

GIVING THE PEOPLE A VOICE WHERE IT COUNTS: A PRESUMPTION IN FAVOR OF ALLOWING PERMANENT RESIDENTS TO VOTE IN LOCAL ELECTIONS

Robin Liu*

This article proposes, as a matter of principle, that there should be a rebuttable presumption in favor of extending voting rights in local elections to permanent residents. It will justify why the proposed presumption should apply, the ways in which it could be rebutted, and offer some insight into how the presumption could serve as a guide to constitutional interpretation and design. It will review the reasons for the connection between citizenship and voting rights, and then address why permanent residents should be granted the right to vote in local elections. Three case studies will be used to illustrate how the presumption could apply to various constitutional democracies.

This article ultimately concludes that normative considerations weigh in favor of enfranchising permanent residents. Noncitizens have demonstrated that they are stakeholders in their communities. Granting them the right to participate in local elections accommodates democratic principles without hindering the ability of national governments to pursue their interests. The article suggests that the proposed presumption should hold unless there is evidence that the issues discussed at the local level include issues generally associated with national policy and that the permanent residents have a reasonable opportunity to naturalize. Notions of fairness and practical considerations weigh in favor of enfranchising permanent residents in local elections.

Copyright © 2021 Robin Liu

* Robin Liu is a Juris Doctorate and Master's in International and Comparative Law candidate at Duke University School of Law (expected 2022). She received fellowships from the Fulbright Commission and German Academic Exchange Service to conduct research on political science at the Free University in Berlin and graduated Phi Beta Kappa from the University of Southern California with a Bachelor of Arts. The author would like to thank Professor Holning Lau for his continuous support and helpful feedback, the editors of this journal for their hard work, as well as the American Society of Comparative Law for awarding this paper the honorable mention for the Eder Prize.

INTRODUCTION	212
I. THE PUSH FOR NONCITIZEN VOTING RIGHTS	216
A. Voting Rights and Political Underpinnings.....	218
B. Noncitizen Voting in Practice.....	221
II. THE UNIQUENESS OF LOCAL ELECTIONS	222
A. The decisions that noncitizens would vote on in local elections do not affect major national interests.	223
B. Many of the concerns raised about NCV are not as pertinent when NCV only applies at the local level.	224
III. A PRESUMPTION FAVORING PERMANENT RESIDENTS’ RIGHT TO VOTE IN LOCAL ELECTIONS	226
A. Applying the Presumption.....	228
1. United States	229
2. Japan.....	232
3. Switzerland.....	235
CONCLUSION.....	237

INTRODUCTION

Giving noncitizens the right to vote could enable them to fight anti-immigrant policies affecting their lives.¹ With a resurgence of anti-immigrant rhetoric, interest in noncitizen suffrage has resurfaced.² The U.S. is just one of many places where municipalities have been calling for noncitizen suffrage.³ Such proposals, however, have been met with reactions that enfranchising non-citizens would be “just plain wrong.”⁴ Others claim that giving noncitizens a voice in elections would “cheapen citizenship.”⁵

1. Noah Berlatsky, *Give All Immigrants the Vote*, FOREIGN POL’Y (Oct. 20, 2020, 5:36 PM), <https://foreignpolicy.com/2020/10/30/give-all-immigrants-right-to-vote-noncitizen-voting-election/>.

2. Eric Zorn, *Column: Jesse White’s Blunder Makes Me Want To Ask, What’s So Terrible About Allowing Noncitizens To Vote?*, CHI. TRIB. (Jan. 23, 2020, 3:53 PM), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-non-citizen-voting-zorn-20200123-weyxtvhldzbvzg26ruzcc3ecmi-story.html>; 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>; Ron Hayduk, *Why Non-Citizens Should Be Allowed to Vote*, JACOBIN (Nov. 6, 2018), <https://jacobinmag.com/2018/11/noncitizen-voting-undocumented-immigrants-midterm-elections>; Spenser Mestel, *Non-Citizens Used to Vote Regularly in America*, 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>.

3. See *infra* p. 2.

4. Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CAL. L. REV. 271, 272 (2005).

5. Ted Ruthizer, *New York’s State Citizenship Initiative Cheapens U.S. Citizenship*, N.Y. TIMES (June 25, 2014, 2:43 PM), <https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/new-yorks-state-citizenship-initiative-cheapens-us-citizenship>.

These critiques do not fully appreciate the longstanding practice of alien suffrage. Noncitizens in many Latin American countries had the right to vote as early as the 1920s.⁶ In 1925, Chile became one of the first countries in the world to enfranchise noncitizens.⁷ Even as Chile redrafted its constitution multiple times, it continued to include a provision that recognized noncitizen suffrage.⁸ Chile's most recent constitution recognizes the right of foreign residents to participate in municipal elections.⁹

Around the same time that Chile recognized noncitizen suffrage, other countries went in the opposite direction and disenfranchised noncitizens.¹⁰ Countries in Europe and North America firmly held that only citizens could exercise the right to vote.¹¹ However, Sweden became one of the first western democracies to break from the pack. In the mid-1900s, Sweden removed its restrictive immigration legislation and opened its borders.¹² Additional attempts at liberation remained slow until 1975 when proponents of noncitizen voting ("NCV") finally pushed through a policy that enfranchised all noncitizens who met a three-year residency requirement.¹³ The advocates succeeded by framing NCV from the more palatable angle of integration.¹⁴

Chile, Sweden, and over forty other countries that provide noncitizens the right to vote are in the minority.¹⁵ The status quo is to condition voting rights on citizenship. However, a growing body of literature challenges the

6. Cristina Escobar, *Immigrant Enfranchisement in Latin America: From Strongmen to Universal Citizenship*, 22 *DEMOCRATIZATION* 927, 927 (2015).

7. GABRIEL ECHEVERRÍA, EUDO CITIZENSHIP OBSERVATORY, ACCESS TO ELECTORAL RIGHTS: CHILE 1, 4 (2015).

8. *Id.*; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 14 (1980) ("Foreigners who have resided in Chile for more than five years, and who meet the requirements stated in the first paragraph of article 13, may exercise the right to vote in the circumstances and manners prescribed by law."); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 14 (2021) (maintaining same text as 1980 version of the constitution).

9. ECHEVERRÍA, *supra* note 7, at 5 (describing voting rights in Chile as of 2015). Notably since this note was written, the Chilean Constitution is being rewritten, which may affect electoral rights under national law. See Philip Reeves, *What A New Constitution Could Mean for Chile*, NPR (May 27, 2021, 4:07 PM), <https://www.npr.org/2021/05/27/1000991508/many-in-the-group-writing-chiles-constitution-are-new-to-politics>.

10. Groups in the U.S., for instance, pushed against the widespread practice of noncitizen suffrage with the growing presence of anti-immigrant sentiment. See *infra* notes 53–54 and accompanying text.

11. Martin Ericsson, *Enfranchisement As a Tool for Integration: The 1975 Extension of Voting Rights to Resident Aliens in Sweden*, 38 *IMMIGRANTS & MINORITIES* 234, 234 (2021).

12. *Id.* at 235–237.

13. *Id.* at 235, 238.

14. *Id.* at 241–42. See also *infra* notes 19–20 and accompanying text (discussing NCV as a means for fostering integration).

15. Ericsson, *supra* note 11, at 235.

assumption that “citizen” and “voter” must be coextensive.¹⁶ Some authors show that NCV is a realistic proposal by citing historical and current examples of noncitizen voting.¹⁷ Other authors approach the discussion from a more theoretical perspective and advocate for NCV by citing various legal and democratic theories.¹⁸ These authors contend that, because noncitizens are subject to the same duties as citizens, such as paying taxes, and have a vested interest in the community, noncitizens should have a say in the government’s policies.¹⁹ The idea is straightforward: there should be “no taxation without representation.”²⁰ Lastly, another branch of literature supports NCV by showing how it will further political integration.²¹ It claims that citizens who have the right to vote become more politically engaged, which in turn creates a more cohesive and fraternal community between the participants.²²

This article builds on literature that focuses on NCV in the local context. The current literature advances arguments in favor of noncitizen suffrage²³ and identifies the trend of enfranchising non-citizens at the local level.²⁴ There is a gap in the literature, however, regarding why arguments for NCV are especially compelling at the local level. The literature that favors NCV generally treats local and national enfranchisement similarly. For instance, some arguments supporting NCV suggest that voting rights should extend to both local and national elections.²⁵ Conversely, arguments for restricting voting to just citizens are presumed to be equally persuasive for local and

16. Dan Ferris et al., *Noncitizen Voting Rights in the Global Era: A Literature Review and Analysis*, 21 J. INT’L MIGRATION & INTEGRATION 949, 951 (2019) (citing first STANLEY A. RENSHON, *NONCITIZEN VOTING AND AMERICAN DEMOCRACY* (2009) and RODOLFO O. DE LA GARZA, *Immigrant Voting: Counterpoint*, in *DEBATES ON U.S. IMMIGRATION* 105–10 (Gans et al., 1st ed. 2012)).

17. See Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093 (1977); Ferris et al., *supra* note 16, at 951.

18. Ferris et al., *supra* note 16, at 951.

19. Alois Stutzer & Michaela Slotwinski, *Power Sharing at the Local Level: Evidence on Opting-In for Non-Citizen Voting Rights*, 32 CONST. POL. ECON. 1, 10 (2020).

20. Ferris et al., *supra* note 16, at 952.

21. See *id.* at 958–59; Heather Lardy, *Citizenship and the Right to Vote*, 17 OXFORD J. LEGAL STUD. 75, 95 (1997).

22. See Ferris et al., *supra* note 16, at 951.

23. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 L. & INEQ. 271, 294–96 (2000); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993).

24. Jean-Thomas Arrighi & Rainer Bauböck, *A Multilevel Puzzle: Migrants’ Voting Rights in National and Local Elections*, 56 EUR. J. POL. RSCH. 619, 624 (2017).

25. Claudio López-Guerra, *Disenfranchisement on the Basis of Nonresidency and Noncitizenship*, in *DEMOCRACY AND DISENFRANCHISEMENT: THE MORALITY OF ELECTORAL EXCLUSIONS* 84–86 (Claudio López-Guerra, ed., 2014); Lardy, *supra* note 21, at 76–77.

national elections.²⁶ To fill the gap in the literature, this article develops arguments specifically for local NCV. It also provides an analytical framework for evaluating when local NCV is appropriate.

This article contends that conflating local and national enfranchisement is flawed because noncitizens could make a stronger claim for the right to vote in local as opposed to national elections. It claims that many of the arguments against noncitizen suffrage mainly apply to national elections. Allowing noncitizens to vote in local elections is unlikely to raise concerns about immigration policy, national security, or foreign policy. Opponents to NCV therefore have a weaker case against local noncitizen suffrage. Conversely, the arguments for NCV based on democratic principles have greater weight at the local level as noncitizens are more significant stakeholders in local communities.²⁷ On balance, there is a strong argument for enfranchising noncitizens at the local level. This article proposes, as a matter of principle, that there should be a rebuttable presumption in favor of extending voting rights in local elections to permanent residents. It will justify why this presumption should apply, the ways in which it could be rebutted, and offer some insight into how the presumption could serve as a guide to constitutional interpretation and design.

This article is divided into three parts. Part I reviews the reasons for the connection between citizenship and voting rights, and highlights how robust this framework has been. It then addresses alternatives to this framework. Upon reviewing academic arguments and state practice, it is possible to understand the arguments for a shift away from the status quo. This section ultimately suggests that permanent residents are the best candidates for NCV. Part II examines why states should analyze national and local elections separately and explains why the case for NCV is stronger at the local level. Lastly, Part III proposes that, in constitutional interpretation and design, there should be a presumption in favor of granting permanent residents the right to vote in local elections. It will also use three case studies to show under what circumstances this presumption could be rebutted.

26. Advocates against NCV are underrepresented in literature, but this is the dominant view globally as NCV is allowed in only a minority of countries. See Ferris et al., *supra* note 16 at 951–52; Michele Wucker, *The Perpetual Migration Machine and Political Power*, 21 *WORLD POL'Y J.* 41, 43 (2004); John Kass, *It's A No-Brainer: Only Citizens Should Vote, Period*, *CHI. TRIB.* (Jul. 10, 2015, 2:00 AM), <https://www.chicagotribune.com/columns/john-kass/ct-kass-immigration-met-0710-20150710-column.html>.

27. Raskin, *supra* note 2323, at 1394.

I. THE PUSH FOR NONCITIZEN VOTING RIGHTS

Enfranchising noncitizens seems to be a major change from the status quo. Advocates for NCV must contend with the current perception that only citizens should have the right to vote. Under the status quo, there is a presumption that citizenship and the right to vote should be linked.²⁸ Because the right to vote is a critical part of any democracy, such a right should be limited to citizens.²⁹ Opponents of NCV believe that drawing the line at citizenship is appropriate because political rights should be exclusive to people who are formally part of the state.³⁰ The relationship between a state and its citizens is special.³¹ Citizens provide their loyalty and dedication to the state in exchange for government protection and benefits.³² Further, keeping the line at citizenship is consistent with republican theories that voting rights must be an exclusive privilege of citizens.³³ Only citizens should be entrusted with the right to control laws within their communities.³⁴ Determining who has the right to vote is ultimately a line drawing exercise. Using citizenship as a threshold to vote is appropriate because citizens can most clearly demonstrate sufficient ties to the state.

From the perspective of opponents to NCV, conditioning voting on citizenship is not contrary to democratic principles. It is generally accepted that noncitizens are not entitled to all of the same rights as citizens.³⁵ Noncitizens gain rights as they develop more ties to their country of

28. Lardy, *supra* note 2121, at 75.

29. See Christopher Arps, Opinion, *Protect Civil Rights with Citizen-Only Voting*, HILL (Sept. 21, 2019, 8:00 AM), <https://thehill.com/opinion/campaign/462096-protect-civil-rights-with-citizen-only-voting> (claiming that voting is a fundamental right of citizenship).

30. See Donald S. Lutz, *The Purposes of American State Constitutions*, 12 *PUBLIUS* 27, 32 (1982); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 *T. JEFFERSON L. REV.* 367 (2003); U.N. Off. of the High Comm'r for Hum. Rts., *The Rights of Non-Citizens*, HR/PUB/06/11 (2006).

31. Ruthizer, *supra* note 5.

32. *E.g.*, *Naturalization Oath of Allegiance to the United States of America*, U.S. Citizenship and Immigration Servs., <https://www.uscis.gov/citizenship/learn-about-citizenship/the-naturalization-interview-and-test/naturalization-oath-of-allegiance-to-the-united-states-of-america> (July 5, 2020) (swearing fealty to the United States as a part of obtaining American citizenship); see NICHOLAS BENEQUISTA, DEV. RSCH. CTR., *PUTTING CITIZENS AT THE CENTRE: LINKING STATES AND SOCIETIES FOR RESPONSIVE GOVERNANCE* 4, 7 (2010).

33. See Richard Dagger, *Republican Citizenship*, in *HANDBOOK OF CITIZENSHIP STUDIES* 145, 145 (Engin F. Isin & Bryan S. Turner eds., 2002) (noting that, historically, republican and citizenship are intertwined words).

34. See *id.*; see, *e.g.*, Ruthizer, *supra* note 5.

35. Paul David Meyer, *Citizens, Residents, and the Body Politic*, 102 *CAL. L. REV.* 465, 467–68 (2014); Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 *VA. L. REV.* 1091, 1140 (2006).

residence.³⁶ The inability of noncitizens to vote is temporary as many noncitizens will be enfranchised once they naturalize.³⁷ States generally impose some requirements for people to partake in elections.³⁸ There is a natural link between the rules on citizenship and rules on voting requirements. Both look to see if a person has sufficient ties to the community and if the person will be a good member of society.³⁹ Indeed, naturalization requirements identify the kind of people a state wants to become part of the body politic, and presumably have a voice in its governance.⁴⁰ Because naturalization provides noncitizens a well-established pathway to vote, there is no need to enfranchise noncitizens.⁴¹

Enfranchising all noncitizens may hurt democratic legitimacy. The pushback to NCV is not limited to academic debates as some countries such as Germany have taken the position that expanding the polity will dilute the voices of citizens and interfere with their special relationship to the government. Adhering to the notion that citizens' voices should be protected, the Federal Constitutional Court of Germany in 1990 struck down laws from sub-federal entities (*Bundesländer*) that allowed noncitizens to participate in local elections in the *Foreign Voters Case*.⁴² It found that such laws undermined the right of the German people to self-determination.⁴³ It ruled that the notion of "the people" (*Volke*) in Article 20 of the Basic Law (the German Constitution) is limited to German citizens.⁴⁴ The German Constitutional Court reaffirmed the link between citizenship and voting rights.

In the same opinion, the German Constitutional Court went on to suggest that the government should make it easier for immigrants to

36. Posner & Vermeule, *supra* note 35, at 1139.

37. This is mostly true where the criteria for naturalization is easy, such as the U.S. and Sweden. However, this paper will later address the consequences of when naturalization is difficult in a particular country.

38. See Sasha Chavkin & Hamish Boland-Rudder, *Your Country, Your Vote – a Rough Guide to Global Voter Restrictions*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 5, 2014), <https://www.icij.org/inside-icij/2014/05/your-country-your-vote-rough-guide-global-voter-restrictions/>; Kristine Liao, *What Voting Rights Look Like in 6 Countries Around the World*, GLOB. CITIZEN (Aug. 21, 2020), <https://www.globalcitizen.org/en/content/voting-rights-around-the-world/>.

39. See Lardy, *supra* note 21, at 92.

40. Meyer, *supra* note 35, at 467.

41. Arrighi & Bauböck, *supra* note 24, at 632.

42. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 1990, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 37 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 1990, 83 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 60 (Ger.).

43. 83 BVerfGE 37 (Ger.); 83 BVerfGE 60 (Ger.).

44. 83 BVerfGE 37 (Ger.); 83 BVerfGE 60 (Ger.).

naturalize instead of giving them the right to vote in local elections.⁴⁵ A state may create a more representative polity without abandoning the current framework. A reasonable alternative to NCV is to adjust the naturalization requirements. Ten years after the *Foreign Voters Case*, the *Bundestag* (legislative branch) opened the pathway to citizenship to persons without German ancestry.⁴⁶ Generally, noncitizens may naturalize after eight years of legal residence in Germany, provided they meet the relevant conditions such as adequate German language ability, a clean criminal record, and a commitment to the Basic Law.⁴⁷ The German case demonstrates that institutions can adjust to calls for more democratic representation whilst maintaining citizenship as a prerequisite for voting rights.

A. Voting Rights and Political Underpinnings

Proponents of NCV push against maintaining the status quo and argue that implementing NCV is practicable. Although opponents of NCV insinuate that voting rights and citizenship are inherently linked, advocates for NCV counter that there is no valid connection between citizenship and acquiring the right to vote.⁴⁸ The right to vote is not unlike other political rights, including the right to the freedom of speech and association, which are automatically granted to noncitizens present in the host country.⁴⁹ It is hard to justify the reservation of voting rights for citizens when other political rights can be more powerful.⁵⁰ Indeed, state practice illustrates how voting rights can be granted to noncitizens just like other political rights.⁵¹ For instance, the U.S. has a long history of enfranchising noncitizens.⁵² Noncitizen suffrage was widespread in the U.S. throughout the nineteenth century and only ended when nativist sentiment took hold of the country.⁵³ The spread of the idea that voting is the exclusive right of citizens can be in

45. 83 BVerfGE 37 (Ger.); 83 BVerfGE 60 (Ger.); see also Kees Groenendijk, *Naturalization as Alternative for Extending Voting Rights?*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG (May 22, 2014), <https://www.bpb.de/gesellschaft/migration/kurz dossiers/184716/naturalization>.

46. Germany historically had *jus sanguinis* citizenship but the Naturalization Act (2000) provided *jus soli* citizenship. Note that this Act was amended in 2014. See *Law on Nationality*, FED. FOR. OFF., <https://www.auswaertiges-amt.de/en/visa-service/konsularisches/-/229970> (last visited Oct. 31, 2021) (Ger.).

47. *Id.*

48. López-Guerra, *supra* note 25, at 87–88.

49. *Id.*

50. *Id.*

51. See, e.g., Ruthizer, *supra* note 5.

52. See RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 19–20 (2006).

53. *Id.* at 17–18.

part attributed to anti-immigrant sentiment.⁵⁴ More recently, parts of the U.S. are shifting back to previous policies of promoting noncitizen suffrage.⁵⁵ The country is not alone in making this move.⁵⁶ The European Union provides citizens of the Member States with the right to vote in the local elections of any other Member State.⁵⁷ A study from 2019 demonstrates that at least forty-five states grant noncitizens some form of voting rights (local, national, or both).⁵⁸ Whilst the German approach of liberalizing naturalization requirements is one possibility,⁵⁹ permitting NCV is a feasible and growing option.

The increasing number of states permitting NCV indicates their embrace of the idea that noncitizens should be afforded some voting rights. The arguments advocating for NCV based on democratic principles and natural rights appear to be gaining traction.⁶⁰ Advocates for NCV suggest that noncitizens should be enfranchised because they have genuine links to the polity, will contribute to collective self-government, and will become part of the political community.⁶¹ Now that concerns related to prejudicial beliefs no longer have the same weight, the arguments for NCV have become more persuasive.⁶² Historically, the decision to deny noncitizens the right to vote was political.⁶³ States chose to take away noncitizens' right to vote in order to appease political concerns that arose in part from prejudicial beliefs.⁶⁴ There is growing acceptance, however, that these assumptions are

54. Matt Vasilogambros, *Noncitizens Are Slowly Gaining Voting Rights*, PEW (July 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/01/noncitizens-are-slowly-gaining-voting-rights>.

55. See Ron Hayduk & Michele Wucker, *Immigrant Voting Rights Receive More Attention*, MIGRATION POL'Y INST. (Nov. 1, 2004), <https://www.migrationpolicy.org/article/immigrant-voting-rights-receive-more-attention>.

56. Arrighi & Bauböck, *supra* note 24, at 626.

57. Treaty on European Union art. 8b, Feb. 7, 1992, 1757 U.N.T.S. 30615.

58. Ferris et al., *supra* note 16, at 949.

59. Germany also allows citizens of EU countries to vote in local German elections. This is an exception to the stance taken in the *Foreign Voters Case*. See *Municipal Elections*, YOUR EUR., https://europa.eu/youreurope/citizens/residence/elections-abroad/municipal-elections/index_en.htm (May 17, 2021).

60. See, e.g., Raskin, *supra* note 23, at 1395; Ulrike Davy, *How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights*, 13 WASH. U. GLOB. STUD. L. REV. 201 (2014).

61. Arrighi & Bauböck, *supra* note 24, at 632.

62. See *supra* notes 58–61.

63. Gabriela Evia, *Consent by all the Governed: Reenfranchising Noncitizens as Partners in America's Democracy*, 77 S. CAL. L. REV. 151, 163 (2004) (suggesting that the right to vote is a discretionary decision made by the state).

64. *Id.* at 163–70; see also Paige St. John, *How a Racist Myth About Immigrants Continues to Fuel Unproven Claims of Voter Fraud*, L.A. TIMES (June 25, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-06-25/racist-myth-of-immigrants-voting-fuels-claims-of-voter-fraud> (showing the

erroneous.⁶⁵ Given the changes in ideology, arguments for NCV are gaining momentum.

The arguments for enfranchising noncitizens based on democratic principles and natural rights are particularly strong for permanent residents. Whilst some human rights literature advocates for a cosmopolitan view of citizenship,⁶⁶ a larger portion of the literature believes that voting rights should only be granted to noncitizens with sufficient ties to the community.⁶⁷ Noncitizens only become permanent residents after fulfilling certain requirements, such as a period of residency, that prove they have sufficient ties to the community.⁶⁸

Permanent residents have sufficient stakes in the community to claim a right to shape the rules that affect their day-to-day lives. Noncitizens are subject to the duties and rules of the society in which they live.⁶⁹ Building on the liberal democratic principle of territorial inclusion and “*quod omnes tangit ab omnibus approbetur*” (what affects all shall be approved by all), NCV is appropriate because people living within the same territorial boundaries and subject to the same laws should have the power to influence them.⁷⁰ With regard to contributing to and becoming part of the political community, communitarian theories stipulate that a community grows stronger when individuals participate more in the political community because such interactions foster common goals and a shared identity.⁷¹ Accordingly, permanent residents who are able to vote will be motivated to engage in the political discourse, which in turn helps them identify more with the host country.⁷² As this process continues, permanent residents will become more integrated with the political community.

link between racism and the denial of voting rights).

65. See Groenendijk *supra* note 45; Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 *CITIZENSHIP STUD.* 607, 612 (2009).

66. See Meyer, *supra* note 35, at 505 (stating that the right to vote is linked with human dignity and self-determination, both of which are universal concerns not necessarily tied to territorial boundaries); see generally Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 *Nw. L. REV.* 963 (2000) (questioning the tendency to use citizenship as the line for defining political communities).

67. See Ferris et al., *supra* note 16, at 949–50.

68. See David M. Howard, *Potential Citizens' Rights: The Case for Permanent Resident Voting*, 95 *TEX. L. REV.* 1393, 1394 (2017) (noting that gaining permanent residency implies sufficient ties to national and local communities because getting that status is conditioned on showing such connections).

69. See Cristina M. Rodriguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 *INT'L J. CON. L.* 30, 30–31 (2010).

70. Cristina M. Rodriguez, *From Litigation, Legislation: A Review of Brian Landsberg's Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*, 117 *YALE L. J.* 1132, 1173 (2008).

71. See Lardy, *supra* note 21, at 95.

72. Rose Cuisson Villazor, *State Citizenship Strengthens What It Means to Be a Citizen*, *N.Y. TIMES* (Nov. 17, 2014, 2:59 PM), <https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-strengthens-what-it-means-to-be-a-citizen>.

Reserving the right to vote to permanent residents serves as a limiting principle and helps maintain the distinction between stakeholders and other inhabitants. Few would argue that temporary visitors, such as tourists, or undocumented aliens should be granted the right to vote.⁷³ Drawing the line at permanent residency helps close the democratic gap and maintains some limit on a powerful right.⁷⁴ Including only permanent residents in a polity, those who are citizens in the making, reduces discrimination between similarly situated inhabitants and closes the democratic representation gap.

B. Noncitizen Voting in Practice

A country's constitution may not speak directly to the issue of NCV. In such cases, the government has the flexibility to decide whether it wants to enfranchise noncitizens. Governments that approach policies in an experimental way have more readily embraced noncitizen suffrage. New Zealand maintains a constitutional self-image as a laboratory for experimentation in the design of democracy and has one of the most liberal voting regimes in the world.⁷⁵ Since 1975, all permanent residents after one year of residency in New Zealand may vote in all elections.⁷⁶ Granting voting rights for noncitizens is consistent with New Zealand's pioneering constitutional culture; it was also one of the first countries to enfranchise women.⁷⁷ Likewise, embracing experimentation is also a feature of the United States Constitution. The structure of federalism fosters states' function as laboratories of innovation.⁷⁸ In light of the Constitution's silence on NCV, municipalities have taken the initiative to enfranchise noncitizens.⁷⁹ With flexibility built in these places that are deemed to be laboratories, there seem to be fewer obstacles to enfranchising noncitizens.

Countries that have the power to grant NCV tend to permit noncitizens to participate only in local elections.⁸⁰ Indeed, there are relatively few countries like New Zealand that allow noncitizens to participate in local and

73. See Meyer, *supra* note 35, at 473.

74. Arrighi & Bauböck, *supra* note 24, at 632.

75. See Rodriguez, *supra* note 69, at 32, 40.

76. Fiona Barker & Kate McMillan, *Constituting the Democratic Public: New Zealand's Extension of National Voting Rights to Non-Citizens*, 12 N.Z. J. PUB. & INT'L L. 61, 61 (2014).

77. *Id.*

78. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (O'Connor, J., dissenting) (stating that federalism promotes innovation by allowing states to serve as laboratories to try new social and economic experiments without risk to the rest of the U.S.) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

79. See *infra* pp. 23–24, 29.

80. Arrighi & Bauböck, *supra* note 24, at 624; Hayduk & Wucker, *supra* note 55.

national elections.⁸¹ The small number of countries granting eligible resident visa holders full noncitizen suffrage illustrates the effect of political realities on the NCV movement. Although democratic considerations in favor of enfranchising permanent residents are persuasive, the battle for NCV also crosses over into the political realm.⁸² Immigration policies remain highly relevant in the discourse on NCV. Whereas citizenship may be decoupled from voting rights, the same cannot be said about immigration policy and voting rights. There is a trade-off between granting voting rights to noncitizens and having flexibility in immigration policy. A country like New Zealand that grants full NCV will likely need to be more selective about who comes into the country. In contrast, a country like the U.S. could let in a wider range of noncitizens without worrying about whether a noncitizen meets the criteria of a desirable voter. Furthermore, a country that grants full NCV may need to worry about how the votes of nonimmigrants could shift national policy.⁸³ Accordingly, countries may be constrained by political considerations and be reluctant or unable to provide noncitizens with full voting rights.

II. THE UNIQUENESS OF LOCAL ELECTIONS

Providing permanent residents with the right to vote in only local elections addresses both democratic and practical concerns. The argument based on democratic considerations relies heavily on the idea that stakeholders in a community should have a say in that community's affairs.⁸⁴ This argument is especially persuasive when looking at the interactions of noncitizens within local communities. For instance, noncitizens interact with members of the local community on a daily basis by going to the grocery store, working in the local community, and sending their children to schools in the local community. Having ties to the local community may be sufficient to sustain a claim of belonging to the local polity,⁸⁵ and being part of the polity entails the right to participate in local elections. However, noncitizens cannot make comparable claims of ties to the national polity. Whilst noncitizens can show a concrete connection to their local communities, their connection to the national polity is more abstract. This is in part due to how the national polity is defined, which includes abstract concepts such as nationality and sovereignty.⁸⁶

81. Arrighi & Bauböck, *supra* note 24, at 624.

82. Harper-Ho, *supra* note 23, at 272.

83. *See infra* p. 13.

84. *See infra* p. 13.

85. *See infra* p. 13–14.

86. *See Nation-state*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/nation->

The exclusion of citizenship as a requirement for voting is stronger for local elections because the definition of the national polity is shaped by citizenship. The national polity is tied together by the identity of being a citizen of the country. When it comes to the national polity, the nation state, i.e., the sovereign, defines who is encompassed in this group using citizenship and will protect citizens against others in the international realm.⁸⁷ Citizenship is tied to the identity of the national polity in a way not seen in local polities. The polity for a local community can be defined by community ties. Whilst democratic principles based on who has a stake may support the full extension of alien suffrage, the theories about how to shape the polity weigh against this. The latter, in fact, highlights relevant differences between the local and national levels that affect how democratic principles should be applied. Because the polities at the local and national level are shaped by different factors, they should be treated as two separate spheres.

Noncitizen suffrage has been incorrectly framed as a single issue of whether noncitizens should be enfranchised. The issue is not so simple. The proper questions to ask are whether noncitizens should have the right to vote in local elections and whether that right should extend to the national level. This set-up better reflects the reality of the multi-tiered governing structures in many countries.

A. The decisions that noncitizens would vote on in local elections do not affect major national interests.

Noncitizens should be allowed to participate in elections which are more limited in scope and more relevant to their day-to-day lives. The existence of multiple levels of governance in most countries suggests that there are different scopes of issues and interests in each sphere. Indeed, national governments must contend with interests stemming from immigration policy, foreign policy, and national security. And decisions made at the national level affect the entire country. Regarding local governance, most countries have local governments elected exclusively by local inhabitants to address local matters.⁸⁸ Whilst there may be some overlap in the matters at the different levels, many matters are separate. Furthermore, the scope of the issues tends to be more limited at the local

state (last visited May 22, 2021).

87. Arrighi & Bauböck, *supra* note 24, at 632 (noting that local governments don't have this responsibility; they are self-governing insofar as they have democratic authorities elected by local citizens and legislative competences in local matters. In the international state system, the legal status and protection of rights of individuals depends fundamentally on being recognized as a citizen of a state).

88. *Id.*

level. In discussing how local elections differ from national elections, a local U.S. official stated, “[t]he mayor and City Council are not deciding national policy. . . . We make decisions about trash pickup, snow removal and equipment for the parks.”⁸⁹ Enfranchising permanent residents at the local level merely provides them with the power to affect decisions in their immediate surroundings.

The gap in democratic representation is notable in the local context because noncitizens cannot vote on issues in local elections that affect their everyday lives. Noncitizens in local communities are an example of “taxation without representation.”⁹⁰ Noncitizens are still obligated to contribute to the community but are denied the power to influence how their contributions are allocated. Enfranchising permanent residents at the local level can further democratic principles without infringing on national interests and policy matters. The particularized nature and limited scope of local elections highlight the limited reach of federal concerns about noncitizen suffrage.

B. Many of the concerns raised about NCV are not as pertinent when NCV only applies at the local level.

The concerns about NCV on immigration policy are more relevant at the national level as opposed to the local level. It is the national level where the federal government must balance its interest in defining “the people” with naturalization policies, immigration integration programs, border control, and immigration selection policies.⁹¹ For instance, the national government has an interest in incentivizing aliens to naturalize and could lose this carrot if full noncitizen suffrage were available.⁹² The national government may desire the knowledge of highly-skilled immigrants or need the labor of lower-skilled immigrants and want to encourage these groups to naturalize.⁹³ Whilst local governments also have an interest in securing desirable employees, they can meet this goal without needing to consider the effects on immigration policy. Because local governments are not often

89. Maggie Astor, *Maryland City May Let Noncitizens Vote, a Proposal with Precedent*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/09/us/college-park-immigrant-voting-rights.html>.

90. Ivan Espinoza-Madriral & Lauren Sampson, *The Case for ‘All Resident’ Voting*, WBUR: COGNOSCENTI (Feb. 27, 2019), <https://www.wbur.org/cognoscenti/2019/02/27/allowing-non-citizens-to-vote-ivan-espinoza-madriral-lauren-sampson>.

91. See generally *Immigration Policy & Law*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/topics/immigration-policy-law> (last visited Dec. 20, 2020).

92. Posner, *supra* note 35, at 1140.

93. See *id.*; Daniel Munro, *Integration Through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization*, 9 J. INT’L MIGRATION & INTEGRATION 63, 65 (2008).

responsible for managing immigration policy, local officials can give more weight to democratic considerations. Accordingly, local governments are better positioned to grant limited voting rights to noncitizens.

Fears about foreigners interfering with policies are especially unfounded in the local context, where the issues up for debate are limited in scope. A general objection to NCV is that noncitizens have ties to their countries of citizenship and would vote in favor of policies that benefit their countries of citizenship rather than place of residence. The fear is that some noncitizens would use their opportunity to vote in a way that could disrupt, subvert, and ultimately destroy the state of residence.⁹⁴ As a general matter, concerns about the loyalty of noncitizens is not a persuasive reason for not enfranchising them. This fear is speculative as there are measures in place to screen out noncitizens who could be disloyal.⁹⁵ As part of the immigration process, noncitizens are screened before they are allowed to enter into a country.⁹⁶ Moreover, permanent residents lack the incentives to be disloyal because that could hurt their chances of naturalization.⁹⁷ Although citing disloyalty as a justification for not enfranchising noncitizens is a weak argument at the national level, it is not even relevant when it comes to local level. Local elections by design do not cover national policies. Most of the decisions that are of interest to foreign governments—such as national security, foreign affairs, and immigration—fall exclusively within the authority of the national government. Because permanent residents would not be able to vote on those matters, there is no need to be concerned about foreign interference through noncitizen suffrage.

The link between noncitizens voting in local elections and threats of foreign interference is not clear. Some local decisions could have broad-reaching effects or may be of interest to foreign governments. For instance, local decisions made in influential cities could be of interest to foreign governments.⁹⁸ However, it is questionable that a foreign government would use this avenue to influence the target country. One imagined scenario for foreign interference may go as follows: Russia could convince Russian citizens in the U.S. to vote for policies in New York that favor Russian investors and other cities eventually follow New York's lead, all of which would snowball into national policies that are more friendly towards

94. Rosberg, *supra* note 17, at 1125.

95. *Id.*

96. *Id.*

97. *See id.* at 1127 (noting that loyalty, in the form of swearing allegiance, is a general requirement for naturalization).

98. An example is New York, where foreign governments may have significant investments that are subject to the rules of New York City and the state of New York.

Moscow. For the reasons mentioned above, noncitizens who become permanent residents are unlikely to participate in such a scheme.⁹⁹ And the Russian government, or any government for that matter, surely has more effective ways of influencing the policies of another government. Tactics related to cybercrime and spreading misinformation would be more effective and have a greater potential in producing immediate results.¹⁰⁰ The threat of noncitizens with divided loyalties subverting national policies through local elections is purely speculative.

III. A PRESUMPTION FAVORING PERMANENT RESIDENTS' RIGHT TO VOTE IN LOCAL ELECTIONS

Focusing specifically on the local context, there is a strong argument for noncitizen suffrage. Because noncitizens interact with their surrounding community, those who reside for a long duration and become permanent residents will likely identify with the local polity. Moreover, in light of democratic considerations, noncitizens who have a stake in local issues should have a say in policies when the reach of such influence is confined. Given these considerations, this article proposes, as a matter of principle, a rebuttable presumption in favor of extending voting rights to permanent residents in local elections. This is a general principle that should guide a range of decisionmakers including courts, legislators, and constitutional drafters. This general principle should function like other normative principles, such as John Stuart Mill's famous harm principle, which entails a presumption in favor of individual liberty.¹⁰¹ Mill's harm principle has been implemented in various contexts by various actors. Similarly, this article's normative presumption in favor of NCV in local elections can be implemented in several ways.

The challenger to the presumption has the burden of demonstrating that there is a legitimate interest outweighing democratic considerations that support noncitizen suffrage. Since permanent residents have the greatest claim to be included in the local polity,¹⁰² the presumption may be rebutted when local elections cover policies usually decided by the national polity. Namely, the presumption favoring NCV may be rebutted if noncitizens

99. See *supra* notes 94–97 and accompanying text.

100. Statement by the NCSC Director William Evanina: *Election Threat Update for the American Public*, OFF. OF THE DIRECTOR OF NAT'L INTELLIGENCE: NEWSROOM (Aug. 7, 2020), <https://www.dni.gov/index.php/newsroom/press-releases/item/2139-statement-by-ncsc-director-william-evanina-election-threat-update-for-the-american-public>; see also RAPHAEL S. COHEN ET. AL, RAND CORP., *COMBATING FOREIGN DISINFORMATION ON SOCIAL MEDIA: STUDY OVERVIEW AND CONCLUSIONS* (2021).

101. See JOHN STUART MILL, *ON LIBERTY* (Penguin Books ed. 1974) (1859).

102. See *supra* Section I.B.

would have the ability to influence policies that are national in nature. This is problematic because it would raise concerns about diluting the voices of “the people”¹⁰³ and possibly constraining the government’s ability to enact national policies.¹⁰⁴

Determining whether a local election covers a range of topics sufficiently broad to help rebut the presumption is fact specific, though a state’s governing structure may offer clues about the relationship between the national and local governments. In countries with a federalist system, such as the U.S., the proposed presumption holds because there is likely a well-established system of national and local governance. Indeed, certain policies are designated for the local governments and other policies are within the purview of the national government. In contrast, the division between the local and national spheres may not be clear in countries with a unitary governing structure. These countries use local governments to implement national policies.¹⁰⁵ Although examining governing structures is a helpful starting point, a country’s governing structure is not dispositive of whether the presumption favoring NCV in local elections may be rebutted. Indeed, there are situations in which the local governments are responsible for policies that are typically associated with national governments. Some federalist countries such as Switzerland have local governments that are more powerful than the national government.¹⁰⁶ The Cantons in Switzerland retain all the sovereign rights which the Federal Constitution does not explicitly or implicitly assign to the Confederation or otherwise specifically forbid.¹⁰⁷ Since the local governments retain the power to include in its local ballots issues that would be considered national interests in many other countries, such as foreign policy,¹⁰⁸ there is a stronger case for rebutting the proposed presumption. Accordingly, the determining factor is whether the issues on the ballot extend beyond what may be expected of local elections.

A challenger of the presumption must also demonstrate that the permanent residents have a reasonable opportunity to naturalize. A

103. See *supra* notes 44–45 and accompanying text.

104. See *supra* notes 91–92.

105. Robert Longley, *What Is a Unitary State?*, THOUGHTCO., <https://www.thoughtco.com/unitary-state-government-pros-cons-examples-4184826> (Sept. 4, 2020).

106. See generally Sarah Byrne & Thomas Fleiner, *Switzerland: Seeking a Balance Between Shared Rule and Self-Rule*, in 1 *DIALOGUES ON DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES* (Raoul Blindenbacher & Abigail Osten eds., 2005).

107. See BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 3 (Switz.).

108. See generally Roland Portmann, *Foreign Affairs Federalism in Switzerland*, in *THE OXFORD HANDBOOK OF COMPARATIVE AND FOREIGN RELATIONS LAW* (Curtis A. Bradley ed., 2019) (noting that the Swiss Constitution expressly reserves a residual treaty-making capacity and autonomous foreign policy competence for the Cantons).

government may address calls for more democratic representation and still condition voting rights on citizenship by liberalizing the requirements for naturalization.¹⁰⁹ In such cases, the government cannot be said to disenfranchise permanent residents because the government has provided permanent residents with a pathway to vote. Permanent residents have the power to decide if they will undergo the process to secure voting rights.¹¹⁰ However, democratic principles may be in jeopardy when noncitizens who are willing to naturalize and meet the criteria do not have a reasonable opportunity to do so. When there are limited opportunities for naturalization, there is essentially no pathway to vote. A class of stakeholders will continue to lack the ability to shape the policies that affect their everyday lives. The inability to naturalize essentially perpetuates noncitizens' positions as second-class people.¹¹¹ The exclusion from naturalization translates to the exclusion from attaining rights. The presumption favoring NCV in local elections fills this void and provides permanent residents with some ability to weigh in on decisions in which they have a stake. Accordingly, due to democratic principles, the presumption favoring participation in local elections should only be rebutted when there is evidence that noncitizens have a reasonable opportunity to naturalize, and they choose not to undergo the process.

A. Applying the Presumption

This section will explore how the proposed presumption could play out in the context of three different constitutional democracies. The constitutions of the U.S. and Japan have no express prohibitions on NCV, but the idea that only citizens have the right to vote has been challenged. In the U.S., the federal ban on alien suffrage at the national level has not prevented municipalities from enfranchising noncitizens in some local elections.¹¹² Likewise, Japan prohibits noncitizens from voting in federal elections. However, an opinion from the Constitutional Court deciding this issue left open the possibility of NCV at the local level.¹¹³ The ball is in the court of

109. See *supra* pp. 7–8.

110. OECD, NATURALIZATION: A PASSPORT FOR THE BETTER INTEGRATION FOR IMMIGRANTS 146 (2011).

111. Mae M. Ngai, Opinion, *Second-Class Noncitizens*, N.Y. TIMES (Jan. 30, 2014), <https://www.nytimes.com/2014/01/31/opinion/second-class-noncitizens.html>.

112. See *infra* pp. 23–24.

113. Ayako Mie, *Debate on Foreigner Voting Rights Reignites Ahead of 2020 Olympics*, JAPAN TIMES (Aug. 20, 2014), <https://www.japantimes.co.jp/news/2014/08/20/national/politics-diplomacy/debate-foreigner-voting-rights-reignites-ahead-2020-olympics/>; Mizuho Aoki, *On the Campaign Trail for the Foreign Right To Vote*, JAPAN TIMES (July 2, 2016), <https://www.japantimes.co.jp/news/2016/07/02/national/politics-diplomacy/campaign-trail-foreign-right-vote/>.

the Japanese legislators who have the opportunity to decide this issue.¹¹⁴ In Switzerland, the answer to whether noncitizens should be enfranchised is varied as each canton has the power to make its own determination. These three cases will illustrate the relevance of the proposed presumption in different contexts.

1. United States

Deciding who may partake in the political process is a question of constitutional design. The U.S. Constitution describes who may be elected to political office. Article I Section 2 describes the election process and qualifications for the House of Representatives. However, there is less information about the qualifications of those who may elect public officials.¹¹⁵ The changing definition of “citizen” provides some clues about this question that has been left open. The 15th Amendment states that all “citizens” regardless of race or color have the right to vote.¹¹⁶ The 19th Amendment is a parallel to the 15th Amendment and provides no “citizen” shall be denied the right to vote on the basis of sex.¹¹⁷ The most recent amendment on this matter, the 26th Amendment, enfranchises all “citizens” over the age of 18.¹¹⁸ Although the language in the amendments suggest some citizenship requirement for the right to vote, there is no explicit ban on noncitizen suffrage in the Constitution¹¹⁹ and the Supreme Court has not banned the practice.¹²⁰ Accordingly, the amendments should be viewed as the floor of who may vote and should not function as the ceiling. Citizens of the U.S. must have the right to vote, but others may be granted that right. The current exclusion of noncitizens from federal elections, which takes the form a federal statute, is a political decision and not one mandated by the Constitution.¹²¹ There is no comparable statute banning noncitizen suffrage

114. Mie, *supra* note 113; Aoki, *supra* note 113.

115. Lutz, *supra* note 30, at 40.

116. U.S. CONST. amend. XV, § 1.

117. *Id.* amend. XIX.

118. *Id.* amend. XXVI, § 1.

119. Raskin, *supra* note 23, at 1396 (arguing that there is no conflict with the Equal Protection Clause, the Naturalization Clause, or any other constitutional principle).

120. See *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (striking down a New York law excluding noncitizens from applying for state competitive civil service positions and noting that “citizenship is a permissible criterion for limiting . . . [voting] rights”) (emphasis added) (citations omitted); *Minor v. Happersett*, 88 U.S. 162, 177 (1874) (stating that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage”).

121. See *Voting by Aliens*, 18 U.S.C. § 611 (2018); Marian L. Smith, *Race, Nationality, and Reality*, *National Archives*, PROLOGUE MAG., Summer 2002, <https://www.archives.gov/publications/prologue/2002/summer/immigration-law-1.html>; see also George M. Fredrickson, UN Rsch. Inst. for Soc. Dev., *The Historical Construction of Race and Citizenship in the United States*, UNRISD/PPICC1/03/ (2003). Although there are no legal obstacles to repealing the federal ban on noncitizen participation in federal

at the local levels. State and municipal governments are free to make their own decisions on the matter.

The U.S. is a federalist system that grants states the powers which are not delegated to the federal government by the Constitution.¹²² The role of states takes central importance in the Constitution as they are mentioned explicitly at least fifty times in forty-five separate sections.¹²³ States retained considerable control over their political systems and under the 10th Amendment have control over many matters that are not in conflict with the Constitution.¹²⁴ Unless an amendment prohibiting all alien suffrage is passed at the national level or the Supreme Court bans such practice, local governments can choose to enfranchise noncitizens. All state constitutions refer to U.S. citizenship when discussing who can vote in their elections.¹²⁵ Nearly every state keeps open the possibility of allowing noncitizens to vote in their elections.¹²⁶

Maryland is a pioneer in this field. Takoma Park, Maryland was the first American municipality to enfranchise noncitizens in local elections.¹²⁷ In 2017, the suburb of College Park became the largest city to allow noncitizens to participate in local elections. Currently, many municipalities in the U.S. that enfranchise noncitizens are in Maryland.¹²⁸

Article I Section 1 of the Maryland Constitution states:

[E]very 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.

Requiring citizenship as a prerequisite to vote does not apply to municipalities other than the city of Baltimore.¹²⁹ Because of this flexibility, Takoma Park extended the franchise to noncitizens through a referendum

elections, the considerations for doing so are beyond the scope of this paper.

122. U.S. CONST. amend. X.

123. Lutz, *supra* note 30, at 40.

124. U.S. CONST. amend. X; *see, e.g.*, JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 22–23, 28–29 (2019).

125. *Laws Permitting Noncitizens To Vote in the United States*, BALLOTPEDIA, https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States#cite_note-2 (last visited Dec. 20, 2020).

126. Five state constitutions prohibit noncitizens from voting including: Arizona, North Dakota, Colorado, Florida, and Alabama. *See id.*; Patty Nieberg, *Three States Pass Amendments That ‘Only Citizens’ Can Vote*, ASSOCIATED PRESS (Nov. 7, 2020), <https://apnews.com/article/alabama-local-elections-constitutions-florida-voting-rights-a28936630a24030df958092834f6b2c1>.

127. Raskin, *supra* note 23, at 1396.

128. *See* BALLOTPEDIA, *supra* note 125.

129. Aaron Kraut, *Takoma Park Stands by Non-U.S. Citizen Voting Law*, WASH. POST (Mar. 24, 2012), https://www.washingtonpost.com/local/takoma-park-stands-by-non-us-citizen-voting-law/2012/03/13/gIQA VBcgBS_story.html.

and seal of approval from the City Council in 1992.¹³⁰ Maryland highlights the autonomy inherent in local governments and affirms the authority of local officials to enfranchise noncitizens. The fact that municipalities in Maryland, and others including Chicago and New York,¹³¹ allow noncitizens to vote in local elections suggests that such practice is consistent with the Constitution. Whilst state action that is not directly in conflict with the Constitution may later be found unconstitutional, there is some indication that a court would uphold the extension of voting rights to noncitizens. In general, the U.S. has gradually granted more groups the right to vote, so extending this right to noncitizens is consistent with previous practice.¹³²

The presumption in favor of local NCV holds in the U.S. because local governments generally do not directly address issues that constitute national policies. Although individual local actions may collectively snowball into a quasi-national stance, local and national issues in the U.S. are generally distinguishable. The 10th Amendment may have originally given states a lot of power, but such power has gradually eroded with the expansion of the federal government through the Supreme Court's interpretation of the Commerce Clause and other enumerated federal powers. Consequently, the most consequential issues on ballots are found in national and not local elections.¹³³ Federal preemption also minimizes the overlap between state and national policies.

Showing that noncitizens in the U.S. have a reasonable opportunity to naturalize would not rebut the presumption if there is no evidence that the local elections cover national-level issues. The presumption is unlikely rebuttable in the U.S. even though the U.S. naturalization process provides noncitizens with a reasonable opportunity to naturalize. In the U.S., legal permanent residents who are at least 18 years old may naturalize if they meet a five-year residency requirement, have good moral character as defined in INA § 1101(f), meet the English language requirement, pass a civics test, demonstrate attachment to the principles and ideals of the U.S. Constitution, and swear an oath of allegiance to the U.S.¹³⁴ The high number of naturalized persons in the U.S. affirms that the U.S. has a reasonable naturalization process. As of 2017, there were approximately 22 million naturalized citizens in the U.S.¹³⁵ Between 2008 and 2018, more than 7.2 million

130. *Id.*

131. Raskin, *supra* note 23, at 1461–62.

132. *See* U.S. CONST. amends. XV § 1, XIX, XXVI § 1.

133. David Schleicher, *All Politics Is National*, Atlantic (July 13, 2012), <https://www.theatlantic.com/politics/archive/2012/07/all-politics-is-national/259789/>.

134. Immigration and Nationality Act, 8 U.S.C. §§ 1101(f), 1423(a)(2), 1427, 1445(a) (2018).

135. Jonathan Petts, *U.S. Immigration Stats - Citizenship by Naturalization*, IMMIGR. HELP (Nov.

noncitizens naturalized.¹³⁶ Nonetheless, since the test to rebut the presumption is conjunctive, evidence of a reasonable naturalization process alone is insufficient to rebut the presumption.

In sum, this article's proposed principle suggests that local governments in the United States should extend voting rights to permanent residents. This extension of rights can be achieved legislatively, as was the case in many municipalities in Maryland. Alternatively, states could choose to take a firmer stance by amending their state constitutions to recognize local voting rights for permanent residents.

2. Japan

Japan has historically defined its polity narrowly and closely ties citizenship with Japanese ancestry. As a geographically isolated country, Japan developed a strong national identity.¹³⁷ Japan demonstrates the difficulty in rebutting the proposed presumptive right to vote in local elections for a country that defines its community using ethno-nationalist criteria.¹³⁸ Japan's citizenship policy is rooted in an isolationist policy to protect peace and stability in the country.¹³⁹ Outlined in the Nationality Law, Japanese nationality is mainly passed from Japanese parents to their children (based on the principle of *jus sanguinis*) and naturalization is tightly controlled.¹⁴⁰ Because of these tight controls on citizenship, two major groups are excluded from Japan's political institutions. The first group is composed of Zainichi Koreans who have lived in Japan and lost their Japanese citizenship during the Allied occupation of Japan.¹⁴¹ Following World War II, much of the Zainichi population and their descendants did not end up becoming naturalized citizens even though they have close ties to the community.¹⁴² As a Japanese official puts it, "[the Zainichi] pay taxes here,

20, 2020), <https://www.immigrationhelp.org/learning-center/u-s-immigration-stats-citizenship-by-naturalization>.

136. *Id.*

137. David Green, *As Its Population Ages, Japan Quietly Turns to Immigration*, MIGRATION POL'Y INST. (Mar. 28, 2017), <https://www.migrationpolicy.org/article/its-population-ages-japan-quietly-turns-immigration>.

138. See generally GRACIA LIU-FARRER, *IMMIGRANT JAPAN: MOBILITY AND BELONGING IN AN ETHNO-NATIONALIST SOCIETY* (2020); Yasuo Takao, *Foreigners' Rights in Japan: Beneficiaries to Participants*, 43 *ASIAN SURV.* 527 (2003).

139. Maia Hall, *The Best of Both Worlds? Japan's Outdated Dual Citizenship Policy*, GOVERNANCE POST (Dec. 11, 2019), <https://www.thegovernancepost.org/2019/12/the-best-of-both-worlds-japans-outdated-dual-citizenship-policy/>.

140. Kokusekihō [Nationality Law], Law No. 147 of 1950, arts. 2, 4 (Japan); see Green, *supra* note 137.

141. Jang Hawon, *The Special Permanent Residents in Japan: Zainichi Korean*, *YALE REV. INT'L STUD.* (Jan. 2019), <http://yris.yira.org/comments/2873>.

142. Green, *supra* note 137 (explaining that although the government has liberalized the

they live the same lifestyle as Japanese, they use the same language we do and they bury their ashes here.”¹⁴³ The Zainichi population struggles with Japan’s naturalization process which is deemed to be “arbitrary and quite strict in nature.”¹⁴⁴ Despite their close ties to the Japanese community, they have little say in the laws that govern them. The second, and growing, excluded group consists of foreign workers who have been moving to Japan since the 1980s. As the group of disenfranchised people living within Japan’s borders grew, the Japanese Supreme Court finally addressed the issue of NCV in 1995, in the case of *Kim v. Osaka*.¹⁴⁵

The Supreme Court was tasked with determining whether voting rights should be restricted to only formal members of the state (i.e., citizens) or also include some noncitizens who meet special qualifications. The court’s decision turned on its interpretation of Articles 15 and 93 of Japan’s 1947 Constitution. Article 15 provides:

The *people* have the inalienable right to choose their public officials and to dismiss them.

All public officials are servants of the whole community and not of any group thereof.

Universal adult suffrage is guaranteed with regard to the election of public officials.

In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.¹⁴⁶

Article 93 states:

The local public entities shall establish assemblies as their deliberative organs, in accordance with law. The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law *shall be elected* by direct popular vote *within their several communities*.¹⁴⁷

The 1947 Constitution opens with the words “[w]e the Japanese people.”¹⁴⁸ Drawing on this reference to Japanese nationals, the Supreme Court reasoned that other references to “the people” in the Constitution refer only to Japanese citizens, implying that only citizens are guaranteed voting rights as

naturalization process, there are only about 1,000 new naturalizations each year, compared to approximately 30,000 new permanent resident visas).

143. Stephen Day, *Japan: The Contested Boundaries of Alien Suffrage at the Local Level*, 16 DEMOCRATIZATION 558, 570–71 (2009).

144. See Green, *supra* note 137.

145. Saikō Saibansho [Sup. Ct.] Feb. 28, 1995, Hei 1993 (gyo-tsu) no. 163, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB], http://www.courts.go.jp/app/hanrei_en/detail?id=201 (Japan).

146. NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 15 (Japan) (emphasis added).

147. *Id.* art. 93 (emphasis added).

148. Day, *supra* note 143, at 564 (explaining that the 1947 Constitution, which came from an original English language, interpreted “all people” to be those with Japanese nationality (kokumin)).

a matter of constitutional law.¹⁴⁹ In dicta, however, the Supreme Court noted that “[i]f foreigners living in Japan are permanent residents and are acknowledged to have close ties with local public entities where they live, taking a measure to give them the right to vote is not prohibited by the Constitution.”¹⁵⁰ Thus, although the Supreme Court rejected the idea of a constitutional right to NCV, it left open the possibility of the franchise for long-term foreign residents at the local level. It suggested that the question of whether or to extend local suffrage to certain groups of noncitizens was a political determination to be made by legislators.

In the period following the Supreme Court’s decision, the foreign share of the overall population has grown.¹⁵¹ The decision by the Japanese Supreme Court leaves a large portion of the population vulnerable. Unlike in Germany’s *Foreign Voters Case*, where the apex court also restricted national elections to only citizens, the legislature did not step in to liberalize naturalization policies.¹⁵² The Japanese legislature is still unable to reach an agreement on this issue.¹⁵³

Japan’s restrictive naturalization policies make it highly unlikely to rebut the presumption in favor of non-citizen voting in local elections. As a country with a unitary form of government, Japan could make a case that the policies voted on in its local elections overlap more with national issues as compared to other countries. In Japan’s unitary form of government, there is no clear distinction between the policies of the national and local governments.¹⁵⁴ However, Japan is unable to meet the other requirement to rebut the presumption; namely, it cannot show that noncitizens have a reasonable opportunity to naturalize. That generations of a racial minority have been unable to successfully claim citizenship illustrates the limitations of Japan’s naturalization process.¹⁵⁵ In fact, this restrictive naturalization process has created a perpetual subclass of people in Japan.¹⁵⁶

149. Saikō Saibansho [Sup. Ct.] Feb. 28, 1995, Hei 1993 (gyo-tsu) no. 163, [SAIBANSHO WEB](#) (Japan); see also Day, *supra* note 143, at 569.

150. Day, *supra* note 141143, at 569.

151. See Green, *supra* note 137.

152. Soo im Lee, *Naturalization Policy in Japan*, 36 龍谷大学社会科学研究所 [RYUKOKU UNIV. RSCH. INST. SOC. SCIS.] 40, 45–46 (2005).

153. See Day, *supra* note 143, at 559 (noting how the disagreement between political parties has led to an impasse).

154. ENRICO D’AMBROGIO, EUR. PARLIAMENTARY RSCH. SERV., JAPAN’S PARLIAMENT AND OTHER POLITICAL INSTITUTIONS 5–6 (2020).

155. Green, *supra* note 137.

156. See Aki Yamada & Taiko Yusa, *Ethnic Microaggressions: The Experiences of Zainichi Korean Students in Japan*, 10 UCLA J. EDUC. & INFO. STUDS. (2014), <https://escholarship.org/uc/item/8620q2sx>; Apichai W. Shipper, *Nationalisms of and Against Zainichi Koreans in Japan*, 2 ASIAN POLS. & POL’Y 55, 70–75 (2010); Drew Ambrose & Rhiona-Jade Armont, *Zainichi: Being Korean in Japan*, AL JAZEERA

Unless Japan modifies its laws to provide noncitizens with a reasonable opportunity to naturalize,¹⁵⁷ the normative presumption in favor of local NCV should hold. Accordingly, Japan's legislature should pass laws to extend NCV rights at the local level. Several related legislative proposals have been made and have failed in recent years.¹⁵⁸ This article's normative presumption in favor of local NCV lends new support to such proposals, suggesting that such legislative proposals should be revived and adopted. In addition, should the Japanese Supreme Court hear another case concerning NCV, the normative presumption proposed in this article could guide the court's ruling. Whilst it is beyond the scope of this article to fully explore the possibilities of future adjudication by the Supreme Court, it is worth acknowledging that the Supreme Court could at least theoretically overrule *Kim v. Osaka* by adopting a more teleological approach to constitutional interpretation. Under a teleological approach, the Court's definition of constitutional voting rights would be guided by democratic principles, including this article's proposed presumption in favor of local NCV.

3. Switzerland

The Swiss case presents a strong prospect for rebutting the presumption in favor of NCV in local elections because the local governments in Switzerland exert distinctly significant power and influence. Switzerland is exceptional because the Constitution distributes the powers between the federal and local government using a bottom-up approach. The construction of the confederation places residual powers in the Cantons and sometimes municipalities.¹⁵⁹ Article 3 of the Swiss Constitution, translated from German, provides:

The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation.¹⁶⁰

The federal constitution does not provide for the powers of the Cantons.¹⁶¹ Because the powers reside at the local level, new federal powers are constructed so that they do not infringe on the sovereignty of the Cantons.¹⁶²

(June 13, 2018), <https://www.aljazeera.com/features/2018/6/13/zainichi-being-korean-in-japan>.

157. It could, for example, adopt a naturalization process that is akin to the naturalization process in the U.S. See *supra* Section III.A.1.

158. See Aoki, *supra* note 113.

159. Byrne & Fleiner *supra* note 106, at 30–31.

160. “Die Kantone sind souverän, soweit ihre Souveränität nicht durch die Bundesverfassung beschränkt ist; sie üben alle Rechte aus, die nicht dem Bund übertragen sind.” BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 3 (Switz.).

161. Byrne & Fleiner, *supra* note 106, at 266–67.

162. *Id.* at 266.

The Swiss have a tradition of revising their constitutions, at the federal and local levels, constantly.¹⁶³ However, all of the revisions retain the bottom-up distribution of power to ensure that the Cantons are able to participate in decision-making at the central level.¹⁶⁴

The 2,929 Swiss municipalities (*Gemeinde*) retain extensive autonomy over local policies. They have significant freedom in designing how their political institutions are organized.¹⁶⁵ The national government plays almost no role in shaping Swiss political institutions.¹⁶⁶ Rules on designing political institutions and voting rights are determined by cantonal and not national legislation.¹⁶⁷ Alien suffrage may be introduced and passed through instruments of direct democracy including popular initiatives proposing amendments to cantonal constitutions or referendums for changes to cantonal electoral law.¹⁶⁸ As of 2019, eight of the twenty-six cantons offer some form of non-citizen voting rights at the cantonal level or granted their municipalities the right to offer alien suffrage themselves.¹⁶⁹ The Swiss system places most of the power including political decisions at the local level.

The Cantons exert considerable power compared to the national government. The bottom-up approach flips the assumption made earlier in this paper that local governments only address issues that are local in nature. The assumption is that local governments are freer to extend local alien suffrage because they do not need to counterbalance as many policy considerations in other fields.¹⁷⁰ Here, the local governments in Switzerland potentially wield greater power because anything that is not explicitly delegated to the Confederation remains the responsibility of the local governments. That is, Swiss cantons are responsible for a broader scope of issues typically expected of local governments.¹⁷¹ If permanent residents were allowed to participate in local elections, they would be granted more influence over a wider array of issues as compared to countries without

163. *Id.* at 267; Hanspeter Tschaeni, *Constitutional Change in Swiss Cantons: An Assessment of a Recent Phenomenon*, 12 *PUBLIUS* 113, 114 (1982).

164. Byrne & Fleiner, *supra* note 106, at 267.

165. Andreas Ladner, *Size and Direct Democracy at the Local Level: The Case of Switzerland*, 20 *ENV'T & PLAN. C: GOV'T & POL'Y* 813, 815 (2002).

166. *Id.*; Stutzer & Slotwinski, *supra* note 19, at 5.

167. Stutzer & Slotwinski, *supra* note 19, at 5–6.

168. *Id.* at 8.

169. *Id.*

170. *See supra* notes 88, 91 and accompanying text.

171. *See Explained: The Role of Switzerland's Powerful Cantons*, THE LOCAL, <https://www.local.ch/2019/0822/explained-the-role-of-switzerlands-powerful-cantons> (last visited Dec. 20, 2020) (explaining that the Confederation takes the lead on matters including foreign policy, defense and national security as well as customs and monetary policy).

bottom-up federalism. Given the small number of limitations on cantonal power outlined in the Federal Constitution, the decisions made at the local level face few challenges.¹⁷² Absent a showing that nonresidents in Switzerland have a stronger democratic claim of belonging to the polity, as compared to other local governments, the greater scope of authority embedded in the Cantons aids in rebutting the presumption proposed in this paper.

The answer to the question of whether there is sufficient evidence that demonstrates reasonable opportunity to naturalize depends on the specific canton. In Switzerland, there are two main pathways to naturalization. Simplified naturalization is available to spouses of Swiss citizens and third-generation immigrants.¹⁷³ Regular naturalization is available to permanent residents who meet the 10-year residency requirement.¹⁷⁴ A permanent resident who meets the federal requirements must then file an application for naturalization with the canton of residence.¹⁷⁵ To proceed with the naturalization process, the applicant must meet the requirements specific to the Canton of residence.¹⁷⁶ Some Cantons require a verbal or written naturalization test.¹⁷⁷ The decisions concerning naturalization may also be left to the communal assembly.¹⁷⁸ In the Swiss case, whether there is a reasonable opportunity to naturalize is highly fact specific. Accordingly, the presumptive right to vote in national elections may be rebutted by certain Cantons.

CONCLUSION

Although national and local governments are moving towards including more individuals in their polities, many noncitizens remain largely powerless in their countries of residence. Cultivating a normative presumption in favor of extending the right to vote to permanent residents in local elections may solve this issue. Normative considerations weigh in favor of enfranchising permanent residents because they have demonstrated that they are stakeholders in their communities. Granting them the right to participate in

172. See generally Byrne & Fleiner, *supra* note 159.

173. *Simplified Naturalisation*, SWISS AUTHS. ONLINE, <https://www.ch.ch/en/foreign-nationals-in-switzerland/naturalisation-in-switzerland/> (last visited May 22, 2021).

174. *Die Ordentliche Einbürgerung* [*Ordinary Naturalization*], STAATSSEKRETARIAT FÜR MIGRATION SEM [STATE SECRETARIAT FOR MIGRATION SEM], <https://www.sem.admin.ch/sem/de/home/integration-einbuengerung/schweizer-werden/ordentlich.html> (Dec. 17, 2020).

175. *Becoming a Citizen*, SWISS INFO (June 5, 2014, 5:39 PM), <https://www.swissinfo.ch/eng/becoming-a-citizen/29288376>.

176. *Id.*

177. *Id.*

178. *Id.*

local elections accommodates democratic principles without hindering the ability of national governments to pursue their interests. The presumption holds unless there is evidence that the issues discussed at the local level include issues generally associated with national policy and the permanent residents have a reasonable opportunity to naturalize. Notions of fairness and practical considerations weigh in favor of enfranchising permanent residents for local elections. The case studies demonstrate how the presumption would include qualified individuals who are excluded from the franchise for reasons not related to voting qualifications.

Extending the boundaries of the local polity to include permanent residents gives voice to community members who share the same burdens and responsibilities as their enfranchised neighbors. This paper should be viewed as a jumping point for future studies that may want to explore the dynamics between voting rights and systems with different distributions of power. The distribution of power seems to affect the scope of issues at the local and national level. Whilst this paper showed how a bottom-up federalist system may be a strong indicator that the presumption should be rebutted, future studies may want to explore if this is a consistent pattern and evaluate whether the ability to rebut serves democratic interests. As a normative matter, should noncitizens still be allowed to participate in local elections where they have the power to influence a wide range of matters? If yes, should mechanisms be put in place to limit the types of issues that noncitizens may vote on? As the preceding discussion shows, the challenges of extending alien suffrage stem from normative and practical considerations. Several places around the world have already stepped up to meet this challenge. With the presumption in place, the hope is that many more will join.