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2023

## The Constitutionality of Non-Citizen Voting and its Use in Modern Local Elections

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# The Constitutionality of Non-Citizen Voting and its Use in Modern Local

## Elections

### **I. Introduction**

The ability to vote is the ability to have a voice. Being a part of a community means that your voice is entitled to representation. That representation should equal that of the whole community. Your voice should not be drowned out or muted by others. Speaking with a vote is something that Americans hold sacrosanct. The right to vote is seen as a patriotic duty. Many people would deny the ability to vote in any American election to non-citizens because it is a fundamental right granted to citizens. However, that is not the case. The labor of holding elections is largely given to the states. The Constitution does not define who is automatically included in the election process. The Constitutional grant regarding elections has been that states control the manner, timing, and places of our elections.<sup>1</sup>

The Constitution, through amendment, has only added who cannot be left out. The grant of who has the right to vote has been defined in the negative sense. States allow voting instructed by the Constitutional amendments that explain who cannot be denied the right to vote. There are people in this country who are purposely left out of the election process. There is also nothing in the Constitution that explicitly states that citizenship is a mandate for suffrage. So why do most citizens think that citizenship is a prerequisite to the polls.

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<sup>1</sup> U.S. Const. Art. 1 § 4.

The idea of non-citizen voting is not foreign to these United States. Alien suffrage has existed in many states in the Western frontier as the county expanded. This was used, in large part, as a tool to gain cooperation of landowners and grant citizenship in newly controlled areas of the continent. Many people in these territories were not citizens and the federal and local governments saw the inclusionary action of voting as an incentive to these people. If the people had a voice, then they were likely to stay included in the way their territory was governed.

The right of alien suffrage was slowly extinguished over time. Local municipalities have fought to bring back alien suffrage. This is possible because there is no federal ban on non-citizen participation in State or local elections. Even where a state may exclude non-citizens from participating in Statewide elections through legislation, a local municipality is free to include non-citizens in local matters. These grants only allow for participation of non-citizens to vote in local or municipal elections. These participants must meet the criteria by being permitted to work, DACA recipients, or green card holders. Participation in municipal elections is not offensive to the State or Federal Constitution where allowed. The right of alien suffrage has been granted on the local level in several counties in Maryland and most recently in New York City. The passage in New York City will extend the right to vote to approximately 800,000 non-citizen voters.

Opponents of these measures argue that statutes like the one passed in New York City cannot stand because it is allowing unqualified people to participate in local government. They primarily make the argument about loyalty; saying that a person who is not a citizen of the USA does not have the requisite loyalty to this country and may still have affiliation to their country of origin. Other arguments include non-citizens not having the knowledge to participate in

elections and that it would encourage the act of illegal immigration. If non-citizens had a voice, perhaps more would want to come to U.S. municipalities that allow it and control the space or change the way that area votes.

However, most of these arguments are easily debunked. “Illegal” or “undocumented” non-citizens still cannot participate in local elections by any mandate. The documentation to vote is so thorough that if someone were to attempt a vote in this manner, it has a higher chance of being noticed, and that person now put their already questionable existence in this country into jeopardy. This does not sound like a logical risk that one in that position would be willing to take.

The non-citizens that are being granted the right to vote must meet strict qualifications. The way the vote had previously been restricted to male landowners of the frontier, the participation in elections is not granted to everyone. So, questions of loyalty can be curbed because these voters have already taken active steps to further their standing within their communities. Perhaps these inclusions can even motivate them to become full citizens and gain further access to their political voice.

This article is going to examine the current New York City statute as well as the prior attempt to get it passed. Then it will examine how similar statutes in other cities have been implemented. Then we will examine a history of non-citizen voting in the United States. Followed by the most prominent arguments against the grant of non-citizen voting. Finally, we will see if the current non-citizen voting plans are hopeful to have the same kind of broad change in gathering interest in full citizenship for those that utilize the program.

## II. Implementation of the New York Statute

In December of 2021, the New York City Council voted to allow qualified non-citizens the right to vote.<sup>2</sup> Newly elected Mayor, Eric Adams, could either sign the bill into law or veto; and he chose to do neither. New York law provides the mayor the opportunity to veto a bill within 30 days.<sup>3</sup> Without any action, the bill passes into law automatically, as happened in this instance. Mayor Adams waited for the bill to become law without his signature and did not stand in the way of the January 9, 2022, deadline. This action, or inaction, was a form of communication and can be interpreted as Mayor Adams' feelings toward this measure. The newly elected mayor was not going to stand in the way of the work conducted by the previous city council. However, he was not giving the legislation a ringing endorsement by putting pen to paper either.

It is curious that Mayor Adams did not sign the bill and it allowed to become law by statute when on the day of the deadline he made a press release that sounds like an endorsement. Council member Ydanis Rdoqiguez, the author of the introduction, Tweeted the press release that states Mayor Adams' belief that all New Yorkers should have a voice in their government.<sup>4</sup> Adams stated support for the proposed legislation. Adams expresses that he held doubts about the introduction, but had those doubts put to rest. However, Mayor Adams then

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<sup>2</sup> Grace Ashford, *Non-citizens' Right to Vote Becomes Law in New York City*, N.Y. Times (Jan. 9, 2022), <https://www.nytimes.com/2022/01/09/nyregion/non-citizens-nyc-voting-rights.html>.

<sup>3</sup> *id.*

<sup>4</sup> Ydanis Rodriguez (@ydanis), TWITTER (Jan. 8, 2022 8:53 pm), <https://twitter.com/ydanis/status/1479988204547854337>.

goes on to say that this will be a positive impact on potentially “millions” being brought into the political conversation, it has been said in previous reporting that the approximate number of non-citizens affected by this legislation is about 800,000 people.<sup>5</sup> So, not quite approaching the “millions” that Mayor Adams is anticipating, but perhaps that is signal that this legislature is meant for expansion into the many cities across America, thus impacting the millions.

With the enactment of this legislation, one might wonder exactly “who is allowed to vote?” Who is a qualified non-citizen? Clearly the one big qualification begins with the person not being a citizen of these United States. According to the legislation, Introduction- 1867-A, a qualified person will be termed a “municipal voter.” A municipal voter is a person who is not a United States citizen on the date of the election.<sup>6</sup> In New York City, like in most major cities, local elections along with state and federal elections are generally held on the first Tuesday of November. This does not include local primaries, which occur at times specified by parties, or special elections.

The municipal voter is a lawful permanent resident, or a person authorized to work in the United States.<sup>7</sup> This includes DACA recipients and green card holders. In addition to either of those the two previous requirements, the voter must also be a resident of New York City for 30 consecutive days, or longer, prior to the election date.<sup>8</sup> Apart from the status requirement, residency requirements have been largely viewed as Constitutional. The 30-day residency

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<sup>5</sup> See Ashford, *supra*.

<sup>6</sup> The N.Y. City Council, File #: Int 1867-2020, Version: A, at 2, (Dec. 1, 2021).

<sup>7</sup> *id.*

<sup>8</sup> See *id.* at 3.

requirement is similarly set forth in the New York State Constitution, that also sets a minimum of 30 days of residency to be eligibility to vote in statewide elections.<sup>9</sup>

The municipal voter must meet all other qualifications for voting under New York State election law, except for citizenship. The person must meet the residency requirement and age minimum designated by election law for New York State. According to records this would make approximately 808,00 people eligible as new voters in municipal elections.<sup>10</sup> The current New York City population is approximately 8.4 million people. That of course does not equate to the actual voting population.

However, it is significant that approximately a tenth of the general population is physically present within the five boroughs of New York City but has not been eligible to vote in previous local elections. Nevertheless, this does not translate into all eligible non-citizen voters taking part in the polls. Even among qualified voters in the previous election, only about 21 percent of eligible voters cast their ballots for municipal elections in 2021.<sup>11</sup>

It must be noted that the bill in New York did not pass unanimously. There were several, mostly Republican, council members that were opposed to the passage of the legislation. Local news outlet, the *Queens Eagle*, noted which councilmembers from the borough voted for and against the legislation. Of those council members that opposed the bill, they are on record as stating they could not agree with the 30-day residency requirement. Insisting that it was too

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<sup>9</sup> N.Y. Election Law § 5-104.

<sup>10</sup> See Ashford, *supra*.

<sup>11</sup> Emily Ngo, *Only 21% of registered voters cast ballots in NYC general election, BOE numbers show*, Spectrum News, (Nov. 30, 2021), <https://www.ny1.com/nyc/all-boroughs/politics/2021/12/01/nyc-election-results-nyc-elections-2021-nyc-very-low-turnout>.

low and was material enough that it should be revisited. There was even a failed motion to have the bill sent back to committee to have it redrafted. Council member Laurie Cumbo also expressed concerns that this would somehow harm or marginalize black voters, should it pass.<sup>12</sup>

The borough of Queens and its elected officials have an important stake in the non-citizen voting game. The data from 2011 showed that Queens has the highest number of non-citizen visa holders.<sup>13</sup> The number presented shows that 22 percent of the borough's population is made up of non-citizens. Just over a fifth. If those are visa holders or some other form of qualified non-citizen, that could be enough of a voting population to impact future elections within the borough.

Many of the arguments against the legislation echo the same arguments that will be explored later in this article. Councilmembers expressed their fear that these qualified non-citizens have not done enough to educate themselves about the U.S. or the political system here to be worthy enough of the vote. They argue that the non-citizen voter may not hold the best interests for the city and therefore should be denied the vote.<sup>14</sup> Councilmembers once again attacked the 30-day residency requirement as simply not an adequate time for a person to qualify as a municipal voter.

The measure granting non-citizen voting rights that passed in 2021 and became law in January of 2022 is not the first effort of its kind. A very similar piece of non-citizen voting

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<sup>12</sup> Jacob Kaye, *Non-citizen voting bill passes City Council*, Queens Daily Eagle, (December 09, 2021), <https://queenseagle.com/all/non-citizen-voting-bill-passes-city-council>

<sup>13</sup> A Report from the Public Service Management Program at the Colin Powell School of Civic and Global Leadership, *NON-CITIZEN VOTING IN NEW YORK CITY*, at 6, (June 2014).

<sup>14</sup> *id.*

legislation was first proposed by Council Member Daniel Dromm in 2010, through Introduction 410-2010.<sup>15</sup> Proposals for non-citizen voting had also been attempted in 2005 and 2006, with Introduction(s) 628 and 245 respectively.<sup>16</sup> However, all three attempts at granting non-citizen voting rights to qualified individuals never made it to an actual vote of the council. The bills were dropped from the council's agenda when those terms were completed.<sup>17</sup>

Council Member Dromm also called qualified non-citizens "municipal voters." The language and propositions were very similar in their definition of who was encompassed in the qualified municipal voter definition. However, there are some key differences in the two pieces of legislation. One obvious difference is the residency requirement. In Dromm's 2010 bill, the residency requirement is six months within New York City, or longer, by the date of the election.<sup>18</sup> In contrast with the 30-day requirement set forth in the 2021 legislation, which shortens the requirement by five months.

One could speculate where the six-month requirement originated because the election law of New York State currently requires residency for 30 days before being eligible to vote. Whether New York State election law was also different in 2011 is one explanation for the key difference in the two bills. If not, then perhaps it was to ensure that non-citizens demonstrated a commitment to their communities even longer than was required by the state.

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<sup>15</sup> The N.Y. City Council, File #: Int 0410-2010, Version: \* at 2, (June 11, 2010).

<sup>16</sup> A Report from the Public Service Management Program at the Colin Powell School of Civic and Global Leadership, *NON-CITIZEN VOTING IN NEW YORK CITY*, at 4, (June 2014).

<sup>17</sup> *id.*

<sup>18</sup> The N.Y. City Council, File #: Int 0410-2010, Version: \* at 2, (June 11, 2010).

Municipal election is defined essentially the same in both the 2010 and 2021 legislation. The 2021 legislation defines a municipal or local election as any general election, primary or run-off for mayor, public advocate, comptroller, borough president, and council member. The 2010 bill specifies that all municipal ballot measures are accessible to municipal voters, but the 2021 election refers to what could be ballot measures as “municipal referendums.” This could be to clarify that the measures are specific to the municipality and to municipal voters. The municipal referendums are pieces of legislation or amendments to the New York City Charter that would affect the five boroughs of New York.

Outside of the amendments to the New York Charter, local administrative law within the city is only passed by vote in the New York City council. Therefore, any vote by citizens or non-citizens alike does not affect local or administrative law. This in effect cancels one of the primary arguments against non-citizen voting, and that is their viewpoint diluting the vote of local citizens. They may have a voice in who gets voted to the city council, but members of the city council must make themselves attractive to all voters, not just non-citizens. So, they will likely act in a manner that is in line with what they campaigned on when designing local legislature.

### **III. The History of Non-citizen Voting**

The story of alien suffrage and non-citizen voting began not long after the birth of the country. The country expanding westward was seen as the destiny of the United States. However, this territory was filled with people who were not part of the United States or the

original colonies. This begged the question of how to get these landowners and men who were in control of large parts of land to want to join the fledgling nation. Thus in 1789 The Northwest Ordinances were passed. These ordinances were established in the territories around the Ohio River, with the intention of settling those areas for the growing nation.<sup>19</sup> The ordinances allowed land owning aliens who had been residents in the area for two years to vote for representatives of the territorial legislature. Aliens who met a residency requirement of three years were eligible to serve in these legislative bodies.<sup>20</sup>

We see a similar structure in the modern-day non-citizen voting legislation. There was an established group of qualified people, landowning men, paired with a residency requirement. The residency requirement in this case also had a graduated component attached to how long a person was in the territory. The legislative purpose was also clear. It was to get those landowners who met the requirements to get involved in the passage of legislation and possibly become representatives of the territory. This involvement led to an investment in the local politics and urge to become full citizens of the territory. The first experiments in alien suffrage were active pathways to citizenship in the young nation.

This was the norm in expanding areas of the west for many years, but the practice finally faced a challenge in court in 1809 with the case of *Stewart v. Foster*. In *Stewart*, a Pittsburgh resident and non-citizen was held to be entitled to the right to vote.<sup>21</sup> The plaintiff had been

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<sup>19</sup> Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1402 (1993).

<sup>20</sup> *id.*

<sup>21</sup> *See id.* at 1403.

denied to the right to vote, even though he fit the requirements of someone that is allowed to take part in the election process. The plaintiff was a tax paying resident. The court ruled in his favor on the basis that he had lived in the municipality and had paid taxes for a period of one year.<sup>22</sup>

In a notable way this was the first instance where the concept of a non-citizen or resident alien being denied the right to vote was raised, despite it being the local practice. The court in that case considered that perhaps aliens should not be granted the vote and compared them to women and infants. However, the court determined that the local law incorporating Pittsburgh withheld to citizens the right to run for office, but that any tax paying male was entitled to vote, regardless of citizenship status. The Supreme Court held that natural justice required anyone who lived in an American jurisdiction, paid taxes, and owned property to have the right to vote.<sup>23</sup>

This is again another layer of the framework set for non-citizen voting rights. There is a person who is an active member of a community. A taxpaying landowner. They are of a certain age. They may not be allowed to hold office, but they are granted the ability to be a part of the local political process. The Supreme court at the time called it a “natural justice,” and that idea of community participation should be kept in mind when analyzing the usage of modern-day non-citizen voting.

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<sup>22</sup> *See id.* at 1403.

<sup>23</sup> Bryant Yuan Fu Yang, *Fighting for an Equal Voice: Past and Present Struggle for Non-citizen Enfranchisement*, 13 *Asian Am. L.J.* 57, 59 (2006) (citing *Stewart v. Foster*, 2 Binn. 110, 122 (Pa. 1809)).

Then came *Spragins v. Houghton* in 1840, which took place in Illinois. Illinois was unlike other states because it had retained alien suffrage long after the war of 1812.<sup>24</sup> The court in *Spragins* understood that the grant of alien suffrage was allowed in the northwest territory to encourage emigration. The *Spragins* court examined requirements to vote in the Illinois territory at the time. One could be a resident of the United States for three years and a resident in the voting district, or if not a citizen, could be a resident of the district for three years and own two-hundred acres.<sup>25</sup> The requirement was to be a representative was a U.S. citizenship who resided in the district for and owned two-hundred acres of land. However, if not a citizen, the person could still be a representative if they were a resident for three years and owned outright at least two-hundred acres of land.<sup>26</sup>

If all landowners of large enough tracts of land could take part in the legislation of the local area, it encouraged participation from those in control of the area. The court interpreted the Illinois framers to having believed that the right of alien suffrage would encourage more citizens to settle in the area.<sup>27</sup> The court describes a political relationship that through residence, habitation, and common social membership there is established a political relationship between the governed and the governing.<sup>28</sup>

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<sup>24</sup> Raskin, at 1404.

<sup>25</sup> *Spragins v. Houghton*, 3 Ill. 377, 393-94 (1840)

<sup>26</sup> *Id.* at 394

<sup>27</sup> *See* Raskin at 1405.

<sup>28</sup> *See id.* at 1405.

The establishment of a political relationship could be one of the goals of the modern statutes that establish non-citizen voting. Those that are eligible through non-citizen voting statutes are already in a relationship with the federal and local government. In a similar way to the alien suffrage of Illinois and the far west territories, this encouragement of participation in local government grows that relationship and forms stronger bonds.

Another player in the western territories was the state of Wisconsin. 1848 the Wisconsin Constitution sought to clarify a requirement that had been used by other states and territories in the past. Wisconsin added the additional requirement that those seeking to utilize the tool had to declare their intent to become citizens. Practitioners of the alien suffrage had two years to become a citizen. The addition codified something that had already been at play. The notion that the involvement in local politics would lead to community building and establish citizenship to its practitioners. In this way the model changed from one of non-citizen voting to one of pre-citizen voting.<sup>29</sup>

This should be a tool that modern law makers can reflect on when creating current non-citizen voting statutes. Modern statutes emphasize the role those non-citizens play in contributing to their communities. However, perhaps they can be used to encourage those that have already taken steps to be green card holding non-citizens and taxpayers to view themselves in this same light. They are members of the community who are on their way to holding full citizenship, and the ability to participate in local elections, much like the tool in Wisconsin, can incentivize going down the fully path to citizenship.

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<sup>29</sup> Ron Hayduk, *Democracy for All*, 24 (2006).

As the growth of the country progressed the tool of alien suffrage fell out of favor. With the coming of World War One and a new patriotic spirit, the idea that non-citizens should be participating any type of election began to be viewed negatively by everyday Americans. This was also coupled with the attempts to block slaves freed after the Civil War from the poll. The state and local laws around elections began to become more restrictive and less inclusive. In a storm of state election laws that sought to restrict access for people of color, and maintain a barrier to women, the laws began to exclude non-citizens who previously enjoyed the right of political participation in their communities.

New York was among the first states to require citizenship to go to the polls, beginning in 1804.<sup>30</sup> The citizenship requirement was held intact until 1968, when non-citizens were granted the ability to participate in school board elections.

In 1926, Arkansas became last state to remove the right of alien suffrage.<sup>31</sup> The right of alien suffrage largely disappeared except for local elections. Since 1968, New York City has granted non-citizens who are the parents of school children the right to vote and run for community school board.<sup>32</sup> This right was only granted if the person had a school age child in the public school system. The grant seems less reflective of other statutes because not only was the person free to vote in the school board election, but they were able to hold a position on the school board. This mirrors the attitude of the modern statute that when a person,

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<sup>30</sup> A Report from the Public Service Management Program at the Colin Powell School of Civic and Global Leadership, *NON-CITIZEN VOTING IN NEW YORK CITY*, at 4, (June 2014).

<sup>31</sup> Hayduk, at 19.

<sup>32</sup> Raskin, 141 U. Pa. L. Rev. 1391, 1460-62.

regardless of citizenship status, has a vested interest in the local issue then they should be free to have a voice in decisions regarding that interest.

New York City was not alone in giving the local vote to non-citizens, with Chicago also allowing non-citizens vote in school board elections. However, in 2002 New York City took the ability away. The City Council granted control of the city school districts to the Mayor's Office.<sup>33</sup> This took away the traditional school board structure and created the current system that has a Chancellor in charge.

There are various subdivisions of city leaders below the Chancellor that now run the New York City public school system. These positions are appointed by the Mayor's Office and further down the line by the Chancellor in charge. So, without the previous structure, there is no need for a school board election. One might imagine that the right of non-citizen voting in this capacity might never have gone away had the system not been switched to its current structure. The requirements that allowed non-citizens to vote and even hold a position in the school board might have been evidence to the current legislation that it does not offend the system itself.

#### **IV. The Constitutional Argument for Granting Non-Citizen Voting**

A strong argument in favor of non-citizens being granted the right to vote in local elections, at minimum, is that the a concept is not outrightly banned by the Constitution of the

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<sup>33</sup> David M. Howard, *Potential Citizens' Rights: The Case for Permanent Resident Voting*, 95 Tex. L. Rev. 1393, 1400, (2017).

United States. Election law is primarily controlled by the states. As stated in Article I of the Constitution, the States control the time, place and means for holding the actual elections. Further, one common misconception is that it would somehow interfere with the way that immigrants and legal aliens within the country go about their pathway to becoming full fledged citizens. However, this does not interfere with Immigration or Naturalization Practices.

Non-citizen voting does not subtract from the obligations imposed on aliens by immigration law or otherwise hinder the purposes of current immigration law. The simple right to vote in local elections, or even state and federal elections, neither confers U.S. citizenship for federal purposes nor immunizes aliens against the operation of any provision of immigration or naturalization law.<sup>34</sup> In practice, the registration for a non-citizen vote, in New York City, is thorough in documenting who is voting and how they qualify for the ability to vote under this statute. The penalties are also spelled out clearly. The person is violating the law if voting without the proper authorizations. This will only lead to further issues, if they were on a legitimate pathway to citizenship or holding legitimate documents granting the right to work and exist in this country.

There is support that could be read into US Code Title 18, section 611 which allows for voting by Aliens and non-citizens. Their participation is authorized in local elections if the participation is allowed by state law. This follows the precedent that the definition of a political community is in the hands of the state.<sup>35</sup> However, non-citizens are barred from voting in

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<sup>34</sup> Raskin, at 1430.

<sup>35</sup> Kimia Pakdaman, *Non-citizen Voting Rights in the United States*, Berkley Pub. Pol'y J., (Mar. 4, 2019), <https://bppj.berkeley.edu/2019/03/04/spring-2019-journal-non-citizen-voting-rights-in-the-united-states/>.

federal elections for offices such as President, Vice President, Presidential elector, US Senate, US House of Representatives, D.C. Delegate, and Resident Commissioner. The only allowance for non-citizen voting has to do with communities and elections that may have a direct impact on their lives.

If a local municipality or state decides to hold democratic elections, then they are the body who is free to set the criteria of who is allowed to participate. This is only preempted by the federal standard of who cannot be left out. This notion is contrary to what most Americans believe. When asked, most Americans think that the “right” to vote is something that is granted to them by some form of federal or even state writing. Many people base the inherent right to vote in their being citizens of the United States. However, the United States Constitution does not prohibit non-citizen voting. The Constitution only mentions citizenship when referring to persons who are both citizens and were held as slaves prior to the Civil War. These people were not considered citizens or eligible to vote at the time. Further, this framework of who cannot be excluded is set at the federal level.

Specifically, Article I, clause 2 of the Constitution provides that the House shall be elected "by the people of the states" and the states determine the qualifications for the electorate.<sup>36</sup> So, this could mean that it is up to the state itself to count among them who are its people. There is no exclusive grant to citizens in that definition. The State can determine who qualifies to participate in the electoral process. If one really wanted to extrapolate that qualification, then the House of Representatives, which is a part of the federal government, is

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<sup>36</sup> Elise Brozovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 Hamline J. Pub. L. & Pol'y 403, 411, (2002).

meant to be voted on by the people of the states. If the state has the option to include non-citizens in who can take part in statewide elections, then they could theoretically include include then in an election for a member of the House of Representatives.

The federal constitution and federal common law bar states from setting disparate standards for representatives. This can be found in the litigation on term limits and experiential standards.<sup>37</sup> Some state constitutions do have a requirement that voting participants be citizens. However, they do allow non-citizens to participate in local elections and do not consider this a violation of their constitutional standards.

If the state does not restrict the core electorate from their ability to vote, based on the other provisions of the Constitution, then they are free to define what the political community is within its boundaries. Congress has no Constitutional ability to restrict that right from the States.<sup>38</sup>

Voting can be viewed as a form of protected speech. How one votes and how one participates in elections is seen as valid protectable speech under the First Amendment. How one votes is a form of political expression under the First Amendment. The courts have acknowledged that permanent residents and citizens are afforded First Amendment protection over speech.<sup>39</sup> Extrapolate this further and this includes political speech. By that principal non-citizen political speech through voting could be counted as constitutionally protectable speech. Denying them the right to vote and express themselves in local elections, as opponents of the

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<sup>37</sup> *United States Term Limits v. Thornton*, 514 U.S. 779, 783, 115 S. Ct. 1842, 1845 (1995)

<sup>38</sup> See Brozovich, *supra*.

<sup>39</sup> Howard at 1404.

statutes seek to do, would deny these people who are contributing to local communities of their political voice. This would violate the First amendment rights that should be afforded to them.

## **V. Municipalities That Have Granted Non-citizen Voting**

### **a. Takoma Park Maryland:**

A well-known example of non-citizen voting is Takoma Park Maryland. The Congressman Jamie B. Raskin, a proponent of non-citizen voting, authored the city of Takoma Park's successful non-citizen voting initiative. Congressman Raskin, who represents Maryland's 8<sup>th</sup> Congressional District, previously served as a State Senator in Maryland. Raskin argues that non-citizen voting is a Constitutionally permissible means of expanding the electorate to include that sector of the population.<sup>40</sup> There is a population that is identifiable through the census and other data. This group works and contributes to the local community but does not have its voice heard.

A similar view is taken of the grant of non-citizen voting in the New York City area. The population of non-citizens that would be eligible to vote is not small even in comparison to the relatively large population of the city itself.

Takoma Park lays out its system of election registration in Section 603 of the City Charter- Registration.<sup>41</sup> The section states in part that (a) Any resident of the City who is a

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<sup>40</sup> Brozovich at 404.

<sup>41</sup> City of Takoma Park, Md., Charter of the City of Takoma Park, § 603, ( 2008).

United States citizen must be properly registered to vote with the Montgomery County Board of Elections in accordance with state law to vote in City elections. (b) Any resident of the “City” who is not a United States citizen, but who is otherwise qualified to be a registered voter in the State of Maryland may register with the City Clerk to vote in City elections. The City Clerk shall maintain a supplemental voter roll, separate from the list of registered voters in the City generated by the Montgomery County Board of Elections, which shall include the names of those non–United States citizens who are registered to vote in City Elections. The City Clerk shall promptly send notice to any jurisdiction in the United States where the new registrant was formerly registered, requesting the cancellation of said voter’s prior registration.

Takoma Park is attempting to ensure that the non-citizen voters can register but keep them separate from the voter rolls of United States citizens. This serves many purposes. One being that many places will hold local, state, and federal elections on the same day or cycle, and non-citizens would only be allowed to vote in some of the elections and not all that are occurring. If the non-citizen voter were given a ballot not intended for them, resulting in an error, that could disturb the trust in the voting process. A trust that is already thin in many parts of the country. There must also be validation to ensure that when the non-citizen is registering to vote in the new local municipality that they are not still registered in the municipality they may have traveled from.

An important thing to acknowledge about Takoma Park is that the resolution to allow non-citizen voting predates the passage in New York City by almost thirty years. The first resolution to allow non-citizen voting was passed in 1993. The legislation was passed for many

of the same reasons as statutes that would follow, i.e., community building and community participation by resident aliens.

So, proponents and opponents alike would be curious to know how the initiative has fared. One would be hard pressed to call it a “success” because that is a metric that can be hard to measure. In an opinion piece for *Cambridge Day*, author Karan Gill, comments on statistics of voter participation. In the article it is noted that in 2009 out of the 436 non-citizens that are registered to vote only 32 participated in the local election.<sup>42</sup> In the article Gill quotes Professor Ronald Hayduk, who has written on United States elections and voting rights, and he called the results “disappointing” for anyone who was really pushing for the inclusion of non-citizens. Gill opines that perhaps the poor voter turnout is due to many non-citizens not being aware that they can vote in these local elections. That may be, or perhaps non-citizens are just as unenthusiastic as the general voting population. Regardless, the evidence presented by Gill should dispel any fears from the opposition that non-citizens will vote in such large numbers that they will drown out the voice of the rest of the population.

#### **b. The Failure of Proposition F in San Francisco and the Success of Prop N:**

Placed on the ballot in 2004, Proposition F would have given non-citizens the right to vote in San Francisco School Board Elections.<sup>43</sup> California allows for certain public measures to

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<sup>42</sup> Karan Gill, *To appreciate import of non-citizens voting, look at Maryland city where they already do*, (April 27, 2017), <https://www.cambridgeday.com/2017/04/27/to-appreciate-import-of-non-citizens-voting-look-at-maryland-city-where-they-already-do/>.

<sup>43</sup> See Yang at 57.

be decided by a ballot vote by citizens. San Francisco sought to introduce a bill that was similar the structure that had recently been taken away in the New York City School board system. This ballot would allow parents of children who are enrolled in the San Francisco Municipal School District the right to vote for its board members.<sup>44</sup> Non-citizens would not be able to hold a seat on the school board. All other California election law requirements would remain in place. Additionally, the person voting would have to have a child enrolled in the public school system.

The ballot failed by a slim majority. This failure was not a landslide and demonstrates that there are many people who see the relationship between the interest and welfare of the community and those non-citizens that are actively participating in it. The people are sending their kids to a school where they have no say in the instruction being taught, or how funding is going to be spent to make their kids into well-rounded adults. This could make non-citizen parents to these kids feel like they are not welcome in the school or even in the community. If the parents are less willing to be involved in the school process, then that can translate into the kids also having trouble acclimating to the school and local culture.

San Francisco did not give up and the ballot measure was reintroduced several times. Eventually the ballot measure was reintroduced in 2016 under Proposition N, to allow parents of students, regardless of citizenship to vote in school board elections. Non-citizens who are

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<sup>44</sup>See id. At 58.

also recognized as the legal guardians of any student in the school system would also be allowed to vote in the school board election.<sup>45</sup>

Proponents of the bill argued that this would increase parental involvement and strengthen the school system. There were additional oppositional arguments like Maryland and New York, that alien suffrage is not unconstitutional and there is no outright ban on it by any means.

Opponents made the argument that allowing any non-citizen to vote in any election would be a violation of California Election Code. That is simply not the case where local municipalities can set their standards for local elections. In 2016, the ballot measure Proposition N passed.<sup>46</sup> The ballot passed by a vote of 54 percent in favor and 45 percent opposed.<sup>47</sup> However, one congressman, did file a ballot initiative ahead of the 2020 elections that would require citizenship in California for any federal, state, or local election. If approved that measure would be able to preempt Prop N and extinguish the voting rights of the non-citizens involved. The ballot initiative was withdrawn prior to a vote. Proposition N was passed with a sunset clause, that is set to expire after the 2022, unless the legislation were to be extended via an ordinance

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<sup>45</sup> BallotPedia, *San Francisco, California, Non-Citizen Voting in School Board Elections Amendment, Proposition N, (Nov. 2016)*, [https://ballotpedia.org/San\\_Francisco,\\_California,\\_Non-Citizen\\_Voting\\_in\\_School\\_Board\\_Elections\\_Amendment,\\_Proposition\\_N\\_\(November\\_2016\)](https://ballotpedia.org/San_Francisco,_California,_Non-Citizen_Voting_in_School_Board_Elections_Amendment,_Proposition_N_(November_2016)).

<sup>46</sup> Vanessa Rancano, Chloe Veltman, *Non-citizens Allowed to Vote in S.F. School Board Election, But Few Will*, KQED, (2016), <https://www.kqed.org/news/11680868/voter-registration-for-non-citizens-begins-in-s-f-school-board-election>.

<sup>47</sup> See BallotPedia, *supra*.

from the Board of Supervisors, which they did at the beginning of this year, making the initiative a permanent one<sup>48</sup>

## **VI. Arguments Against Non-citizen Voting:**

Just as there are many proponents of allowing qualified non-citizens to vote in local elections, there are also many opponents. As demonstrated in the repeated ballot measure failure and eventual passage of the proposition in San Francisco, over the last two decades, the number on either side has been roughly equal. Opponents to non-citizen voting point to these four reasons for not granting alien suffrage.<sup>49</sup>

### **a. Non-citizens Do Not Have the Requisite Loyalty to the United States:<sup>50</sup>**

Many immigrants come to the United States to become citizens. They come with the hope of having the “American Dream” of a better life, and they want to integrate themselves into a country they have fought to get into. While some immigrants do have fond memories of their home country and culture and may seek to keep some of that in their everyday life that cannot be said about everyone’s story.

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<sup>48</sup> Zaidee Stavely, *Non-citizen parents can vote in San Francisco school board recall. But will they?*, (Feb. 4, 2022), <https://edsource.org/2022/non-citizen-parents-can-vote-in-san-francisco-school-board-recall-but-will-they/666796>.

<sup>49</sup> See Brozovich at 406.

<sup>50</sup> See id.

Refugees and asylum seekers, particularly, might be less inclined to want to support former governments that persecuted them for political, religious, ethnic, or other reasons. Those people fled an oppressive government or a war-torn country. They are most likely not a sleeper-cell terrorists' group, like one would imagine from movies or television shows. Those that did struggle to get to the United States and reach a level of resident alien status, with the ability to work, pay taxes, and attend school, would likely not want to jeopardize that over anything trivial.

However, of course one cannot imagine, unless you are in that position, what is it like should you have to choose a real "loyalty" to the United State or your home government. It is hard to imagine a situation, other than if the United States were in a conflict with your home country, that the need would ever really rise to a level of national security. The penalties that are already in existence through immigration law are not bypassed by any of the voting statutes. These carry harsh consequences for someone impersonating a citizen to vote. This could lead to fines, jail, or even deportation. The threat of deportation serves as a powerful deterrent to voter fraud.<sup>51</sup>

**b. Non-citizens Do Not Have the Knowledge to Vote Effectively:<sup>52</sup>**

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<sup>51</sup> See Yang at 70.

<sup>52</sup> See Brozovich at 406.

Those opposed to statutes like the ones passed in Maryland, California, and New York, often believe the statutes skip over important parts of the naturalization process to become a citizen.<sup>53</sup> Specifically, this allowance of non-citizens to vote glosses over the written test that a permanent residence must take before being granted citizenship. The argument is that the person will be voting in local elections and be unfamiliar with things like the bill of rights, the power of the U.S. Constitution, and the freedom of the religion.

The very simple rebuttal to that proposition is that there several natural born United States citizens, and perhaps even those that have gone through the naturalization process that do not know a number of those things off the top of their heads. The argument that opponents are making is not entirely that non-citizens lack the requisite knowledge of the constitution and different branches of government, but that they lack the knowledge of where and how to inform themselves about political matters and candidates. Another test many citizens would easily fail themselves. Realistically the non-citizens that would be granted the right to vote under these statutes have undergone many levels of scrutiny. They have experience with the governmental system to access a green card or worker status and are familiar with the inner workings of local government offices.

New non-citizens working on achieving citizenship status potentially have more of a fervor for learning about the local politics of their new home communities. If they are contributing at the local level and have school age children, they have more of an incentive to increase their level of involvement.

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<sup>53</sup> Howard Husock, *Non-citizen voting doesn't pass this test*, The Hill, (Dec. 1, 2021), <https://thehill.com/opinion/immigration/583470-non-citizen-voting-doesnt-pass-this-test>.

**c. Non-citizen's Political Interests Are Fundamentally Contrary to That of the Citizen Base:<sup>54</sup>**

Another argument akin to the lack of knowledge of the United States system of government is that the beliefs and ideals of the non-citizen is in direct conflict with that of the U.S. citizen. However, those non-citizens are present in our communities and do get counted in other ways. Non-citizens are counted in population distribution and polls that are relevant to municipal infrastructure such as schools and utilities.<sup>55</sup> The bodies of these non-citizens are relevant to local politicians when it comes to population data for the allocation of budget dollars for schools and other social programs. Yet these same people who are valuable members of the community are not allowed to have a voice in electing the same politicians in control of the local spending and statutes. Allowing them the right to vote in these types of elections balances the present condition where they are counted but have no voice.

Legislatures do not have a reason to listen to people who cannot vote. Disenfranchisement creates an imbalance in cities with large immigrant populations.<sup>56</sup> In this way the argument that the direct needs and ideals of the non-citizen voting population is perfectly aligned with that of the average U.S. citizen voting in the same local election.

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<sup>54</sup> Id.

<sup>55</sup> See Yang at 71.

<sup>56</sup> Howard at 1409.

A weaker argument presented in the negative, is that the amount of non-citizens voting is negligible. There is no sacrifice in not having their voice represented because there simply are not enough of them to warrant the need to listen.

The opposition argues that the number does not amount to a number that would sway an election in one direction or the other, so even if these people are not represented it does not make a material difference.<sup>57</sup> However, the extension of a right should not be determined by the amount of people who will use it.<sup>58</sup> This argument can also be rebutted by looking at the current participation in the election process. The right to vote does not get taken away from the four fifths of New Yorkers that do not participate in any local election. Active participation of the right to vote is not a requirement to keep the right vote or to have it granted to you.

**d. The Naturalization Process Would Be Severely Diminished if Non-citizens Are Granted the Right to Vote.<sup>59</sup>**

This argument is a minor one in the opposition to non-citizen voting. The argument that this serves as a distraction from the process of immigrants and non-citizens on their pathway to full-fledged citizenship. It kind of follows the same reasoning as some of the other arguments,

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<sup>57</sup> See id. At 1417.

<sup>58</sup> See id. At 1418.

<sup>59</sup> See Brozovich at 406.

in that it is circumventing the steps to become a citizen and granting a right to someone who is not ready to hold it.

This can be rebutted by the notion that someone who has taken the time to become part of the group qualified to vote under these statutes has already been through several hoops to gain that status. Those that are qualified under the statutes must be residents of the area and are green card holders or otherwise qualified to work in the area. They have reached some level of recognized contributing member of society in the eyes of the existing immigration process. The way that past alien suffrage statutes have been applied and the argument that should be made for the modern-day statutes is that these people are already on a path to citizenship. Granting them the ability to vote in local elections can entice and deepen their desire to become citizens by giving them a preview of what it is like to exercise their voice in the election process.

**e. The Extension of Voting Rights to Non-citizens Will Devalue the Right of  
Citizenship:<sup>60</sup>**

This is minor category in the opposition to the grant of non-citizen voting. This is the idea that by allowing non-citizens any ability to vote somehow cheapens or takes away from

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<sup>60</sup> See Yang 69.

the right to vote for full citizens in this country. This would blur the line between citizens and non-citizens.<sup>61</sup>

This is rebuttable simply because the grant of any kind of alien suffrage does not mute the vote of the citizens in any way. Full citizens are still the only ones allowed to vote in statewide and federal elections. Allowing a voice to a pre-existing segment of the population does not mute the voice of the other citizens around them. Another presumption would be that if the perspective of the non-citizen voter is so counter to that of the citizen voter, then this should encourage full citizens to show up to the polls and drown out the non-citizen voter's voice by being more politically active.

**f. The Grant Will Promote Illegal Immigration and Other Criminal Activity:<sup>62</sup>**

The opposition promotes the idea that granting non-citizens voting rights would establish a breeding ground for illegal activity. That would have many negative consequences, including undermining trust in the current election system. As we have seen from recent elections that is a very delicate topic that people are on edge about. There was widespread talk of voter fraud in the 2016 and 2020 elections. This led to accusations of non-citizens voting in

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<sup>61</sup> See Howard at 1402.

<sup>62</sup> See Yang at 69.

federal elections. Federal law and every state law prohibits non-citizens from voting in federal elections.<sup>63</sup>

That is not changed by the existing or proposed statutes. The penalties for a non-citizen voting in a federal election, which include prison time, fines and possible deportation are seen as effective deterrents. There is no reason to believe that a non-citizen voting in a municipal election would be attempting, purposefully or even mistakenly, to vote in federal or state elections that are not open to them generally.

Also, opponents have the idea that allowing non-citizen voting, even in local elections would increase the amount of illegal immigration activity that is taking place in the United States. The amount of immigration that is happening has only increased over time, and that is without any type of widespread accessibility to voting.<sup>64</sup> Immigrants make up roughly 13.5 percent of the U.S. population.<sup>65</sup>

**g. Non-citizen Voting Will Violate the Federal and State Constitutions.<sup>66</sup>**

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<sup>63</sup> Douglas Keith and Wendy R. Reiser, *Non-Citizens Are Not Voting. Here Are the Facts.*, Brennen Center for Justice, (Feb. 13, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/non-citizens-are-not-voting-here-are-facts>.

<sup>64</sup> See Pakdaman, (2019).

<sup>65</sup> See *id.*

<sup>66</sup> See Yang at 69.

This is the basic argument from opponents, and we already see that there is no barrier to alien suffrage in the United States Constitution. However, many states do have provisions that define the political community as being comprised of citizens.

Despite state constitutional hurdles, non-citizen voting can withstand these attacks using the Home Rule Doctrine. “Under the doctrine of home rule, the city charter trumps, or ‘supersedes,’ a conflicting state law when it pertains to a municipal affair.” Nevertheless, “the state retains supremacy” over non-municipal, statewide matters.<sup>67</sup>

Regarding the current New York City Legislation, the New York State Constitution states that citizenship is a mandate for participation in state elections.<sup>68</sup> This is in contrast with the new NYC legislation. This is where the use of the Home Rule Doctrine would effectively insulate the local election from State election law.

Currently the Republican National Committee has filed a lawsuit against the non-citizen voting legislation in New York City.<sup>69</sup> Their argument is that American elections should be decided by American citizens.<sup>70</sup> The Republican National Committee views this as a partisan move by the Democratic party to subvert future elections. This argument has not been prominent in the opposition to non-citizen voting in the past.

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<sup>67</sup> See *id.* At 75.

<sup>68</sup> N. Y., ELECTION LAW, § 5–102, (2021).

<sup>69</sup> See *Ashford supra.*

<sup>70</sup> *Id.*

However, this perspective has grown due to the assumption that most non-citizen, immigrants, or low-income people are more likely to register and vote as Democrats. Without sufficient data on how municipal voters have registered in the past, this is simply an assumption and has not been proven. Nevertheless, Republicans view the Democratic politicians attempts to extend voting rights as a long-term plot to ensure support in local elections.

## **VII. Voting as a Pathway to Citizenship:**

Many people could possibly wait until they are granted citizenship to vote. However, it is a relatively large amount of time to become a citizen. There is a backlog of citizenship applications. While legal non-citizens can apply for naturalization after five years, the process can average close to ten years to finally grant citizenship.<sup>71</sup>

The U.S. Department for Citizenship and Immigration services shows that the minimum someone must be a lawful permanent resident to apply for naturalization is five years.<sup>72</sup> There are apparently other routes around the five-year minimum that include being married to a United States citizen or having service in the U.S. armed forces. Those two circumstances might not be options for everyone applying for a type of citizenship. Someone might be immigrating with their family, or already married, and might not be qualified for military service.

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<sup>71</sup> See Yang at 63.

<sup>72</sup> U.S. Citizenship and Immigr. Serv., *Fiscal Year 2020 Naturalization Statistics*, (2021) <https://www.uscis.gov/citizenship-resource-center/naturalization-statistics>.

A noteworthy piece of data from the U.S. Citizenship and Immigration services statistics is that most people applying for naturalization attempt to do so through the sponsorship program. This is where a family member who is already a citizen can assist in legally getting their non-citizen relative through the process. That data speaks directly to the opposition of non-citizen voting who argue that those in the middle of the process or just completed are somehow not loyal to their new home. The argument can be made that they are excited to share in the process with other family members and committed to growing their family unit in their newfound communities.

Even after the five years wait time to apply for naturalization, the process of testing and issuing of documents can take anywhere from six months or more. A *New York Times Article* detailing lengthened wait times for processing under the Trump administration and prior to the COVID-19 pandemic, it is estimated that there were approximately 9 million people are eligible for citizenship.<sup>73</sup> One must wonder what is keeping so many people from making the leap to full citizenship status. The *New York Times* speculates that at least part of the problem is the high cost of the examination and the English requirement that is associated with it. For many it is just easier to renew the current legal resident status, rather than jump through the additional hoops.

With the wait times increasing and so many people who are of legal resident status it makes sense to include these people in local elections. These are residents who have qualified to take part in their communities in other ways and are already on a path where citizenship can

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<sup>73</sup> Miriam Jordan, *Wait Times for Citizenship Have Doubled in the Last Two Years*, (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html>.

realistically be achieved. Perhaps allowing them to participate in local elections when they have lived in communities for, at minimum, five years, can incentivize further participation in the naturalization process.

It may be a higher threshold of constitutionality, but perhaps participation in local elections can be added to the legal residents file as proof that they are committed United States democratic process. Of course, just as voting is not required of full citizens, it should not be mandatory for legal residents qualified to vote in local elections to participate. However, the act could be looked at in a favorable light when they are attempting to become naturalized.

Suffrage would aid in assimilation and naturalization.<sup>74</sup> The five-year waiting period, among other purposes, is designed to acclimate and integrate non-citizens into the United States. Granting the right to vote, even in local elections, would allow non-citizens the opportunity to participate in the democratic process. There could possibly be no better way to envelope non-citizens, already on their way to citizenship, in the political and electoral process. This gives them experience in the American democratic process and can make naturalization appear more attractive.<sup>75</sup>

## **VIII. Conclusion:**

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<sup>74</sup> See Howard at 1411.

<sup>75</sup> See Howard at 1411.

The reasons that opponents put forth against the ability of non-citizens to vote are not based in fact. There is no Constitutional grant of the vote purely to the citizenry. As shown, the right to define a political community is vested in the state and municipal governments. When granted, the right to vote is granted to permanent residents. These are people attempting to build a life in the United States and become part of their chosen community. In a nation of immigrants where many people are proud of their ethnic or national heritage, it would be wrong to assume that all people who traveled from another country will always be loyal to that country and not the one they presently reside in. These community members are raising families and have children in the school system. They are working and paying taxes. However, they do not have adequate representation because they are not allowed to use their political voice in the voting process.

Allowing non-citizens to participate in municipal elections allows for greater immersion in the communities where they are already living, working, and contributing financially. While these people have not made a pledge to become a citizen within a set amount of time, this may serve as an incentive to keep up with the process of full naturalization.

Places like Takoma Park, Maryland and New York City could help those non-citizens who choose to participate in the municipal elections by reminding them, through means of direct messaging or mailing, to follow up on full naturalization. This could mirror the alien suffrage statutes of the 1800's that allowed for non-citizen voting that included a pledge to become a citizen. Without making the current municipal voter take a pledge, but it could softly nudge them in the direction of becoming a full citizen, by demonstrating the positivity of taking part in the local democratic process.