

¹⁹⁸ See Sara Roth, *What Is a Sanctuary City and What Does It Mean in Portland?*, KGW8 (Dec. 2, 2016), <https://www.kgw.com/article/news/investigations/what-is-a-sanctuary-city-and-what-does-it-mean-in-portland/362144981>.

¹⁹⁹ *Id.*

²⁰⁰ *Contemporary Movements in Massachusetts*, RON HAYDUK (Feb. 13, 2005), <http://ronhayduk.com/immigrant-voting/around-the-us/massachusetts/>.

district.”²⁰¹ Noncitizen voting permits and encourages political participation and will have a positive impact on the community by providing all members with a voice and by accurately reflecting the needs and interests of the community.

Representation of the voices of noncitizens in Oregon is essential to democracy. Approximately 10% of Oregon residents are immigrants.²⁰² However, when looking even closer at smaller communities, the importance of access to the vote becomes more apparent. In East Multnomah County, 26% of the population is nonwhite.²⁰³ By another metric, Oregon House District 47 and 48, smaller areas within and near East County, have a collective population of 42% people of color.²⁰⁴ While this statistic includes both citizens and noncitizens, it means that the voices of a significant percentage of the population will not be reflected in decisions over, for example, the school board and local ballot measures. In order for election results to accurately and adequately reflect the needs of the community, the voices of all members must be heard.²⁰⁵

Noncitizen voting will have a lasting impact on society and will benefit the community as a whole. Extending the right to vote to all members of a community ensures that governmental actions accurately represent the needs and interests of the community, instead of the needs of a select few. Voting helps determine where and which resources should be allocated. Additionally, local governments should extend the right to vote to noncitizens to fight against discrimination and promote democratic values.

VI. CONCLUSION

Noncitizen voting has been commonplace throughout U.S. history, and citizenship was not used as a voter qualification for the vast majority of American’s past. Since the founding, fundamental principles of democracy have asserted that all individuals who had stake, membership, and investment in their community were entitled to vote; only in this way could the electoral process guarantee its promise of equal representation. Sufficient stake, membership and investment were demonstrated by (1) residence in the community, (2) a non-binding attestation of intent to become a citizen of the United States, and (3) contribution to the

²⁰¹ Thomas Elias, *Non-Citizen Voting Push Begins to Spread*, SAN DIEGO UNION TRIB. (Dec. 19, 2019, 2:52 PM), <https://www.sandiegouniontribune.com/pomerado-news/opinion/editorial/so-cal-focus/story/2019-12-19/elias-non-citizen-voting-push-begins-to-spread>.

²⁰² AM. IMMIGR. COUNCIL, *supra* note 169.

²⁰³ *East County, 2013–2017, Factsheet*, ECONORTHWEST, <https://multco.us/file/83233/download> (last visited Feb. 3, 2021).

²⁰⁴ *Economic Mobility Marginalization*, MULTNOMAH COUNTY, <https://multco.us/commissioner-stegmann/economic-mobility> (last visited Feb. 3, 2021).

²⁰⁵ Sean McElwee, *Why Voting Matters*, DEMOS (Sept. 16, 2015), <https://www.demos.org/research/why-voting-matters-large-disparities-turnout-benefit-donor-class>.

community. This last factor is principally satisfied by the payment of taxes.

The imposition of citizenship requirements in state and federal elections finds no support in our nation's legal jurisprudence or its guiding principles. The Constitution of the United States undeniably commands that the individual states have the power to decide who may vote. Municipalities within those states also have the power to set their own voter qualifications for votes on local matters. Citizenship requirements at the federal, state, and local levels are a relatively recent phenomena, and they were only implemented to maintain white supremacist domination of the political process and to prevent the achievement of truly democratic results.

The struggle for voting rights by minority communities has been long and difficult to say the least. Minority groups have fought both federal and state governments tooth and nail for access to the ballot. These ceaseless efforts underscore the importance that voting holds in a truly democratic society. In order that all interests be represented and that all solutions are heard when searching for answers to a locale's problems, all persons must be represented in the democratic process, including noncitizens. While efforts towards democratic inclusion are still ongoing at the federal level, municipalities across the nation are beginning to realize the value of noncitizen voting. The State of Oregon and the City of Portland have the power to implement noncitizen voting and would benefit from doing so. A substantial portion of our community includes noncitizens, and their values and ideas need to be reflected in a society that promises a voice to all.

VII. APPENDIX

Exhibit 1 - Original Oregon Constitution

SECTION 10th 2.

In all elections not otherwise provided for, by this Constitution, every white male citizen of the United States, of the age of twenty one years, and upwards, who shall have resided in the State during the six months, immediately preceding such election; and every white male of foreign birth of the age of twenty-one years, and upwards, who shall have resided in the United States, one year, and shall have resided in this State, during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law.

Oregon Secretary of State, *State 1857 Constitution*, <https://sos.oregon.gov/blue-book/Documents/state-1857-constitution1.pdf>.

Exhibit 2 - Cities with Noncitizen Voting Rights as of November 2018

<i>City</i> ¹⁰	<i>Total Foreign-Born Residents</i> ¹¹	<i>Registered</i>	<i>Voted</i>
Illinois			
Chicago	322,601		
Maryland			
Barnesville	4		
Chevy Chase Section Five	53		
Chevy Chase Section Three	34	0	0 ¹²
Glen Echo	14	unavailable	unavailable ¹³
Hyattsville	4,263	33	12 ¹⁴
Martin's Additions	53	N/A	N/A ¹⁵
Mountain Rainier	2,079	unavailable	25 ¹⁶
Riverdale Park	2,436	N/A	N/A ¹⁷
Somerset	191		
Takoma Park	2,901	360	72 ¹⁸
California			
San Francisco	115,412	81	30 ¹⁹

From Kimia Pakdaman, *Noncitizen Voting Rights in the United States*, BERKELEY PUB. POL'Y J., Spring 2019, at 33 (<https://bppj.berkeley.edu/2019/03/04/spring-2019-journal-noncitizen-voting-rights-in-the-united-states/>) (internal citations omitted).