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# *Noncitizen voting and the extraconstitutional construction of the polity*

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*The core substantive principle of democracy is that those subject to the law should have a voice in its formulation—a principle of consent realized primarily through the mechanism of the vote. Yet the populations of few (if any) nation-states consist solely of formal citizens; migration and transnational practices give rise to populations within states bound by laws over which they have no direct control. In this essay, I consider a practice that can help address this potential democracy deficit—alien suffrage. I focus on three jurisdictions that have adopted some form of noncitizen voting in their histories—the United States, New Zealand, and Ireland—and consider how their practices reflect on the processes by which constitutional democracies construct their polities. Alien suffrage is not inconsistent with a sense of national identity nor does it necessarily diminish the cultural value of the vote. At the same time, the adoption of the practice may not be part of a robust regime of immigrants' rights nor is it necessary to promote participation by noncitizens. Whether a society adopts alien suffrage, however, does reflect that regime's particular constitutional values and structures, as well as assumptions about the manner and pace at which the body politic ought to incorporate noncitizens.*

Perhaps the core substantive principle of democracy is that those who are subject to the law ought to have a say in its formulation. The franchise serves as the primary mechanism for the realization of this consent principle. The right to vote has come to define both the practice and the formal status of citizenship the world over. In many constitutional democracies, the right to vote is limited to formal citizens and, along with the right to remain, represents the chief attribute that gives content to the formal concept of citizenship. Therein lies a potential dilemma: the aspirations and realities of democracy do not always align. Migration and other transnational practices create populations within nation-states that are bound by laws over which they have no direct control, producing categories of people differentiated from one another by their

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status before the law. For temporary sojourners, this powerlessness is of little moment. But for the millions of people who live and work in societies in which they lack formal citizenship and, therefore, the right to vote, the core principle of democracy provides no protection from the state.

Democracies might solve this problem by extending the right to vote to noncitizens. Dozens of democracies around the world, in fact, have taken this step, primarily by recognizing voting rights for permanent residents in local elections.<sup>1</sup> In many cases, the justification for doing so has been not to enfranchise migrants or noncitizens generally but, rather, to extend reciprocity to nationals of other states that permit noncitizens to vote. And yet, the practice reveals that formal citizenship, the right to vote, and participation in the policy are not coterminous. Much has been written articulating the normative claims in favor of noncitizen voting.<sup>2</sup> In this essay, I explore instead the factors that contribute to a community's decision actually to extend the franchise,<sup>3</sup> the implications of the practice for our understanding of how democratic societies conceptualize the relationship between citizenship and voting, and what the practice tells us about the tools democratic societies use to construct their polities.

In most democratic settings, the national constitution or other framework, constitutive documents of the nation-state do not fully determine the size and scope of the polity, even when those documents contain voting eligibility rules. Instead, the polity is constructed, dynamically, through contestation in the political process, with occasional involvement by courts. The decision not to extend alien suffrage does not mean that a society does not consider noncitizens to be part of the polity, while the decision to grant alien suffrage is not necessarily incompatible with an exclusive conception of the polity. Whether a society chooses to adopt some form of alien suffrage as the

<sup>1</sup> In this essay, unless otherwise specified, when I invoke noncitizen voting, I refer to voting by permanent residents.

<sup>2</sup> For a discussion of this literature and an argument that the lack of voting rights for noncitizens weakens the political power that certain groups ought to have, see Cristina M. Rodríguez, *From Litigation, Legislation*, 117 *YALE L.J.* 1132, 1173–78 (2008).

<sup>3</sup> David Earnest has conducted the most comprehensive empirical analysis of alien suffrage, and his work has shown that the national culture of specific settings, particularly the extent to which a society conceives of itself as a multiethnic union, rather than pressure from an international or transnational human rights regime, has determined willingness to extend the franchise. In an extremely helpful typology, he identifies four different nationalist and three different transnationalist explanations scholars have advanced for why nation-states adopt particular strategies for incorporating noncitizens into their political life, including alien suffrage. See David C. Earnest, *Neither Citizen Nor Stranger: Why States Enfranchise Resident Aliens*, 58 *WORLD POL.* 242 (2006) (reviewing the extensive literature explaining why societies choose particular strategies to incorporate noncitizens). The nationalist points of view explain that the decision to extend political rights is a function of: a society's historical understanding of how the nation has been constituted, *id.* at 248; the state's institutions, *id.* at 249–250; a trade-off for ensuring that more expensive social and economic rights not be granted to noncitizens, *id.* at 250; and, finally, the political parties in power, where either left- or right-of-center parties are more likely to enfranchise or extend rights to noncitizens, *id.* at 251. The transnationalist explanations include that international human rights norms and international governmental organizations pressure states into adopting incorporationist practices, *see id.* at 253–254, and that, in some cases, resident aliens “organize across borders” ensuring that in settings where migrants come from geographically proximate countries, the pressure to incorporate will be higher. *id.* at 255.

particular means of accounting for the interests of noncitizens will be a function, ultimately, of the nation-state's constitutional culture, in two senses of the term. Both the values and structures that frame constitutional debates—particularly with respect to citizenship as a practice—and the laws and policies that literally define the resident population, shape the decision whether to give formal voice to noncitizen residents. “The people,” therefore, should not be understood as static but, rather, as an ongoing project subject to debate. Crucially, these debates happen at multiple levels of decision making—a factor central to understanding the nature of polity construction and identity formation within nation-states.<sup>4</sup> The fact that the question of who has formal voice in the polity is left partially to the political process provides a necessary definitional flexibility in the democratic setting, particularly during times of heightened migration and transnational integration.

To explore further how democratic societies define the people, I consider the non-citizen voting practices of three jurisdictions—the United States, New Zealand, and Ireland—each of which is a long-standing democracy, and each of which contains large populations of noncitizens as the result of recent migration.<sup>5</sup> These jurisdictions occupy three points along the alien suffrage spectrum, from limited local rights to universal national rights, thus illuminating the various models of construction available. Though the United States has a long and rich history of enfranchising noncitizens, the practice has nearly disappeared and exists today only in a handful of localities, pursuant to the control of state and local governments.<sup>6</sup> In Ireland, since 1963, all permanent residents have had the right to vote in local elections after six months of residence—a prerogative extended and protected not by the local governments themselves but by the national government.<sup>7</sup> New Zealand has the most robust alien suffrage regime in the world, permitting legal permanent residents who have resided in the country for at least one year to vote in both national and local elections.<sup>8</sup> To be sure, the fact that most alien suffrage rights remain local in nature means that the practice is somewhat

<sup>4</sup> This definition occurs at a high, national level, with broad participation by the people's representatives, because the immigration laws, which determine who will have the legal status necessary to claim the right to vote, are formulated largely at the national level. But the process is also often decentralized and localized, because subfederal governments and voters are in control of many alien suffrage regimes.

<sup>5</sup> The alien suffrage guarantees that exist in each of these jurisdictions are also “non-discriminatory,” a term used in the literature to describe regimes that do not impose nationality qualifications for access to the franchise. See, e.g., DAVID C. EARNEST, *OLD NATIONS, NEW VOTERS: NATIONALISM, TRANSNATIONALISM, AND DEMOCRACY IN THE ERA OF GLOBAL MIGRATION* 29 (State Univ. of New York Press 2008). “Discriminatory” regimes, on the other hand, extend voting rights only to noncitizens of particular nationalities, usually for historical reasons that relate to the country's colonial history. See *id.* at 27. Historically, for example, the United Kingdom granted voting rights in parliamentary elections to citizens of Commonwealth nations and to the Republic of Ireland, and citizens of Brazil have special voting rights in Portugal. See *id.* at 27–28.

<sup>6</sup> For a detailed history of alien suffrage in the United States, see Gerald Rosberg, *Aliens and the Right to Vote*, 75 MICH. L. REV. 1092, 1093–1100 (1977). For a discussion of contemporary efforts to extend the franchise to noncitizens in various states in the United States, see RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 15, 15–40 (Routledge 2006).

<sup>7</sup> See EARNEST, *supra* note 5, at 30.

<sup>8</sup> *Id.* at 32.

marginal as a feature of the contemporary democratic nation-state.<sup>9</sup> Nonetheless, most of these guarantees have emerged since World War II, and the last two decades have produced record migration around the globe and increased political integration among nation-states, thus justifying scholarly scrutiny of the practice.

In section 1, I consider the status of the noncitizen and the role of the vote within a democracy in general terms. In section 2, I consider how constitutional history, practice, and structure have contributed to the alien suffrage regimes of each society. In section 3, I explore how each society's historical relationship to immigration and emigration have influenced the scope of noncitizen voting rights. In the process, I consider how the choice to extend the franchise creates unique institutional frameworks for immigrant incorporation.<sup>10</sup> Along the way, I consider various questions: Does the practice of alien suffrage secure meaningful political power or render aliens part of the so-called people? In the absence of alien suffrage, what other mechanisms do societies use to broaden the scope of the polity beyond the formal citizenry, and does the availability of those mechanisms influence the suffrage question? In light of the variety of alien suffrage practices, is it possible to understand "the people" of a democracy as a coherent concept within societies and across societies?

## 1. Democracy and the noncitizen

The practice of alien suffrage raises the question of whether including noncitizens in the polity as voters undermines democratic legitimacy. In 1990, in the so-called *Foreign Voters Case*, the Federal Constitutional Court of Germany ruled that the extension of voting rights in local elections to noncitizens violated the Basic Law.<sup>11</sup> The Court concluded that Hamburg and Schleswig-Holstein<sup>12</sup>—subfederal entities that had

<sup>9</sup> In addition, in the postwar period, a number of states either have considered alien suffrage and declined to adopt the practice (France, Japan, Latvia, and subfederal jurisdictions within Switzerland and the United States) or rescinded noncitizen voting guarantees (Australia, Canada, and the United States). See *id.* at 37–39.

<sup>10</sup> See Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1122–1126 (2008).

<sup>11</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 31, 1990, BVerfGE 83, 37 (F.R.G.), reprinted in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 197 (Duke Univ. Press 1997). In its decision, the Court did not foreclose the possibility that the Basic Law could be amended to permit alien suffrage. In December 1992, the Basic Law was, in fact, amended to permit nationals of EU member states to vote in county and local elections, in order to comply with the Maastricht Treaty requiring local voting rights for all EU citizens in their countries of residence, thus effectively nullifying the Court's decision. See KOMMERS, *supra* at 199.

<sup>12</sup> The assembly of this German *Land* voted to allow resident aliens from Denmark, Ireland, the Netherlands, Norway, Sweden, and Switzerland to vote in local and district elections in an act of reciprocity—in recognition that German citizens residing in those states also were permitted to vote in local elections. See Daniel Munro, *Integration Through Participation: Non-Citizen Resident Voting Rights in an Era of Globalization*, 9 INT. MIGRATION & INTEGRATION 42, 68 (2008). A number of noncitizen voting regimes are based on this sort of principle of reciprocity. Still others reflect the decision by a former colonial power to permit citizens of former colonies to have status as electors. Portugal, for example, grants citizens of Brazil residing in Portugal the right to vote. See EARNEST, *supra* note 5, at 28–29.

chosen to enfranchise noncitizens—had undermined the right of the German people to self-determination. Voting, the court reasoned, amounted to a direct exercise of the state authority possessed by the people, and the enfranchisement of noncitizens permitted individuals who were not a part of the German people to exercise that authority, thus fracturing the cohesive and unified polity necessary for self-government. The implication was that the polity could not be separated into national and local constituencies. The concept of the people is singular in the Basic Law, providing a uniform basis for “democratic legitimation” at all levels of government.<sup>13</sup> The body politic, because it wields state authority, is determined by formal and national citizenship.

In interpreting the Basic Law to define the polity in this way, the German Court indirectly challenged an important assumption that underlies certain concepts of democracy—that representative democracy requires “complete congruence” between rights holders and those subject to the authority of the state.<sup>14</sup> The Court implicitly rejected the notion that a democracy deficit exists when noncitizens governed by the state have no voice in the formulation of the law, or at least it found that the Basic Law contemplated reciprocity between the state and the people when defined legally (and perhaps culturally), but not sociologically or with reference to the actual territorial population of permanent and quasi-permanent members.<sup>15</sup> In so doing, the Court made plain—by the implication of its reasoning, not explicitly—that the consent principle on which democracy is based is something of a fiction.

The assumption that the “democratic people” and, therefore, the electorate can consist only of those admitted to citizenship is by no means universal. The German Court itself recognized the possibility that the Basic Law could be amended. By one estimate, forty-five democracies around the world have extended the franchise to noncitizens in some form or another.<sup>16</sup> The German Court’s interpretation of the polity thus occupies an outer position on a spectrum defining who counts as the people eligible to exert state authority through the mechanism of the vote. Those nations that have adopted the practice of alien suffrage define their polities and conceptualize voting differently, contemplating both the existence of varied definitions of the people and distinct sources for democratic legitimation. Though the suffrage guarantees in many of these jurisdictions are nominal, insignificant, or encumbered by procedural or legal requirements, in many others, the guarantees are substantial and even include the right of noncitizens to stand for office. Four societies have granted universal suffrage to noncitizens at the national level,<sup>17</sup> leading many scholars

<sup>13</sup> See KOMMERS, *supra* note 11, at 198–199.

<sup>14</sup> *Id.* at 198.

<sup>15</sup> For an excellent analysis of the Court’s opinion and a discussion of the alien suffrage movement in Germany written in the immediate aftermath of the Court’s decision, see Gerald L. Neuman, *We Are the People: Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L. L. 259 (1991–1992). Neuman argues, among other things, that the German Court’s conceptualization of the polity reflects a particular conception of nationhood formed in the nineteenth century when “linguistic and cultural nationalism . . . led to an emphasis on nationality rather than residence as a crucial factor in defining a polity.” *Id.* at 291.

<sup>16</sup> See Rainer Bauböck, *Expansive Citizenship—Voting Beyond Territory and Membership*, 38 PS: POL. SCI. & POL. 683–687 (2005).

<sup>17</sup> Chile, Malawi, New Zealand, and Uruguay permit noncitizens to vote, after a period of permanent residence, in national elections. See EARNEST, *supra* note 5, at 32–33.

to characterize alien suffrage as an “emerging norm of democratic practice,”<sup>18</sup> even as the reasons states have adopted the practice vary considerably from jurisdiction to jurisdiction.

However, before exploring why and how this norm of democratic practice has emerged in particular contexts, it is important to understand the limitations of using alien suffrage as the lens through which to measure whether a society lives up to its democratic aspirations as well as to understand how democratic societies construct their polities. With respect to the first problem, it may be of little moment that populations on the periphery of the polity exist. Migration is timeless, which means that such populations always have existed and always will exist. It may be sufficient that a democratic regime guarantee all people subject to its jurisdiction the treatment required by the basic principles of due process; however, that obligation need not extend to giving noncitizens affected by the law meaningful influence over its formulation, whether through voting rights or other mechanisms. Any theory of democracy must identify who is sufficiently invested and acculturated into a society to warrant being part of the people—a line-drawing exercise that inevitably will exclude some individuals governed by a society’s laws. Even if democratic legitimacy does not preclude alien suffrage, it may not require it, and the practice may tell us little about the nature of any given polity.

With respect to the second problem—how polities construct themselves—suffrage is by no means the only mechanism for inclusion in a society and in its participatory dynamics, and so an understanding of who the people are requires a broader scope. Moreover, alien suffrage as it is practiced today may not, in actual fact, reflect the meaningful incorporation of noncitizens into the polity. Many existing guarantees are limited—only three democracies permit noncitizens to vote in national elections. Rates of noncitizen turnout in those societies where suffrage does exist are lower than citizen turnout.<sup>19</sup> Most important, those nations that do extend voting rights to noncitizens tend to limit those rights to permanent residents, although millions of people reside outside of their countries of citizenship for extended periods of time and without permanent legal status. In other words, between the tourist and the lawful permanent resident, there are millions of other quasi members living in democratic societies, and a growing range of legal statuses define the terms of their presence. In Ireland, for example, an increased reliance on temporary workers who do not have access to the local voting rights afforded to permanent residents limits the extent to which noncitizens resident in Ireland may become part of the polity.<sup>20</sup> Access to the franchise

<sup>18</sup> *Id.* at 21.

<sup>19</sup> See Munro, *supra* note 12, at 77–78 (citing lower socioeconomic status and lack of official-language mastery of noncitizens as the primary explanations for lower voter turnout).

<sup>20</sup> Cf. J. M. Mancini & Graham Finlay, “Citizenship Matters”: *Lessons from the Irish Citizenship Referendum*, 60 AMER. QUART. 575, 585 (2008) (noting that the rise of the temporary work system in Ireland and the proscription of birthright citizenship for children of nonpermanent residents, will lead to emergence of two classes of noncitizens and workers—one with full social and economic benefits and one with “minimal recourse to even basic protections”). The United States, similarly, has become increasingly reliant on temporary and undocumented immigrants, who are not eligible for naturalization under current law, to serve its labor needs at both the high and low end of the markets.

ultimately can be manipulated by changing the formalities of who is admitted and how. It is not enough to identify the availability of the vote for permanent resident noncitizens to determine how broadly the polity is defined, because it matters just as much who has the formal legal status that makes the franchise possible. Addressing this particular dynamic is beyond the scope of the essay, but it should be firmly kept in mind as background to the analysis that follows.<sup>21</sup>

Consideration of the suffrage question should be useful, nonetheless, despite these limitations. By considering the practice from the perspective I have outlined, I hope to move the debate regarding noncitizen suffrage beyond calls for its implementation, on the one hand, and rejection of the practice as dilutive of the value of citizenship, on the other, toward a broader discussion of the mechanisms available for shaping the size and character of the polity in a way that accounts for the interests of those who reside within it.

## 2. Constitutional values and alien suffrage

At its core, the practice of alien suffrage recognizes that certain noncitizens have claims to participation in the polity—either because they have interests they are entitled to defend against the state and in relation to fellow members or because certain noncitizens constitute *de facto* members of society entitled to participate directly in the formulation of the law. Assuming that the three societies under consideration recognize the legitimacy of at least some noncitizen demands on the polity, why do they adopt widely divergent approaches to the suffrage question? Why is the practice virtually nonexistent in the United States but robust and permitted at the national level in New Zealand?

I do not purport to offer anything approximating a complete answer here, if only because a comprehensive explanation likely will be historically and culturally contingent. Nonetheless, I argue that whether and *how* a society permits alien suffrage ultimately reflect the pace at which that society believes full incorporation of new members ought to occur. At least two factors influence whether suffrage serves as a mechanism for acknowledging noncitizen membership in the polity. In this section, I consider the role played by constitutional culture and structure. I reserve for section 3 the consideration of how a society's historical and evolving relationship to migration shape the practice.

In the United States, the limited salience of citizenship as a constitutional concept, combined with the federalist structure of the polity, has shaped the trajectory of alien suffrage. From the late nineteenth through the twentieth centuries, courts gradually acknowledged that important provisions of the Constitution applied to noncitizens, protecting them from arbitrary discrimination by states via application of the equal

<sup>21</sup> One possible solution to this bureaucratic “end run” around the extension of the franchise to persons with a meaningful stake in the society is to grant automatic voting rights or naturalization to anyone, regardless of status, after a certain number of years of residence. See RUTH RUBIO-MARÍN, *IMMIGRATION AS DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN THE UNITED STATES AND GERMANY* (Cambridge Univ. Press 2000) (advancing such a proposal).

protection clause<sup>22</sup> and ensuring them a voice in the political debate by extending First Amendment free speech and association protections,<sup>23</sup> albeit ones limited by the government's power to deport. As Alexander Bickel famously argued, we "live under a Constitution to which the concept of citizenship matters very little" and that "prescribes decencies and wise modalities of government quite without regard to the concept of citizenship."<sup>24</sup> Even definitions of the people that draw clear distinctions between citizens and noncitizens recognize that the people as a whole encompasses more than just citizens. In *United States v. Verdugo-Urquidez*, for example, Chief Justice Rehnquist noted that "the people" represents a term of art used throughout the Constitution to refer "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." In other words, "the people" is not limited to citizens but, rather, includes persons with some sort of property or presence in the United States.<sup>25</sup>

These developments have made any perceived need for alien suffrage less salient over time. In fact, they are of a piece with and help to explain the Supreme Court's conclusion that individual states can, but need not, exclude aliens from voting. Recognizing the state's interests qua states, the Court has left the ultimate decision, with respect to the extension of political rights, to the decentralized political

<sup>22</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (establishing that the equal protection clause applies to persons, not just citizens, and emphasizing that the right to the fruits of one's labor is protected regardless of citizenship, in the process of declaring San Francisco's denial of permits to operate laundries to Chinese residents a violation of the equal protection clause); see also *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down Arizona law denying noncitizens access to welfare benefits on the ground that noncitizens were entitled to heightened protection under the equal protection clause and that the state's interest in saving money by reserving social service expenditures for its own citizens was not compelling); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (noting that due process protections apply to noncitizens).

<sup>23</sup> *Bridges v. Wixon*, 326 U.S. 135, 161–162 (1945) (Murphy, J. concurring) (noting that the First and Fifth Amendments "extend their inalienable privileges to all persons and guard against any encroachment on those rights by federal or state authority"). T. H. Marshall elaborated the now-classic paradigm followed by states in their extension of various types of rights to the people—a process he argued occurred in parallel to the development of the modern state itself: states moved from extending various civil rights, to protecting political rights, which ultimately enabled rights holders to demand for themselves social and economic rights. See T. H. MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT: ESSAYS*, WITH AN INTRODUCTION BY SEYMOUR MARTIN LIPSET (Doubleday 1964). As David Earnest, among other scholars, has pointed out, "noncitizens have won their rights in a reversed sequence." For noncitizens, the protection of civil rights has been followed by the extension of social and economic rights, both in the United States and Europe, though in the U.S., those rights at the federal level have been more precarious. The political rights of voting and officeholding, by contrast, represent the final stage of evolution. See Earnest, *supra* note 3, at 245.

<sup>24</sup> ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 53–54 (Yale Univ. Press 1975). Peter Schuck has argued that the "marginal benefits to most aliens of moving from legal resident status to full membership are slight" and that "the right to vote is probably unimportant to most aliens." Peter Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, in *IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* 58 (William Rogers Brubaker ed., 1989).

<sup>25</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment, which protects the "right of the people" to be free from unreasonable searches and seizures, did not apply to a Mexican national in Mexico whose home was searched by U.S. officials).

process.<sup>26</sup> The same courts that played a major role in the incorporation of noncitizens into the democratic fold through the extension of speech and equality rights have not taken the initiative to extend political rights.<sup>27</sup> In so doing, the courts, simultaneously, have secured for noncitizens constitutional stature and defined voting rights as the core feature of the principle of self-government, which can only be realized by the citizen core of the polity and those whom citizens choose to include. In contrast to the Irish model discussed in more detail below, then, sub-national governments in the United States exert powerful control over the pace of political incorporation, including by controlling whether *local* governments may extend the franchise.

The question then becomes: Why has the political process in the United States not produced a robust, modern-day alien suffrage regime? In general, the states have been reluctant in the post–World War II era to enfranchise noncitizens. In some cases, they even have prevented local governments from adopting alien suffrage. Cambridge, Massachusetts, for example, has filed home-rule petitions with the state on a regular basis, seeking the necessary authorization to extend voting rights to noncitizens in local election, but has been rebuffed consistently.<sup>28</sup>

Leaving aside the historical factors discussed in section 3, the Court in *Cabell v. Chavez-Salido* provides one explanation. In the process of recognizing state authority over the suffrage question, the Supreme Court actually articulated the justification for exclusion. Its analysis reflects ideas deeply rooted in U.S. conceptions of popular sovereignty that might operate at the state level as much as at the national level:

The exclusion of aliens from basic democratic processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.<sup>29</sup>

Alternatively, states may have abandoned alien suffrage over time because it became less salient as a means of protecting noncitizens from the state, precisely because of the

<sup>26</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982). See Neuman, *supra* note 15, at 292 (noting that article I of the Constitution, which provides that members of the House of Representatives shall be “chosen every second Year by the People of the several States” could be interpreted to prohibit alien suffrage, as could the references to the “People” in the Preamble and the Tenth Amendment, but that it appears to be settled that alien suffrage is “neither constitutionally compelled nor constitutionally forbidden”).

<sup>27</sup> EARNEST, *supra* note 5, at 96 (noting that states in which courts have assertively extended civil and social protections to noncitizens have been less likely to extend voting rights to the same populations than states with less “activist” judiciaries, thus disproving the assumption made by some scholars that voting rights are likely to be the product of activist judiciaries). He explores this finding with relation to case studies of Germany, the Netherlands, and Belgium. See *id.* at 111–125.

<sup>28</sup> See Michael Castagna et al., *Securing Non-Citizen Voting Rights: Determining the Feasibility of Enabling Legislation in Massachusetts 1–2* (2005), available at [http://ase.tufts.edu/uep/Degrees/field\\_project\\_reports/2005/4-securing\\_noncitizen\\_voting\\_rights.pdf](http://ase.tufts.edu/uep/Degrees/field_project_reports/2005/4-securing_noncitizen_voting_rights.pdf). For an extended account of recent local noncitizen voting initiatives in the U.S., see HAYDUK, *supra* note 6.

<sup>29</sup> *Chavez-Salido*, 454 U.S. at 439–440. The Court also notes that “judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it.” *Id.*

court decisions discussed above. Even if some mechanism for making the state responsive to the interests of noncitizens is required by democracy, the Court has provided the states with viable options by guaranteeing free speech and association rights, which themselves could enable noncitizens to participate in public life and develop civic identities.

Just as important has been the fact that many states themselves have chosen to lift citizenship requirements for civil service employment and extend integration-oriented benefits to immigrants that are more generous than what the federal baseline requires and more targeted than what the federal government, or an activist judiciary, could provide.<sup>30</sup> These developments, arguably, have made suffrage an easy protection to dismantle, even within a constitutional context that contemplates the incorporation of noncitizens. Suffrage simply has been replaced. Today, these other state practices, along with the market, provide the context for immigrant integration, equipping newcomers with the tools to defend their interests in the public sphere. In other words, the United States' failure to adopt alien suffrage does not tell a complete story about the status of noncitizens within the polity.<sup>31</sup>

Another plausible hypothesis in tension with these conclusions, however, is that the judicial innovations described above have rendered the vote the only attribute of citizenship that makes the formal legal status distinctive or valuable. As the result of constitutional doctrine, few distinctions between citizens and noncitizens exist at the state level—precisely where noncitizen voting rights played a role historically. In other words, tying voting to citizenship is a way that states (or the federal government at the national level) can give meaning to citizenship, either in and of itself or as an incentive for naturalization and, therefore, assimilation. A variation on this claim would be to emphasize that voting is particularly valuable or precious. Following both the U.S. Court in *Cabell v. Chavez-Salido* and the Federal Constitutional Court of Germany, voting reflects the ultimate expression of a distinctive identity and peoplehood—an identity that citizens of the states may prize in their capacities as state voters as much as in their capacity as national voters. Whereas the rights protections that have been elaborated by courts merely restrain the state from arbitrary behavior, voting rights give entrance to a core community. For noncitizens to be a part of the fully realized

<sup>30</sup> For a discussion of these efforts in this decade, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation* 106 MICH. L. REV. 567, 581–609 (2008) (describing state-based strategies for immigrant incorporation); see also IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* 10 (Univ. California Press 2006) (noting that citizenship requirements for social services, licensing, and employment have been disappearing).

<sup>31</sup> Compare PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 18–21 (Oxford Univ. Press 2008) (arguing that we fetishize the right to vote and that other mechanisms, such as ability to donate to political parties and the incentive for politicians to pay attention to the interests of future voters, ensure that noncitizens have a voice in the political process) with Cristina M. Rodríguez, Book Review, Peter Spiro, *Beyond Citizenship: American Identity after Globalization*, 103 AM. J. INT'L. L. 180, 194–195 (2009) (critiquing the view that formal citizenship status has lost its significance, in part on the ground that lack of access to the franchise is politically significant for noncitizens).

people, they must go through a more extended process than simply acquiring the status of noncitizen.<sup>32</sup>

In a similar vein, naturalization offers an alternative to the decoupling of suffrage from citizenship that takes account of the need to endow citizenship with some meaning. Indeed, in the *Foreign Voters Case*, the German Court acknowledged that the legislature retained the authority to redefine the body politic by adjusting citizenship rules.<sup>33</sup> Naturalization and alien suffrage obviously are not perfect substitutes—the former, by definition, takes more time and will inevitably leave out more noncitizens than alien suffrage. However, because naturalization provides complete access only after a period of acculturation, it represents an unremarkable feature of the legal regimes of immigrant-receiving societies. Alien suffrage is in tension with the concept of popular sovereignty, because it extends the power to exercise state authority through the vote to persons who have not undergone the transition deemed necessary to achieve formal recognition of their qualifications to be full members of the polity. In the United States, a relatively generous naturalization regime thus balances the objective of giving those who are governed by the law a voice, on the one hand, with the interest in ensuring the acculturation of members of the polity who exercise state authority (as opposed to simply being acknowledged as rights bearers), on the other.

The U.S. story thus suggests a puzzle: suffrage is, at once, insignificant and central. It is unnecessary or peripheral as a mechanism for assimilating newcomers and ensuring the participation of the broader membership, yet it is central to defining the core of the polity and giving content to citizenship as a formal status.

The example of New Zealand, by contrast, bridges the gap between these two positions. Suffrage is central to the nation-state's constitutional identity, and that very centrality justifies noncitizen voting rights at the national level. In New Zealand, where voter registration has been compulsory since 1924,<sup>34</sup> the franchise and its protection seem crucial to the nation's self-conception and have been described as “deeply rooted in the collective psyche.”<sup>35</sup> In fact, New Zealand's identity as a nation-state is intimately tied to its status as a historical, global leader in the expansion of the franchise; it led the world, for example, in extending the right to vote to women in 1893.

New Zealand also maintains a constitutional self-image as a laboratory for experimentation in the design of the democracy<sup>36</sup>—a theme most recently evidenced by the decision in the early 1990s to abandon the British first-past-the-post elections in favor

<sup>32</sup> This sort of distinction is arguably present in the Fourteenth Amendment itself. The equal protection and due process of law guarantees apply to persons, exerting a baseline restraint on arbitrary action by the state, whereas the privileges and immunities clause, which was intended as the centerpiece of the Fourteenth Amendment even though it means little today, makes clear that certain entitlements beyond the baseline belong to citizens only.

<sup>33</sup> See KOMMERS, *supra* note 11, at 198.

<sup>34</sup> Alan McRobie, *The Electoral System*, in *ESSAYS ON THE CONSTITUTION* 312, 323 (Philip A. Joseph ed., 1995).

<sup>35</sup> See NEILL ATKINSON, *ADVENTURES IN DEMOCRACY: A HISTORY OF THE VOTE IN NEW ZEALAND* 10 (Univ. Otago Press 2003).

<sup>36</sup> *Id.* at 12.

of a new system of proportional representation.<sup>37</sup> Scholars of politics in New Zealand draw a correlation between these sorts of innovations in defining the electorate and the principles of openness and egalitarianism crucial to the development of “a frontier society.”<sup>38</sup> Scholars also describe the society’s constitutional culture as highly pragmatic and responsive to changing circumstances.<sup>39</sup> Indeed, the set of rules that defines the New Zealand electorate is simultaneously enshrined in “macro constitutional settlement” documents and is the product of evolutionary adaptation to a changing population, ultimately reflecting compromises forged in the political process.<sup>40</sup>

Thus, the extension of the franchise in national elections to noncitizens in New Zealand hardly seems to reflect an undervaluing of the vote and, in fact, reinforces the nation’s conceptualization of its political culture. This self-image demonstrates both that it is possible to extend suffrage to noncitizens while treating the vote as quasi-sacred *and* that the decision to extend the vote to noncitizens has much to do with the way in which the franchise is framed historically. To be sure, the fact that New Zealand extends national voting rights to noncitizens does not mean that it has abandoned the self-conscious act of defining its political community. The noncitizen voting rule does not create a universal polity; it merely pushes the decision about whom to include to the point at which the immigration laws are made, rather than placing it at the point of screening for citizenship. An explanation for why two societies that valorize the vote take nearly opposite approaches to noncitizen suffrage thus defies abstraction from historical detail. In other words, what distinguishes different democratic regimes in their approach to alien suffrage is not the weight or value of the vote within the broader constitutional context but, rather, how a particular society determines what makes its political community distinctive.

The Irish case, in which the national and local electorates are defined according to two very different conceptions of the polity, complicates the story further. Since 1963, all noncitizens in Ireland have had the right to vote in local elections after six months of residency—the most permissive residency requirement in the world.<sup>41</sup> Though these rights are local in nature, they are guaranteed by the national government and, therefore, apply throughout the country, regardless of the noncitizen’s origins. At the same time, only Irish and British citizens may vote in national elections. The Irish case, thus, reflects a capacity to distinguish between the national and the local “people.” In fact, the contested path to voting rights for British citizens in national elections underscores the fact that—even when a close conceptual correlation is drawn between the citizenry and national identity—local alien suffrage is possible<sup>42</sup> and

<sup>37</sup> *Id.* at 201–227 (detailing the history of the adoption of proportional representation, likening the reform to the adoption of women’s suffrage, and attributing it to a concern for equality and fairness, a general “crusade for the moral reform of politics,” and the machinations of particular individuals and parties).

<sup>38</sup> McRobie, *supra* note 34, at 319.

<sup>39</sup> See, e.g., Matthew S. Palmer, *New Zealand Constitutional Culture*, 22 N.Z. UNIV. L. REV. 565, 574–576 (2007).

<sup>40</sup> Elizabeth McLeay, *Evolving Rules in a Parliamentary Democracy*, 6 ELECTION L.J. 421, 421 (2007).

<sup>41</sup> EARNEST, *supra* note 5, at 30.

<sup>42</sup> Cf. Neuman, *supra* note 15, at 322–330 (discussing whether American conceptions of popular sovereignty and federalism would preclude voting rights at the state level, concluding that “this history of federalism supports the view that the Constitution does not make *national* citizenship a prerequisite for voting in the states,” and that federalism would not preclude local voting rights in any case).

can exist alongside a constitutional definition of the people based on a thick sense of national identity.

That strong sense of national identity framed the debate over voting rights for British citizens in the early 1980s. In 1984, the Irish Supreme Court heard a challenge to a bill that would have granted voting rights to citizens of the U.K. who already possessed local rights, in both Dáil (national parliamentary) elections as well as in presidential elections and referendums. The move represented an act of reciprocity recognizing the rights granted to Irish citizens in the U.K.<sup>43</sup> The Court struck down the bill for being inconsistent with the conception of national suffrage that underpinned the Irish Constitution.<sup>44</sup>

In reaching this conclusion, the Court drew a distinction between the article 16 suffrage guarantee and other constitutional provisions, such as freedom of association and expression. Though the Constitution nominally granted the latter rights to citizens alone, the courts had interpreted them to apply to noncitizens. The Court characterized suffrage as distinct, however, treating it as a framework right different in kind from the other sorts of rights.<sup>45</sup> Thus, the Court's decision insulated the suffrage question from the ordinary political process, requiring the people to determine the outer limits of the national electorate through constitutional referendum. Just as the German Basic Law was amended in the wake of the *Foreign Voters Case*, Irish voters eventually added the Ninth Amendment to the Constitution, extending the suffrage guarantee to citizens of the U.K. and establishing the state's authority to extend similar rights to citizens of other EU member states that grant national voting rights to Irish citizens.

This series of events does not explain why Ireland adopted and maintains local alien suffrage (a question deferred to section 3). Still, it does suggest that limited national suffrage—as distinct from other rights that enable political participation, such as freedom of speech—is not inconsistent with local voting rights for noncitizens, a state of affairs that would be compatible with the U.S. jurisprudence and practice discussed above. Perhaps even more important, this history underscores how quickly the political process can reformulate conceptions of national sovereignty in the wake of new political and institutional demands. In both the Irish and German cases, the evolution of the EU has led to dramatic reformulations of conceptions of popular sovereignty as played out through the concept of alien suffrage.

The different practices outlined above demonstrate, ultimately, that conclusions regarding who belongs in the polity as well as in the electorate are shaped by a combination of constitutional structures, extraconstitutional debates informed by constitutional values, and external political pressures. The interest in defining the polity

<sup>43</sup> See BRYAN FANNING ET AL., IRISH POLITICAL PARTIES, IMMIGRATION, AND INTEGRATION IN 2007, at 14 (2007), available at <http://www.law.ed.ac.uk/staff/joshaw/files/immigrationandintegrationinparties2007.pdf>

<sup>44</sup> In the Matter of Article 26 of the Constitution and in the Matter of The Electoral (Amendment) Bill, 1983, [1984] I.R. 268 (Ir.), available at [http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/\(WebFiles\)/3B9009F8586D952880257F3002DA959/\\$FILE/Electoral1983\\_\[1984\]IE268.htm](http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/(WebFiles)/3B9009F8586D952880257F3002DA959/$FILE/Electoral1983_[1984]IE268.htm)

<sup>45</sup> See FANNING ET AL., *supra* note 43, at 14.

broadly is not inconsistent with defining the electorate narrowly, particularly when significant constitutional protections are understood to apply without respect to citizenship, as has been the case in the United States. At the same time, a conception of suffrage as central to a nation's constitutional identity is compatible with noncitizen voting, where the content of that identity revolves around a particular conception of the right to vote. New Zealand's practices underscore the point that a robust culture of voting and electoral innovation is consistent with, even amplified by, alien suffrage. But the U.S. and Ireland both demonstrate that the polity can be defined differently at different levels of government, to accommodate ambivalence about who constitutes the people and changing views about how the interests of noncitizens are best taken into account in government and politics.

### 3. Alien suffrage and immigration

Implicit in the discussion in section 2 is the conclusion that how a society defines its polity—who constitutes its people—is related not just to the values and practices that have evolved from its political and constitutional frameworks but also to the particular historical relationship the society has had to immigration. In this part, I consider in more detail how a society's constitutional history in a more literal sense—in the sense of how the population is physically defined—might influence the noncitizen suffrage question.<sup>46</sup>

As David Earnest has shown in his empirical analysis of twenty-four democracies' alien suffrage policies, noncitizen voting rights tend to be granted in societies that seek to construct a polity without respect to ancestry. Whether a country adopts alien suffrage has less to do with whether it has become postnational than with certain states' long-standing conception of nationhood as either multiethnic or ethnoculturally defined.<sup>47</sup> The nation-states that have enfranchised noncitizens have been historically "assimilationist,"<sup>48</sup> in the sense that they have sought to turn immigrants into citizens instead of treating immigration as anathema in order to maintain an ethnically and culturally defined conception of the polity. States with *jus soli* citizenship rules, which arguably reflect great openness to incorporating newcomers regardless of ancestry, have been more likely to extend suffrage to noncitizens than states with a *jus sanguinis* citizenship rule, where citizenship is determined by bloodline,<sup>49</sup> though not necessarily ethnically. Relatedly, countries in which the rights of national minorities and the allocation of power among existing "indigenous" ethnic or linguistic groups inform the political struggles, such as Belgium, have taken longer to enfranchise noncitizens

<sup>46</sup> For a sweeping account of how the United States has used its immigration and citizenship laws to construct itself as a nation, see ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (Harvard Univ. Press 2006).

<sup>47</sup> EARNEST, *supra* note 5, at 141–142.

<sup>48</sup> *Id.* at 142.

<sup>49</sup> *Id.* at 95–96 (noting that *jus soli* states are more likely to extend noncitizen voting rights than *jus sanguinis* states).

than their nonethnically divided counterparts.<sup>50</sup> Presumably these differences result from the absence of consensus within the citizenry about whether culture ought to define who the people are.

And yet, the United States (along with Canada and Australia, which have rescinded alien suffrage guarantees in the postwar period)<sup>51</sup> and New Zealand—the classic immigrant, multiethnic, *jus soli* democracies—stand at opposite ends of the immigrant suffrage spectrum. This fact reinforces the simple and unsurprising conclusion that the particular practices a society adopts to mediate the competing concerns of democratic accountability, sovereignty, and immigrant incorporation reflect the society's own history. Nonetheless, reviewing the particular immigrant contexts of each of the three regimes under consideration will help illuminate the relationship between immigration and polity definition.

In the United States, noncitizen suffrage played an important role, historically, in the construction of the polity by helping to settle the territories<sup>52</sup> and attract immigrants to build the human capital of a country with aspirations of thriving from coast to coast. To the extent that noncitizen suffrage operated as an incentive for settlement, then, it necessarily faded as a practice as territories became states, as the nation's population reached a size that meant frontier settlement was no longer a high priority,<sup>53</sup> and as changing demographics led to growing skepticism regarding immigration.<sup>54</sup> The consequence of this shift has been a redefinition of the mechanisms of immigrant incorporation. As Irene Bloemraad has emphasized, scholars, politicians, and voters in the late nineteenth and early twentieth centuries—the eras when noncitizen voting was common—believed that participatory activity by immigrants mattered to the health of the larger society.<sup>55</sup> Whereas political parties and unions, along with ethnic associations and religious organizations, played a major role, historically, in involving new immigrants in larger social and political processes,<sup>56</sup> today it is primarily the

<sup>50</sup> *Id.* at 120–124. It should be noted, however, that New Zealand is self-consciously bicultural, given the place the indigenous Maori population occupies in the society's politics.

<sup>51</sup> See *supra* note 9.

<sup>52</sup> See Rosberg, *supra* note 6, at 1096–98; Neuman, *supra* note 15, at 295, 299 (noting the practice of alien suffrage in various territories and its continuation after those territories became states). Cf. Cristina M. Rodríguez, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth-Century America*, 108 *YALE L.J.* 1805 (1999) (noting that the granting to women of political rights such as voting and the right to sit on juries in the territories of Washington and Wyoming was considered a means of attracting women to the Western territories).

<sup>53</sup> Neuman, *supra* note 15, at 299.

<sup>54</sup> Jamin Raskin has advanced a different historical argument for the disappearance of alien suffrage, contending that suffrage has always been exclusive in some way in U.S. history. Whereas race, gender, property, and wealth used to serve as bases for exclusion, today citizenship status performs that role. See Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 *U. PENN. L. REV.* 1391, 1395 (1993).

<sup>55</sup> BLOEMRAAD, *supra* note 30, at 247; see also HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (Oxford Univ. Press 2006) (discussing a forgotten tradition of treating immigrants as citizens-in-waiting, entitled to access to the same rights and privileges as citizens).

<sup>56</sup> See BLOEMRAAD, *supra* note 30, at 247.

market and, secondarily, the occasional state-sponsored integration programs that serve as the engines of incorporation.

New Zealand certainly conceives of itself, like the United States, as a nation of immigrants. Immigration has constituted the population since the nineteenth century, and “net migration gains” have reached record levels in this decade.<sup>57</sup> However, the adoption of noncitizen voting was a function of this history only in the narrowest sense. It resulted from the protracted process by which New Zealand came into its full independence from Britain. Until 1975, the law required electors to be “British subjects” and resident in New Zealand for a certain period. The 1975 Electoral Act removed the former requirement and left only the latter in place, making residency the only eligibility requirement for voting.<sup>58</sup>

More significant than its origins, however, is the fact that the practice of noncitizen voting remains intact today. Citizenship has never been added to the eligibility requirements, despite the fact the electoral laws have been amended multiple times, and despite the fact that the major sources of immigration (from European to Asian) have changed considerably in recent decades. Noncitizen voting, in other words, has become an entrenched universal norm rather than a function of the country’s British heritage. What is more, as a practice, it is at once widely accepted and little remarked upon; the abundant scholarly literature on voting in New Zealand barely notes the existence of alien suffrage, and the merits of the practice are largely absent from political debate. Any number of factors could explain this lack of attention, including the possibility that New Zealand’s conception of itself as an immigrant-receiving society, which also encourages the broadest participation possible, accommodates the practice easily;<sup>59</sup> that the practice has had a limited impact on the nature of the polity; or that lawmakers and politicians acknowledge the potential benefits that flow from it, such as promoting immigrant integration.<sup>60</sup>

Regardless of the importance assigned by citizens or scholars of New Zealand to non-citizen voting, the existence of alien suffrage in national elections ultimately means that the immigration laws, rather than the citizenship laws, largely define the people of New Zealand. The fact that nearly 20 percent of the population of New Zealand is foreign-born means that the polity is remarkably heterogeneous as well as “new.” Since 1990, in particular, immigration from Asia has risen sharply, further diversifying the population and engendering some ambivalence but no apparent retrenchment with respect to future immigration flows.<sup>61</sup>

<sup>57</sup> See Richard Bedford, *New Zealand: The Politicization of Immigration* (2003), available at <http://www.migrationinformation.org/Profiles/display.cfm?ID=86>.

<sup>58</sup> For a discussion of this history, see Elizabeth McLeay, *Democratic Experiments in New Zealand*, Dept. of Senate Occasional Lecture Series, Parliament House 93 (2005), available at <http://www.aph.gov.au/senate/pubs/pops/pop44/mcleay.pdf>.

<sup>59</sup> See McLeay, *supra* note 40, at 423 (noting wide participation as a value but acknowledging that more scholarly attention should be given to understanding New Zealand’s unusual alien suffrage practice within that context).

<sup>60</sup> See REPORT OF THE ROYAL COMMISSION ON THE ELECTORAL SYSTEM § 9.5 (1986), available at <http://www.elections.org.nz/voting/mmp/royal-commission-report-1986.html>.

<sup>61</sup> See Bedford, *supra* note 57. In 2002, approximately 54 percent of new immigration approvals were of citizens of countries in Asia.

At the same time, New Zealand’s immigration policy selects for a very particular type of immigrant. In 2002, for example, the government raised the level of English-language competence required for entry; the selection system, as a whole, is “biased” toward immigrants with substantial educational and professional qualifications in a deliberate effort to screen for immigrants who will contribute to social cohesion.<sup>62</sup> Though its definition of the polity does not seem in any sense culturally defined, through its immigration laws New Zealand does control the channels to universal suffrage by prioritizing the selection of immigrants it considers to be compatible with its national ethos of promoting prosperity as well as “biculturalism within a context of increasing ethnic and cultural diversity.”<sup>63</sup>

The fact that suffrage rights in the U.S. have contracted to apply almost exclusively to an inner core of the polity thus does not seem different in kind from the tools used by New Zealand, which enfranchises noncitizens but nonetheless screens them for their compatibility with New Zealand political culture in the construction of the electorate through the immigration laws. Indeed, the fact that U.S. immigration law does not select in any rigorous fashion for skills or assimilability but focuses predominantly, instead, on family ties may well reflect a much more diverse conception of the polity.

Ireland has only recently become an immigrant-receiving society as the result of its late twentieth-century economic transformation. Even more so than those of New Zealand, its alien suffrage practices predate mass immigration, particularly from outside Europe, and cannot be described as having been designed to correct any sort of democracy defect engendered by global migration. Instead, the practice was adopted as a matter of reciprocity toward the British, as Irish citizens had been permitted to vote in local British elections since 1948.<sup>64</sup> Commentators also have traced the origins of local noncitizen voting to the desire to “show up” Northern Ireland, which denied Catholics the right to vote at the time, by emphasizing residency as the criterion for local voting rights, rather than religion or nationality.<sup>65</sup>

That said, the practice of alien suffrage has been justified in light of Ireland’s new status as an immigrant-receiving society. Political actors within Ireland have emphasized that the past Irish experience with *emigration* engenders something of a sense of obligation within Ireland to integrate today’s immigrants. Moreover, the practice persists today and seems well entrenched (though also underutilized),<sup>66</sup> despite growing ambivalence over the sharp rise in immigration and increasing distrust of asylum seekers.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See 56 SEANAD DEB. Col. 1067 (Jul. 10, 1963) (“I wonder whether it is not a matter of justice that we should treat British residents in this country on similar terms. . . . In my view the British acted with considerable generosity after 1948 in the matter of giving citizenship to our people”). Debates in the Irish Seanad also suggest that some lawmakers were motivated by the fact that “British citizens living here contribute to taxes and to rates. They perform jury service. They contribute in every way as citizens, but they are restricted from voting.” See 56 SEANAD DEB. Col. 1069 (Jul. 10, 1963).

<sup>65</sup> Alexandra Starr, *Ireland Transformed*, SLATE, Oct. 16, 2008, <http://www.slate.com/toolbar.aspx?action+print&id=2201909>.

<sup>66</sup> See *infra* note 71 and accompanying text.

In 2004, that ambivalence came to the fore in dramatic fashion, when 80 percent of the national Irish electorate voted to end the extension of *jus soli* citizenship to the children of all immigrants, limiting Ireland's once universal birthright citizenship rule to children born of at least one Irish citizen parent, or of one parent entitled to be a citizen. This outcome has been attributed to escalating concern that the universal *jus soli* guarantee was being abused by asylum claimants entering Ireland to give birth to Irish children.<sup>67</sup> But it is also of a piece with the retrenchment in recent years of immigrants' rights, along with a political discourse of increased demonization and categorization of the asylum seeker.<sup>68</sup>

The fact that local noncitizen suffrage remains secure, despite the political movement that resulted in the citizenship referendum, might seem curious at first glance. The referendum might have reflected Irish voters' desire to control immigrants' access to the full rights of citizenship by preventing migrants not eligible for citizenship from forcing new members—their children—into the polity. But this desire for control over the citizenry was not accompanied by calls for restrictions on immigration,<sup>69</sup> nor was a defense of “Irishness” a part of the official campaign.<sup>70</sup> The political movement behind the referendum thus appears to have been compatible with a limited recognition of suffrage rights for those admitted to permanent residence, particularly at the local level. The referendum brings into relief the fact that local voting does not solidify a permanent relationship between immigrants and the body politic in the same way that citizenship rules do.

The fact that the referendum did not bring to the surface criticism of noncitizen suffrage might also be suggestive of the limited role the practice, particularly at the local level, plays in bringing immigrants into the polity. Research from Europe and Ireland lends support to this view. A recent report studying the extent to which political parties have succeeded in promoting immigrant integration in Ireland found that, although efforts have been made to encourage immigrants entitled to vote to register, many immigrants do not realize they are entitled to vote, and government outreach to voters has been thin.<sup>71</sup> Furthermore, the mere existence of the franchise is

<sup>67</sup> See Starr, *supra* note 65; see also John A. Harrington, *Citizenship and the Biopolitics of Post-nationalist Ireland*, 32 *J. L. & Soc'y*. 424, 443–445 (2005) (detailing government arguments in defense of the referendum, including the claim that citizenship “tourism” was burdening the health care system).

<sup>68</sup> See Bryan Fanning, *Racism, rules and rights*, in *IMMIGRATION AND SOCIAL CHANGE IN THE REPUBLIC OF IRELAND 6*, 17–21 (Bryan Fanning ed., Manchester Univ. Press 2007).

<sup>69</sup> One assessment of the referendum as compatible with open immigration policy emphasizes Ireland's increased reliance on temporary workers, suggesting that the citizenship referendum represents a means of continuing immigration while policing entry into citizenship in a way that facilitates the emergence of two workforces, or two classes of membership. See also Mancini & Finley, *supra* note 20, at 585.

<sup>70</sup> See Harrington, *supra* note 67, at 447.

<sup>71</sup> BRYAN FANNING, NEIL O'BOYLE & JO SHAW, *NEW IRISH POLITICS: POLITICAL PARTIES AND IMMIGRANTS IN 2009* (2009), available at [http://www.ucd.ie/mcri/resources/new\\_irish\\_politics\\_report\\_final.pdf](http://www.ucd.ie/mcri/resources/new_irish_politics_report_final.pdf) (drawing this observation from the reports of immigrant candidates, members of political parties, and individuals active in voter registration campaigns claim); see also Bryan Fanning & Fidele Mutwarasibo, *Nationals/non-nationals: Immigration, citizenship and politics in the Republic of Ireland*, 30 *ETHNIC & RACIAL STUD.* 439, 444 (2007) (“Concerns raised by NGOs months in advance of the election that non-citizen immigrants entitled to vote in the local government elections would encounter difficulties in registering to vote proved justified”).

not sufficient as a defense mechanism if noncitizens are not able or choose not to take advantage of the power it affords them to influence the platforms of political parties or assume office at the local level, where possessing some state power might translate into influence at higher levels of government and with the electorate as a whole. The same report recommended active promotion of naturalization among members of the immigrant community in Ireland, underscoring again that noncitizen suffrage and naturalization are far from perfect substitutes.

In the end, the most interesting dimension of the alien suffrage story may be not whether divergent practices suggest different conceptions of democracy and political organization among nation-states, but whether alien suffrage can facilitate immigrant incorporation in a way that advances robust participation and social cohesion—a consideration beyond the scope of this essay but worthy of further research. In Ireland, the practice of noncitizen voting at the local level transforms political parties into potentially powerful agents of acculturation. Though party outreach to noncitizen voters has been limited, it could develop with time, because the incentive for parties to cultivate noncitizen interest is built into the structure of the electorate.<sup>72</sup> Moreover, research from the United States and Canada underscores the importance of creating mechanisms for active noncitizen participation in order to ensure immigrant integration. These mechanisms need not take the form of voting rights; however, something more than relying on networks created by the economy and family seems in order.<sup>73</sup> In the United States, even if the political culture does not offer fertile ground for the implementation of noncitizen voting, it may still be possible to foster a culture of participation. Perhaps the most important conclusion to derive from a consideration of alien suffrage practices, then, is not that the realization of democracy should lead states on an inexorable march toward New Zealand–style noncitizen voting but, instead, that claiming access to and participation in the polity takes work and recognition through a variety of state and nonstate mechanisms.

## Conclusion

In New Zealand and Ireland, the practice of noncitizen voting has been well entrenched and accepted for decades and does not seem threatened by growing disquiet over rising numbers of immigrants. In the United States, by contrast, alien suffrage represents a vital but now nearly defunct practice in the nation's long history of immigrant incorporation. The dramatic growth of the immigrant population in the last two decades may yet give rise to more examples of noncitizen voting in the U.S., but it necessarily will be piecemeal because of the structure of the states' control over the franchise.

Explaining these differences is as easy and as difficult as pointing to three different systems rooted in similar principles of popular sovereignty mediated through

<sup>72</sup> For studies of efforts by Irish political parties to reach out to noncitizens, see FANNING, ET AL., *supra* note 43; FANNING, O'BOYLE & SHAW, *supra* note 71.

<sup>73</sup> See BLOEMRAAD, *supra* note 30, at 251 (emphasizing that political incorporation works better when "government extends a hand," offering "concrete settlement assistance" and recognizing "diverse identities").

demonstrably different constitutional structures and histories. It may be possible to identify, broadly, the political and cultural characteristics that lead democratic societies to adopt alien suffrage. However, among those societies where the practice has played a role in the development of the polity, it can be difficult to disentangle the story from the society's particular constitutional histories and structures, making generalized conclusions about the relationship between alien suffrage and the nature of democracy difficult. It is hardly novel to suggest that a society's decision to adopt a particular set of alien suffrage practices reflects its own political culture.

Still, what this sort of study does reveal is that, despite the close alignment drawn in theory and practice between the right to vote and the definition of the people, the political incorporation of noncitizens does not rise and fall on whether the vote has been extended. In the end, there are many ways to construct a democratic polity, and the process of construction is an ongoing and contested one to which political debates and institutions at every level of government contribute. The variety of ways in which alien suffrage has been assimilated into the political cultures of democratic societies thus underscores a generalizable point—the process of constructing the people of a democracy is dynamic and realized through multiple mechanisms of decision making.