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# RESIDENT ALIEN VOTING RIGHTS IN A POSTMODERN WORLD

JASON WISECUP\*

“No point mentioning those bats, I thought. The poor bastard will see them soon enough.”<sup>1</sup>

## I. INTRODUCTION

The Colorado Supreme Court’s logic in *Skaft v. Rorex*<sup>2</sup> — that a resident alien can be denied the right to vote for the sole reason that he or she is not a citizen — represents the prominent approach used in state election statutes that govern resident alien voting nationwide.<sup>3</sup> It has also often been used in law school textbooks as the controlling case for whether excluding resident aliens from voting in state elections is constitutional.<sup>4</sup> Although persisting for thirty years without being overruled, an exploding immigration population in the United States has recently caused the decision’s logic, and the law based on it, to be heavily criticized by some legal scholars.<sup>5</sup>

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1. HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS* 1 (2d. ed. 1998).

2. 191 Colo. 399, 533 P.2d 830 (1976).

3. COLO. REV. STAT. § 1-2-1-101 (2006). States as follows:  
Qualifications for registration

(1) Every person who is eighteen years of age or older on the date of the next election and who has the following qualifications is entitled to vote at all elections:

(a) The person is a citizen of the United States . . .

4. See DANIEL LOWENSTEIN & RICHARD HASEN, *ELECTION LAW CASES AND MATERIALS* 43-50 (3d ed. 2004) (using *Skaft v. Rorex* as the example case for resident aliens and the right to vote).

5. See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 *LAW & INEQ.* 271, 285 (2000); Paul Tiao, *Noncitizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 *COLUM. HUM. RTS. L. REV.* 171, 172 (1993); James B. Raskin, *Legal Aliens, Local*

Much of human knowledge is considered Truth<sup>6</sup> merely because it has been repeated *ad infinitum*. As time moves forward, certain presumptions and categories lose their popularity as it is discovered that their foundations are weak or non-existent. This proposition is easily applied to the resident alien classification used by courts and legislatures as a pretense for denying resident aliens the franchise.

In this paper, I will address the "essential" characteristics ascribed to resident aliens and the modern arguments underlying those characteristics. Further, I will use a postmodern analysis to expose the false foundations that underlie modern arguments. Finally, the argument will be made for the elimination of the resident alien classification where it pertains to the franchise in the local setting and propose the use of new, fluid categories that more properly reflect the ends that are sought by those seeking to limit the franchise.

Section II of this paper will address the constitutional and statutory authority governing the right to vote, as well as the history, case law, and arguments for and against extending the franchise to resident aliens. This section will use *Skafté v. Rorex* as a case study. Section III concerns the policy debate around the issue. Section IV will sketch the modern theories that preceded postmodernism and provide a general explanation of postmodernism and critiques of that theory. Section V will analyze the modern arguments for and against extending the franchise to resident aliens and will propose the use of new categories that are more fluid than the current resident alien distinction. Section VI will conclude the piece.

## II. THE RIGHT TO VOTE

Part (a) of this section addresses the constitutional and statutory authority of the resident alien franchise. Part (b) explains the history of the alien franchise within North America. Part (c) addresses the relevant case law in this area. Parts (d) and (e) address the modern arguments for and against extending the franchise to resident aliens.

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*Citizens: The Historical Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1399 (1993); Gabriela Evia, Note, *Consent by All the Governed: Reenfranchising Noncitizens as Partners in America's Democracy*, 77 S. CAL. L. REV. 151, 157-58 (2003).

6. See DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* 13 (1997).

a. *Constitutional and Statutory Authority*

The United States Constitution does not forbid, nor require, that the franchise be extended to resident aliens.<sup>7</sup> The Constitution merely requires that “citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>8</sup> Further, the United States Supreme Court has recognized that state and national citizenship are distinct.<sup>9</sup> Therefore, noncitizens of the United States may still be residents of the particular state where they reside.<sup>10</sup> This varying definition of citizenship has resulted in contradictory and confusing results.

For example, when a resident alien, who resided in the state of Wisconsin, attempted to avoid the draft by claiming that he was not a citizen, the Wisconsin Supreme Court cited *The Slaughterhouse Cases*<sup>11</sup> to support its finding that the defendant was a citizen of the state, if not the nation, and thus eligible for the draft.<sup>12</sup> The court explained that, “under our complex system of government there may be a citizen of a state who is not a citizen of the United States in the full sense of the term.”<sup>13</sup> Further, even if the state-national dichotomy did not exist, national citizenship is not necessarily synonymous with the right to vote.<sup>14</sup> Historically, suffrage has been conditioned on numerous criteria unrelated to citizenship.<sup>15</sup>

Under Article I, Section 2; Article II, Section 1; and the Naturalization Clause of Article I, Section 8 of the United States Constitution, states have the right to define the electorate.<sup>16</sup> This has been found to encompass the power to grant the franchise to resident aliens.<sup>17</sup> Laws restricting the “core electorate”<sup>18</sup> laid out in other provisions of the Federal Constitution form the only exception to the States’ power to define the electorate.<sup>19</sup>

7. Harper-Ho, *supra* note 5, at 285.

8. U.S. Const. amend. XV § 1.

9. *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

10. Harper-Ho, *supra* note 5, at 286.

11. 83 U.S. 36 (1873).

12. *See In re Wehlitz*, 16 Wis. 468, 480 (1863).

13. *Id.*

14. Harper-Ho, *supra* note 5, at 287.

15. *Id.* at 286-87; *see also* Le’a Malia Kanehe, *The Akaka Bill: The Native Hawaiians’ Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 867 n.56 (2001).

16. *See* U.S. Const. art. I, § 2; U.S. Const. art. II, § 1; U.S. Const. art. I, § 8, cl. 4.

17. Harper-Ho, *supra* note 5, at 287.

18. The “core electorate” is defined as those who make up the eligible voting population. Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259, 313 (1992), *cited in* Tiao, *supra* note 5, at 209.

19. *See* Neuman, *supra* note 18, at 287-88 (the relevant provisions include the Fifteenth Amendment, which prohibits race restrictions; the Nineteenth Amendment, which prohibits gender restrictions; the Twenty-Fourth Amendment, which

Passage of the Voting Rights Act reinforced the States' power to define the electorate.<sup>20</sup> Further, the Voting Rights Act prevents states from denying the vote to certain groups of citizens.<sup>21</sup> Despite the fact that the Voting Rights Act has never been found to apply to resident aliens, some commentators have argued that it embodies certain American core values, including non-discrimination and the notion of a political community, which apply to all residents.<sup>22</sup>

b. *History of the Resident Alien Franchise*

In North America, aliens were first allowed the right to vote in the colonies, which usually only required that voters be residents or local inhabitants.<sup>23</sup> Such voters could not, for example, be British citizens.<sup>24</sup> After the Revolution, alien suffrage continued as many states granted foreigners state citizenship.<sup>25</sup> In some states, the franchise was extended to resident aliens without citizenship.

For example, Pennsylvania allowed for the enfranchisement of aliens after two years of residence.<sup>26</sup> National citizenship was seen as an irrelevant prerequisite for the right to vote. Instead, the franchise was readily extended to white male property owners, regardless of citizenship.<sup>27</sup> Professor Raskin and other commentators state that some contemporary scholars believed excluding resident aliens from the franchise at this particular time would have led the country to believe federal citizenship was a sufficient condition precedent for obtaining the right to vote.<sup>28</sup> This was problematic, since most U.S. citizens did not at that time possess the right to vote because of land and gender restrictions.<sup>29</sup>

While some of the States were opening up the franchise to resident aliens, Congress was also enfranchising segments of the resident alien population. In 1789, Congress reenacted the Northwest Ordinance of 1787, which gave freehold aliens who

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prohibits poll taxes; and the Twenty Sixth Amendment, which granted 18 year-olds the right to vote).

20. 42 U.S.C. § 1971(a)(1) (1973).

21. Harper-Ho, *supra* note 5, at 293.

22. Tiao, *supra* note 5, at 172.

23. Raskin, *supra* note 5, at 1399.

24. *Id.*

25. *Id.* at 1400.

26. CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 174 (1960).

27. Raskin, *supra* note 5, at 1401.

28. *See id.*; see also Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin v. Massachusetts*, 1805, 97 AM. HIST. REV. 349, 349 (1992).

29. Raskin, *supra* note 5, at 1401.

had been residents for two years the right to vote for representatives to territorial legislatures.<sup>30</sup> The Ordinance also gave wealthier resident aliens who had been residents for three years the right to serve in these bodies.<sup>31</sup>

After the War of 1812, commitment to alien voting began to recede.<sup>32</sup> This tendency was part of a widespread anti-immigrant sentiment that pervaded the country during this era.<sup>33</sup> Some commentators believe that popular support for the abolition of the property qualification during this period may have undermined alien voting:

The abolition of property qualification would have meant that, in states with alien suffrage, *all* male aliens, not simply the property owners and the wealthy, would have the right to vote. Thus, for the first time, alien suffrage states would be extending political membership to a different, and obviously more threatening, class of aliens — those generally deemed unworthy of the ballot.<sup>34</sup>

Professor Raskin notes that, during the Civil War era, alien suffrage was yet another contention between the North and South.<sup>35</sup> Northerners attempted to enlarge the political influence of immigrants, while the South attempted to marginalize them.<sup>36</sup> During consideration of the Kansas-Nebraska Act,<sup>37</sup> an amendment was presented to forbid alien voting in the new territories.<sup>38</sup> Although the amendment failed, it was symbolic of the contentious debates, and the expansion and contraction, of alien suffrage during this period.<sup>39</sup> Despite this time of franchise recession, alien voting once again gained ground after the Civil War, as thirteen new southern states, anxious to draw new settlers, adopted alien suffrage.<sup>40</sup>

Alien suffrage then experienced huge setbacks at the beginning of the twentieth century. Anti-immigration sentiment was high in the United States as a result of exploding immigration rates and World War I.<sup>41</sup> Between 1908 and 1928, ten states en-

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30. See Act of Aug. 7, 1789, Ch. 8, 1 Stat. 50, 51 n.(a) (1789).

31. *Id.*

32. Raskin, *supra* note 5, at 1404.

33. See Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About its Interpretation*, 39 AKRON L. REV. 289, 289 (2006).

34. Raskin, *supra* note 5, at 1404.

35. *Id.* at 1409.

36. *Id.*

37. *Id.*

38. *Id.*

39. See Adam Winkler, *Voter's Rights and Parties' Wrongs: Early State Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 881 n.29 (2000).

40. Evia, *supra* note 5, at 157-58.

41. Raskin, *supra* note 5, at 1416; Harper-Ho, *supra* note 5, at 282-83.

ded, or greatly restricted, alien suffrage within their jurisdictions.<sup>42</sup> In 1928, for the first time in a hundred years, a national election was held where no resident alien had the right to cast a vote for any office — national, state, or local.<sup>43</sup>

c. *Case Law*

Case law has almost universally rejected a constitutionally mandated right to vote for resident aliens. Yet, strands of case law exist that conceivably support the extension of the franchise to resident aliens if their logic is extended.<sup>44</sup> Moreover, the United States Supreme Court and lower federal and state courts have taken different positions regarding extension of the franchise.

i. *United States Supreme Court Decisions*

In *Minor v. Happersett*,<sup>45</sup> the Supreme Court renounced the proposition that citizenship was synonymous with voting rights. The case, decided in 1875, involved a white woman, Virginia Minor, whose application to vote in the 1872 presidential election was rejected by Happersett, the local registrar of voters.<sup>46</sup> Happersett denied Minor the right to vote for the sole reason that she was a woman.

Minor then brought suit claiming that she had been deprived of the right to vote.<sup>47</sup> The Court held that, despite the fact that women were citizens under the Constitution, they were not guaranteed the right to vote.<sup>48</sup> The Court reasoned that the drafters of the Constitution had not intended to add the right of suffrage to the privileges and immunities of citizenship as they existed at the time of its adoption.<sup>49</sup> Similarly, the Court also specified that citizenship was not necessarily a condition precedent to the right to vote.<sup>50</sup> Although the franchise was extended to women under the 19th Amendment,<sup>51</sup> the case's holding demonstrated the distinction between the right to vote and citizenship.

In *Carrington v. Rash*,<sup>52</sup> the Court struck down a Texas constitutional provision which barred recently arrived military per-

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42. Raskin, *supra* note 5, at 1415-17.

43. *Id.* at 1416-17.

44. See Section II(c)(i-ii).

45. 88 U.S. 162 (1874).

46. *Id.* at 162.

47. *Id.*

48. *Id.* at 165.

49. *Id.* at 171.

50. *Id.* at 177.

51. U.S. Const. amend. XIX.

52. 380 U.S. 89 (1965).

sonnel from voting in State elections.<sup>53</sup> The case, decided in 1965, involved a serviceman who, although originally from Alabama was domiciled in Texas and commuted to work in New Mexico.<sup>54</sup> The serviceman owned a house in Texas, paid property taxes in Texas, and had his automobile registered in Texas.<sup>55</sup>

The Court struck down the provision reasoning that states could not “fence out” a sector of the population by limiting their voting rights for the sole reason of how they would probably vote.<sup>56</sup> Texas argued that the provision was necessary to prevent the danger of a “takeover” of the civilian community from bloc voting by military personnel.<sup>57</sup> In dismissing Texas’s argument, the Court stated, “[t]he exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.”<sup>58</sup>

In *Sugarman v. Dougall*,<sup>59</sup> the Court struck down a New York statute which barred resident aliens from holding civil service positions.<sup>60</sup> The plaintiffs in this case, decided in 1973, were resident aliens discharged from their civil service positions for the sole reason of their alienage status.<sup>61</sup> The Court held that aliens were a suspect class under the Equal Protection Clause and that strict scrutiny was therefore the appropriate standard of review.<sup>62</sup> Nevertheless, the Court found that States have a strong interest in both establishing their own form of government and in limiting participation in government to persons within the “political community.”<sup>63</sup> Further, the Court held that the States have broad discretion to define their “political community,” including the disenfranchisement of aliens.<sup>64</sup> The Court reasoned that:

Such power inheres in the State by virtue of its obligation . . . “to preserve the basic conception of a political community.” And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy

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53. *Id.* at 89.

54. *Id.* at 90-91.

55. *Id.* at 91.

56. *Id.* at 94.

57. *Id.* at 93.

58. *Id.* at 94 (citation omitted).

59. 413 U.S. 634 (1973).

60. *Id.* at 635-36.

61. *Id.* at 636.

62. *Id.* at 642.

63. *Id.* at 642.

64. *Id.* at 643.



. . . functions that go to the heart of representative government.<sup>65</sup>

The Court then held that a less exacting type of Equal Protection scrutiny should be applied to state actions that restrict the alien right of suffrage.<sup>66</sup> The Court's analysis suggested that a rationality based means-ends analysis should instead be used.<sup>67</sup> It reasoned that citizenship was a permissible criterion for limiting such rights and that alienage itself was a factor that reasonably could be employed in defining what constitutes the "political community."<sup>68</sup> This exception to the strict scrutiny protection of aliens under the Equal Protection Clause is often referred to as the political function exception.<sup>69</sup>

The Court *In re Griffiths*,<sup>70</sup> a case decided the same day as *Sugarman*, reinforced the application of the suspect classification to aliens.<sup>71</sup> The case involved a resident alien who was denied admission to the state bar purely on the basis of her alien classification.<sup>72</sup> Griffiths was a citizen of the Netherlands who had married an American citizen.<sup>73</sup> She was considered a Connecticut resident but had refused to apply for national citizenship because of the prerequisite that she renounce her Netherlands citizenship prior to becoming an "American."<sup>74</sup>

The Court again held that classifications based on alienage, like those based on nationality or race, are inherently suspect.<sup>75</sup> The Court reasoned that aliens, as a class, are a prime example of the "discrete and insular" minority for whom the application of close judicial scrutiny is appropriate.<sup>76</sup> The Court, in striking down the Connecticut rule, distinguished between lawyers, who are practitioners involved merely in the practice of law, and those positions involving matters of state policy reserved for citizens.<sup>77</sup> This distinction was important, since a rationality test would have been used if legal practice had been found within the political function exception.<sup>78</sup>

65. *Id.* at 647 (citation omitted).

66. *Id.* at 648.

67. *See id.*

68. *Id.* at 649.

69. Kristen M. Schuler, Note, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 305 (1996).

70. *In re Griffiths*, 413 U.S. 717 (1973).

71. *Id.* at 721.

72. *Id.* at 718.

73. *Id.*

74. *Id.*

75. *Id.* at 721.

76. *Id.*; *see also* *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938).

77. *Griffiths*, 413 U.S. at 724.

78. *See* Schuler, *supra* note 57, at 305.

The Supreme Court, though not explicitly overruling any of the above cases, has also failed to provide a roadmap of how they apply the right to vote to resident aliens in a contemporary context. This task has been taken on by the lower courts.

ii. *Lower Federal Court and State Court Decisions*

In 1974, the U.S. District Court of Maryland in *Perkins v. Smith*<sup>79</sup> stated that, under either a rationality or strict scrutiny analysis, resident aliens could be excluded from jury service.<sup>80</sup> The court found that because jury service was a broad public policy function that went to the heart of representative government, the State's decision to exclude resident aliens from jury service was a compelling interest narrowly tailored to meet the ends sought.<sup>81</sup>

The court also applied the Black's Law Dictionary definition in explaining the distinction between aliens and citizens:

[An alien is defined as] "a person resident, in one country, but owing allegiance to another . . . . In the United States, one born out of the jurisdiction of the United States, and who has not been naturalized under their constitution and laws." On the other hand, a citizen is "[o]ne who, under the constitution and laws of the United States, or of a particular state, and by virtue of birth or naturalization within the jurisdiction, is a *member of the political community*, owing allegiance and being entitled to the enjoyment of full civil rights."<sup>82</sup>

Nevertheless, the court held that it could not be disputed that aliens are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.<sup>83</sup>

*Skafté v. Rorex*

In the 1976 Colorado Supreme Court case, *Skafté v. Rorex*, a resident alien was denied the right to vote in school elections for the sole reason that he was not a citizen under Colorado law.<sup>84</sup> Skafté, a permanent resident alien residing in Boulder County, attempted to register for a school election with the Boulder County Clerk and was denied.<sup>85</sup>

The Boulder County Clerk denied the application because § 123-31-1(3), C.R.S. 1963 defined an elector for the purposes of school elections as a "person who is legally qualified to register

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79. 370 F. Supp. 134 (D. Md. 1974).

80. *Id.* at 136.

81. *Id.* at 137, 139.

82. *Id.* at 136-37.

83. *Id.* at 135.

84. *Skafté*, 191 Colo. at 400; COLO. REV. STAT. § 123-31-6(2) (1963).

85. *Skafté*, 191 Colo. at 400.

to vote for state officers at general elections” and who meets residency requirements.<sup>86</sup> Further, the statute provided that registration requirements for school elections “shall be the same as those governing general elections.”<sup>87</sup> Those two propositions effectively incorporated the requirement that electors must be United States citizens into the procedural requirements for participation in local school elections.<sup>88</sup> Skafe brought suit for relief in the Boulder County District Court.<sup>89</sup> That court, agreeing with the United States citizenship requirement rationale, granted summary judgment for the county clerk.<sup>90</sup>

Skafe appealed the clerk’s decision by asserting that the Colorado statutes prohibiting resident alien voting in local school elections violated the Equal Protection Clause.<sup>91</sup> The Colorado Supreme Court held that the resident alien classification was not a suspect classification and that therefore the compelling interest test should not be applied at least with regard to the franchise.<sup>92</sup> Thus, applying a rationality test, the court reasoned: “The state has a rational interest in limiting participation in government to those persons within the political community. Aliens are not a part of the political community.”<sup>93</sup>

The court, although concluding that the process of filing for citizenship established the loyalty necessary to take part in the political community,<sup>94</sup> also reasoned that the statute governing voting rights<sup>95</sup> did not create an irrebuttable presumption about the status of alienage.<sup>96</sup> The court, seemingly noticing the logical problems with this proposition, attempted to justify its position by stating that, “[t]o hold otherwise would turn the conclusive presumption doctrine into a ‘virtual engine of destruction for countless legislative judgments which have . . . been thought wholly consistent with . . . the Constitution.’”<sup>97</sup>

In summary, the courts have agreed that resident aliens are a suspect class under the Equal Protection Clause. Nevertheless, the courts invoking the political function exception have also applied mere rationality as the standard of review in cases involving the right to vote. Thus, to eliminate the barriers between resident

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 402.

93. *Id.*

94. *Id.*

95. COLO. REV. STAT. § 123-31-6(2) (1963).

96. *Skafe*, 191 Colo. at 404, 834.

97. *Id.* (citation omitted).

aliens and the right to vote, the *Skaft* standard must be discarded and the resident alien classification must be rethought.

### III. THE POLICY DEBATE OVER ENFRANCHISING RESIDENT ALIENS

A thorough understanding of the policy debate concerning the extension of the franchise is important considering the new, more fluid, approaches to voting rights.

#### a. *Arguments Against Enfranchising Resident Aliens*

Numerous modern arguments against extending the franchise to resident aliens have pervaded judicial opinions and law review articles.<sup>98</sup> The idea that citizenship has a tangible meaning in the eyes of Congress is often an important starting point for many of these arguments.<sup>99</sup>

Many believe that citizenship is a “special” classification which bestows on the citizen “an understanding of the English language” and “a knowledge and understanding of the fundamentals of the history and principles and form of government of the United States.”<sup>100</sup> Other reasons cited include the importance of “integrating aliens into society,”<sup>101</sup> precluding aliens who manifest opposition to our society or government,<sup>102</sup> and limiting citizenship to those who demonstrate “good moral character.”<sup>103</sup>

Justice Rehnquist, in his dissent in *Sugarman*, emphasized the presumption that native born and naturalized citizens would be more integrated in American society than aliens:

Native-born citizens can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact with other citizens. Naturalized citizens have also demonstrated their willingness to adjust to our patterns of living and attitudes, and have demonstrated a basic understanding of our institutions, system of government, history, and traditions. It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect “government” to treat us. An alien who grew up in a country in which political mores do not reject bribery or self-dealing to the same extent that our culture does . . . could rationally be

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98. See, e.g., Harper-Ho, *supra* note 5, at 285; see Tiao, *supra* note 5, at 172; Raskin, *supra* note 5, at 1399; Evia, *supra* note 5, at 157-58.

99. See *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting).

100. See *id.* at 659-60; 8 U.S.C. § 1423.

101. H.R. Rep. No. 1365, 82d Cong., 2d Sess., 78 (1952).

102. 8 U.S.C. § 1427(a)(3).

103. *Sugarman*, 413 U.S. at 660.

thought not to be able to deal with the public and with citizen civil servants with the same rapport that one familiar with our political and social mores would . . . ."<sup>104</sup>

Harper-Ho summarizes the main arguments against the extension of the franchise to resident aliens as follows: that the collective will of the community as a whole would be threatened if outsiders could have a voice in issues affecting that community;<sup>105</sup> potential conflicts of interest between the United States and the alien's country of residence could arise;<sup>106</sup> there are equal protection concerns regarding distinctions between resident and illegal aliens in the right to vote;<sup>107</sup> aliens are not "inescapably tied" to the community and thus could avoid the effects of government policies by returning to their home country;<sup>108</sup> fears that aliens would vote as a bloc;<sup>109</sup> that aliens are not capable of voting intelligently;<sup>110</sup> that the alien vote will "dilute" the power of citizens' voting;<sup>111</sup> and that granting resident aliens the franchise will open the door to illegal immigrant voting.<sup>112</sup>

Many of these arguments have also been used to stop extension of the franchise to other groups in the past. For instance, the "disloyalty argument" used against extending the franchise to resident aliens is identical to the disloyalty argument used against extending the franchise to both women and Blacks.<sup>113</sup> The "lack of knowledge" argument was similarly leveled against Blacks until the Voting Rights Act eliminated literacy tests and other knowledge based barriers to voting.<sup>114</sup>

Some commentators have given special force to the argument that it should be the province of citizens, rather than judges, to decide who should be allowed to vote.<sup>115</sup> This argument, which has strong civic republicanism roots,<sup>116</sup> is based on the presumption that those currently voting have an obvious in-

104. *Id.* at 661-62.

105. Harper-Ho, *supra* note 5, at 298.

106. *Id.* at 299.

107. *Id.* at 301.

108. *Id.* at 302.

109. *Id.* at 303.

110. *Id.*

111. *Id.* at 304.

112. *Id.*

113. Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 *YALE L.J.* 473, 476 (1997) (quoting John Ross, New York Convention of 1821: "[Blacks are] incapable . . . of exercising [the] privilege [of voting] with any sort of discretion, prudence or independence.").

114. Harper-Ho, *supra* note 5, at 303-04.

115. Raskin, *supra* note 5, at 1439-40.

116. See LOWENSTEIN & HASEN, *supra* note 4, at 24-26; Raskin, *supra* note 5, at 1445-46.

terest in defining the franchise because every new voting member theoretically dilutes the voting power of each existing member.<sup>117</sup>

There is also evidence that citizens have regularly expanded the franchise through democratic means when confronted with a compelling reason to do so.<sup>118</sup> For example, it has been argued that it was the propertied that enfranchised the propertyless, whites who enfranchised Blacks, and men who enfranchised women.<sup>119</sup>

#### b. *Arguments For Enfranchising Resident Aliens*

Modern arguments for the enfranchisement of resident aliens have generally fallen into one of two categories.<sup>120</sup> The first category is comprised of arguments that propose extending the franchise at the local level, mostly through empirical bases. The second category can be loosely summarized as those categories based on American tradition and Natural Law.

Local alien suffrage has made headway in the last several decades, especially in Europe.<sup>121</sup> Some European countries have even altered their constitutions to protect resident alien voting rights.<sup>122</sup> Raskin believes that this global push to confer local voting rights on all municipal inhabitants underscores the importance of similar measures in the United States.<sup>123</sup> This is especially relevant since the possibility for exploitation of displaced persons is substantial if we make capital and labor mobile but political rights immobile.<sup>124</sup>

As travel technology becomes more sophisticated, and the economy of the world becomes more fluid, employment will also become more fluid. One can envision an even greater increase in the number of workers employed outside of their home country, where they are classified as citizens. These workers may be employed for limited time periods that do not quite reach the statutory minimums required for citizenship status. Such people are *de facto* nomads, still considered citizens and thus able to vote in a country they no longer have a connection with, and unable to establish citizenship in their country of residence.

Concerns about adequate representation is another argument for allowing alien voting at the local level. For example, the Latino population in the United States has recently expanded,

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117. Raskin, *supra* note 5, at 1440.

118. *Id.*

119. *Id.*

120. *See generally id.*

121. *Id.* at 1459.

122. *See* Neuman, *supra* note 18, at 259.

123. Raskin, *supra* note 5, at 1460.

124. *Id.*

but the amount of citizen Latinos has failed to keep pace.<sup>125</sup> The number of noncitizen adult Latinos increased from 1.7 million in 1976 to 5.2 million in 1990.<sup>126</sup> This is especially worrisome because noncitizen Latinos make up a substantial percentage of the population in southwestern communities.<sup>127</sup> One can envision a scenario, which undoubtedly exists, where noncitizen Latinos make up a majority of the local community. In this situation, a minority of the resident population — citizens — would wield greater power than the majority of the residents.

Resident aliens, at least at the local level, have the same obligations as citizens.<sup>128</sup> Therefore, because aliens and citizens have equal obligations, it only follows that aliens should also have equal privileges.<sup>129</sup> Resident aliens pay taxes, are subject to the same criminal punishment as citizens, and can be drafted or enlist into military service.<sup>130</sup>

Resident aliens' vested interest in local affairs is another factor in favor of enfranchising them.<sup>131</sup> Noncitizens are residents of communities and are thus subject to local policies such as taxes, zoning, and community development, to the same extent as citizens, if not more.<sup>132</sup> The Chair of the Village of Marin's Additions Council, in his testimony before the Maryland General Assembly Committee on Constitutional and Administrative Law, best summarized the argument by stating:

We believe every resident in our community, regardless of ultimate national or state citizenship is entitled as a fundamental right to participate in governing our municipal affairs . . . because the residents for who we argue here, bear responsibilities within the municipality — such as keeping their properties neat and clean, removing snow from the sidewalk in front of their homes, recycling — responsibilities from which they receive no immunity merely because they may not be U.S. citizens. Certainly then, these residents should have a say in how our community will be run.<sup>133</sup>

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125. Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1499 (1993).

126. *Id.*

127. See Art Moore, *Is Mexico Reconquering U.S. Southwest?*, available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=25920](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=25920) (last visited Sep. 26, 2005).

128. Harper-Ho, *supra* note 5, at 295.

129. *Id.*

130. Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 906 (2007);

131. Harper-Ho, *supra* note 5, at 296.

132. *Id.*

133. *Hearings on H.R. 665 Before the Maryland General Assembly Comm. on Const. and Admin. Law 2* (1992) (statement of Sharon Hadary Coyle).

Humanitarian reasons also underpin one of the strongest arguments for extending the franchise to resident aliens. Once aliens have been permitted to center their lives in the United States, their need for employment rests on most of the same reasons applicable to citizens.<sup>134</sup> Just as citizens, aliens need to eat, they need to support their families, they need money, and they need self respect and the ability to control their lives.<sup>135</sup> Further, they require recognition as equal human beings; a right not to be treated as inferior because of their place of birth. After all, "democracy rests on the human right of self-determination."<sup>136</sup>

The general democratic principle that "governments derive their just powers from the consent of the governed"<sup>137</sup> is easily extendable to resident aliens. If resident aliens are not able to vote, then they are unable to select representatives who will protect their interests.<sup>138</sup> Powerless resident aliens are therefore left highly vulnerable to discriminatory acts of the government against them.<sup>139</sup> Left without a political voice, resident aliens may also be tempted to resort to social unrest and violence to fill the vacuum left by the absence of suffrage.<sup>140</sup> This may seem far-fetched but examples of immigration riots are not inconceivable.

Scholars have identified four governing principles to which "liberal republicanism" is committed to: deliberation in politics (or civic virtue), the equality of political actors, universalism, the notion of a common good, and citizenship manifesting itself in broadly guaranteed rights of participation.<sup>141</sup> Although this theory does not require that resident aliens be enfranchised, many "liberal republicans" believe that transforming political communities, through inclusion of those marginalized, enhances political freedom universally.<sup>142</sup> Further, alien voting in local elections could be portrayed as "civic education" for the more potent rights associated with national citizenship.<sup>143</sup> For example, most schools provide an education in democratic principles for children.<sup>144</sup> Similarly, school governance provides a lesson in political structures for their parents.<sup>145</sup>

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134. Gerald L. Neumann, *Speech and Democracy: Rhetorical Slavery, Rhetorical Citizenship*, 90 MICH. L. REV. 1276, 1288 (1992) (book review).

135. *Id.* at 1288-89.

136. Harper-Ho, *supra* note 5, at 294.

137. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)

138. Harper-Ho, *supra* note 5, at 295.

139. *Id.* at 298.

140. *Id.*

141. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

142. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988).

143. Raskin, *supra* note 5, at 1454.

144. *Id.* at 1455.

145. *Id.*



Finally, xenophobic motivations may underlie the current refusal to extend the franchise to resident aliens. Alien voting in the United States, deeply embedded as it was, ended because of xenophobic nationalism not constitutional concerns.<sup>146</sup> Further, "Americans have always found plenty of ideological reasons, from racism to Social Darwinism, from religious bigotry to nativism, to justify exclusionary and discriminatory policies."<sup>147</sup> Recall that the Court in *Carrington* held that the government could not "fence out" a sector of the population by limiting their voting rights simply because of that sector's ideological stances.<sup>148</sup> Xenophobic motivations and the political preferences of resident aliens should not be offered to justify their disenfranchisement.

#### IV. A POSTMODERN PERSPECTIVE

An in-depth introduction to postmodernism is necessary to understand how application of postmodern theory to the resident alien quandary literally changes how one views the problem. Part (a) will provide a brief, historical sketch of the modern legal theories that postmodernism reacted against. Part (b) will explain postmodernism in its different forms, and part (c) will review the major critiques of postmodern thought.

##### a. *Modern Theories*

Although a complete summary of the history of jurisprudence is beyond this piece, a quick synopsis is important to set the stage for the origins and understanding of postmodern theory.

The first major modern theory has been coined by commentators as "legal science" or the "formalist school".<sup>149</sup> This school conceived that a uniform, perfect legal system could be founded on natural law principles, which were discernible through logical processes.<sup>150</sup> Principles "might be drawn from reasoning as to the nature of man in the abstract."<sup>151</sup> Law could be, if correctly interpreted and applied, a science.<sup>152</sup>

For numerous reasons, this school lost ground in the early-mid part of the twentieth century to a group of theories collectively called "realist."<sup>153</sup> The realists believed that the law was

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146. *Evia*, *supra* note 5, at 162.

147. *Id.* at 164.

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

149. ROSCOE POUND, *JURISPRUDENCE* 50 (West Pub. Co. 1959).

150. *Id.*

151. *Id.*

152. *Id.*

153. See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

indeterminate, or at best “suggested modest probabilities.”<sup>154</sup> Further, the realists believed that since law was totally contained within society and therefore far from a science it little more than the facts of judicial behavior. Justice Oliver Wendell Holmes, one of the forerunners of realism, was famous for his statement that “[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.”<sup>155</sup>

After World War II, realism declined and liberalism filled the vacuum.<sup>156</sup> Philosophical liberalism, as opposed to political liberalism, was a product of the 18th century Enlightenment period.<sup>157</sup> Those who we call “liberals” and “conservatives” in today’s political atmosphere are almost all philosophical liberals.<sup>158</sup> Many commentators see philosophical liberalism as the “unofficial politics, ethics, and psychology of the United States.”<sup>159</sup> Although there are numerous types of philosophical liberals,<sup>160</sup> all liberalism is based on the foundation of individuality.<sup>161</sup> Liberals envision the individual as existing “prior to society” and that everyone shares particular immutable characteristics.<sup>162</sup> These characteristics include rationality and self-interest.<sup>163</sup>

Philosophical liberalism, and most Western philosophy in general, is organized around dualisms or binary oppositions.<sup>164</sup> One of the most important tenets of philosophical liberalism is the dualism between the public and the private realms of life.<sup>165</sup> The state may regulate the former when necessary, but may not regulate the latter.<sup>166</sup> Philosophical liberals dispute among themselves what activities are public or private, but they do not dispute whether the private/public distinction actually exists.<sup>167</sup> This is why today’s political conservatives and political liberals are

154. See generally KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (Oceana Pub. 1960).

155. Holmes, *supra* note 153, at 466.

156. See Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561, 561 (1988).

157. ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY* 84 (N.Y.U. Press, 2006).

158. *Id.*

159. *Id.*

160. From Process Theorists like Hart, to Historical Originalists like Justice Scalia, to ACLU Dworkinite liberals, to Law and Economics theorists like Judge Posner.

161. SCALES, *supra* note 157, at 84.

162. *Id.* at 84-85.

163. *Id.* at 85.

164. *Id.* at 86; see also JACQUE DERRIDA, *OF GRAMMATOLOGY* (1976).

165. SCALES, *supra* note 157, at 84.

166. *Id.*

167. *Id.* at 86.

both, almost without exception, philosophical liberals. They do not, for instance, debate that individuality exists; they only debate what circumstances justify the state's restriction of individual preferences.<sup>168</sup>

Those wanting to preserve the liberal tradition but who saw the inherent problems and contradictions within its major underpinnings, attempted variations.<sup>169</sup> Pluralism is one of the most prominent variations on liberal thought in the United States.<sup>170</sup> Madison's focus on factions in the *Federalist No. 10* shows that pluralism has roots originating from the birth of the Republic.<sup>171</sup> Prominent pluralists believe that the world is "not, as a fact, composed of a few vast entities known as States, set over against crowds of isolated individuals."<sup>172</sup> Rather, pluralists believe that each civilization is composed of a group of internal societies, each with their own components and makeup.<sup>173</sup>

It was, although possibly not acknowledged as so, a drastic departure from pure liberal theory. It took the onus of analysis away from the individual and placed it on groups. Despite a move away from individual to groups, pluralism is rooted in liberal thought because of its underlying presumption that the actors within groups will act in a rational way.<sup>174</sup> Pluralism received and continues to receive criticism for its inherent assumption that competing groups would "cancel each other out."<sup>175</sup> Furthermore, pluralism has specifically been targeted for slighting the severe inequalities that are present between the "groups" within the United States.<sup>176</sup> "Outsiders," unsatisfied with the underlying assumptions and effects of liberalism and its pluralist progeny, began to look for answers outside the artificially imposed limits of liberal discourse. One of these "outsider" theories was Postmodernism.

#### b. *Postmodernism Defined*

Although postmodernism defies definition, and many of its adherents refuse to label themselves as such, its history can help shed light on its scholars and major underpinnings. The term postmodernism, first used consistently in literary criticism in the 1950s, was picked up by art critics and architects in the 1960s, and

168. *Id.*

169. *See generally* THE FEDERALIST NO. 10 (James Madison).

170. *Id.*

171. *Id.*

172. LOWENSTEIN & HASEN, *supra* note 4, at 15 (quoting DAVID NICHOLLS, THE PLURALIST STATE 140 (1975)).

173. *Id.*

174. *See* SCALES, *supra* note 157, at 85.

175. *See id.* at 17.

176. *Id.*

during the 1980s had spread into the vocabularies of sociologists and cultural anthropologists.<sup>177</sup> Postmodernism also greatly impacted legal scholarship.<sup>178</sup> Postmodern legal thought, first adopted by several Critical Legal Studies scholars during the 1980s, became evident in law review articles and mainstream legal scholarship during the 1990s.<sup>179</sup> If one statement most easily sums up postmodernism, it would be “incredulity toward metanarratives,” or the rejection of universal “stories” used to explain society and reality.<sup>180</sup>

Litowitz frames Postmodernism on three different levels, which simplifies its explanation.<sup>181</sup> At the first level, where it relates to art, postmodernism is characterized by a simultaneous acceptance, reaction, and wholesale incorporation of modern and pre-modern art.<sup>182</sup> In fact, art scholars have stated that postmodernism “is part of a never-ending dialogue with Modernism.”<sup>183</sup> Like modern art, postmodernism stresses the breakdown of a single dominant perspective, the end of linear narratives, and the fragmentation of self; but unlike modern art, it borrows from the past without apology.<sup>184</sup> For example, a film like *Pulp Fiction* could be categorized as postmodern because it has no linear narrative (the plot is not based on a time continuum) and it borrows from previous genres (1970s exploitation movies).<sup>185</sup> The Luxor in Las Vegas, Nevada, a massive technologically ruled casino resembling an Egyptian pyramid, is another example of architectural art that mixes the past and the present.<sup>186</sup>

At the second level, postmodernism is a general mood within western industrial society.<sup>187</sup> Postmodernity is the result of two major forces within society: one, the interconnection of diverse cultures via the media, and two, the move toward an accelerated, integrated, information driven, global economy.<sup>188</sup> For example, a contemporary American can own a German car,

177. Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 39, 41 (2000).

178. *Id.* at 40.

179. *Id.*

180. JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984).

181. Litowitz, *supra* note 177, at 41-42.

182. *Id.* at 42.

183. CHARLES JENCKS, *THE NEW PARADIGM IN ARCHITECTURE* at vii (7th ed. 2002).

184. Litowitz, *supra* note 177, at 42.

185. *Id.*

186. See Reza Dibadj, *Postmodernism, Representation, Law*, 29 U. HAW. LAW & REV. 377, 391 (2007) (explaining that “postmodernism looks both backward and forward because it recognizes that a temporal dimension can serve as a powerful contextual tool . . .”).

187. Litowitz, *supra* note 177, at 43.

188. *Id.*

work as a broker selling shares in Scottish companies to Shanghai investors, eat at an Ethiopian restaurant, and catch up on the political instability in Darfur via an internet broadcast.<sup>189</sup>

Advancements in technology have effectively shrunk the world and created a global culture, an eclectic society that is no longer dominated by hegemonic national customs.<sup>190</sup> The diversification and widening of choices within society is far from trivial as it sends a signal that no cultural norm is more “inevitable” or “natural” than any other cultural norm.<sup>191</sup> The forces that underpin postmodern thought begin to showcase to each individual that his own “culture” is not naturally determined.<sup>192</sup>

This has huge implications as individuals repeat this realization in other areas of their life.<sup>193</sup> This globalizing process also makes people question whether their personal identity is grounded in anything more than customs, habits, societal constraints, and contingent events.<sup>194</sup> The proposition that there is no absolute foundation underlying personal identity is referred to as the “death of the subject.”<sup>195</sup> The “self” takes on a more fluid form, where it cannot be seen as isolated from the rest of society. Chamallas argues that the “postmodern view of the self as multiple and relational also means that personal identity is not static, but rather is made up of fragments of experience that do not fit into a coherent whole.”<sup>196</sup> Moreover, “[w]hen the same point is made with respect to a social idea, presumption, or cultural artifact, it is referred to as the ‘social construction of reality’.”<sup>197</sup>

One of the most famous examples of a “social construction” is that of race. Historically, American society in general has subscribed certain characteristics to Blacks that were deemed the race’s “essential characteristics.”<sup>198</sup> Laws endorsing slavery were based on the assumption, (one not widely questioned at the be-

189. See Dibadj, *supra* note 186, at 398-99 (discussing the exportation of American culture via media).

190. Litowitz, *supra* note 177, at 43.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*; see also LITOWITZ, *supra* note 6, at 137 (explaining Richard Rorty’s view that people are simply a sum of their interests, views, and talents, with nothing substantial underlying them).

195. See *Death of Man (Death of the Subject)*, in ROUTLEDGE CRITICAL DICTIONARY OF POSTMODERN THOUGHT 221 (Stuart Sim ed., 1999).

196. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 93 (2d ed. 2003).

197. *Id.*; see PETER BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1967).

198. Daniel J. Sharfstein, *The Secret History of Race in the United States*, available at [http://www.yalelawjournal.org/archive\\_abstract.asp?id=252](http://www.yalelawjournal.org/archive_abstract.asp?id=252) (last visited Sep. 25, 2005).

ginning of the Republic), that Blacks were an inferior race to Caucasians. As the history of the union has progressed, the social construction that Blacks are inferior has been, at least to an extent, deconstructed.

The recent dominance of a flexible service economy has been another important development in the postmodern condition.<sup>199</sup> A new emphasis on intangible goods like software and securities has eroded the stability of the *traditional* economy.<sup>200</sup> This proposition does not mean that the economy has become less effective or efficient, but simply that it has *evolved*, for lack of a better word. The foundations and makeup of the current global economy have little resemblance to the traditional local economy that has been dominant throughout much of the history of civilization. The economy today is a different creature than it was even 30 years ago. As the economy has become more malleable, the tremors of that instability have reflected on other societal institutions. Immutable institutions, deeply rooted in society, that were once deemed natural and inevitable are now seen as variable concepts.<sup>201</sup>

Postmodernism, at the third level where it relates to law, is a critique of the enlightenment doctrines including liberalism.<sup>202</sup> Although often clouded in legal jargon,<sup>203</sup> postmodernism questions whether the law is based on a false view of the individual.<sup>204</sup> Postmodern theorists “point out that the existing legal arrangements are based on a set of universal Enlightenment notions that should not be silently assumed amid the current climate of diversity, contingency, and fluidity.”<sup>205</sup> Postmodernism attempts to divulge these assumptions by finding the language games that insulate the legal hierarchy from external critique.<sup>206</sup> Grand narratives involving God, human nature, and history are no longer seen as the immutable foundations of society.<sup>207</sup>

### c. *Postmodern Critiques*

Postmodernism is a discipline that is currently under assault in academia. One scholar has denounced the Postmodern Project

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199. Litowitz, *supra* note 177, at 44.

200. *Id.* (emphasis added).

201. *Id.*

202. *Id.* at 42.

203. LITOWITZ, *supra* note 6, at 2.

204. Litowitz, *supra* note 177, at 45.

205. *Id.*

206. *Id.*; see also LITOWITZ, *supra* note 6, at 22-23 (discussing the internal and external approaches to legal theory).

207. Litowitz, *supra* note 177, at 37.

as “a rebel crew milling beneath the black flag of anarchy,”<sup>208</sup> others call it “a nickname attributed to characters of shadowy reputation.”<sup>209</sup> Richard Rorty, who once identified himself as “postmodern,” recently said of the term, “[n]obody has the foggiest idea what it means . . . . It would be nice to get rid of it. It isn’t exactly an idea; it’s a word that pretends to stand for an idea.”<sup>210</sup> Catharine MacKinnon has referred to postmodern thought as “familiar if fancier reasons for doing nothing.”<sup>211</sup> Comments such as these makes one wonder if postmodernism will soon inhabit the “quiet room” with many of the other subjugated knowledges of society.<sup>212</sup>

MacKinnon’s critique of postmodernism is vocal and heavily cited.<sup>213</sup> MacKinnon, a prominent Feminist scholar, has derided postmodernism for its refusal to accept a universal social reality.<sup>214</sup> Where postmodernism believes that social reality is constructed, fluid, or simply does not exist (depending on the postmodernist), MacKinnon believes that postmodernists are simply ignoring “it.”<sup>215</sup> In a powerful critique MacKinnon claimed that: “[p]ostmodernism has decided that because truth died with God, there are no social facts. The fact that reality is a social construction does not mean that it is not there; it means that it is there, in society, where we live.”<sup>216</sup>

MacKinnon’s critique seems to suffer from many of the flaws that have doomed the modern theories. For example, in one breath she seems to deny the charge that her vision of feminism is “essentialist,”<sup>217</sup> but in another she claims that “woman-ness,” as opposed to gender, is a concrete, not abstract, term.<sup>218</sup> The problem lies in MacKinnon’s attempt to make a distinction between “social facts” and “objective truth,” a hard sell indeed for which she provides no real guide.

Still, MacKinnon’s critique and other prominent critiques of postmodernism have raised questions about the effectiveness and purpose of the Postmodern Project. For instance, postmodernism

208. Edward O. Wilson, *Back From Chaos*, THE ATLANTIC MONTHLY, Mar. 1998, at 41, 58.

209. Dibadj, *supra* note 186, at 398-99.

210. Litowitz, *supra* note 177, at 39.

211. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 710 (2000).

212. See MICHEL FOUCAULT, POWER AND KNOWLEDGE 78-108 (Colin Gordon ed., 1977).

213. See Catherine A. MacKinnon – Biography and Bibliography, available at <http://www.cddc.vt.edu/feminism/MacKinnon.html>.

214. MacKinnon, *supra* note 211, at 693.

215. *Id.*

216. *Id.* at 703.

217. *See id.* at 696.

218. *See id.*

states that because there is no truth and everything is merely an interpretation, dishonesty is therefore impossible.<sup>219</sup> The general proposition that “there is no truth” is more symbolic than literal and probably roots from the imprecision of language, society’s over-emphasis on dualities,<sup>220</sup> and the limits of human logic.<sup>221</sup> Albert Camus, a noted existentialist,<sup>222</sup> put it simply in his book *The Stranger*: “And my lawyer, rolling up one of his sleeves, said with finality, ‘Here we have a perfect reflection of this entire trial: everything is true and nothing is true!’”<sup>223</sup> Rorty illuminates this idea in *Contingency, Irony, and Solidarity*:

Truth cannot be out there — cannot exist independently of the human mind — because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own — unaided by the describing activities of human beings — cannot.<sup>224</sup>

Still, it is reasonable to argue that under the postmodern line of thought “it cannot be ‘known’ whether the Holocaust is a hoax, whether women love being raped, whether Blacks are genetically inferior to Whites, or whether homosexuals are inherently child molesters.”<sup>225</sup> Postmodernism could thus be seen as breaking down all of the foundations we hold self-evident. It is therefore seen by many as the type of useless radical skepticism, dressed in new shoes, that inevitably leads to a downward spiral of “infinite regress.”<sup>226</sup> Critics also state that adherence to a postmodern philosophy seems comparable to adherence to liberalism in that postmodernism could be seen as endorsing moral relativism, which in turn yields social paralysis.<sup>227</sup>

## V. POSTMODERNISM AND THE RIGHT TO VOTE

### a. *A Fluid Approach to Categorization*

I summarized the arguments for and against extending the franchise to resident aliens in part II(c) and II(d).<sup>228</sup> In this section, I will examine the modern assumptions underlying those ar-

219. *Id.* at 703.

220. See SCALES, *supra* note 157.

221. See generally JOHN D. CAPUTO, *DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA* (1996).

222. For a good, short summary of existential philosophy, which shares many of the tenets of postmodernism, see JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMAN EMOTIONS* (Citadel Press 1985).

223. ALBERT CAMUS, *THE STRANGER* 91 (2d. ed. 2004).

224. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 5 (1999).

225. MacKinnon, *supra* note 211, at 703.

226. See SCALES, *supra* note 157, at 34-35.

227. *Id.* at 43.

228. It may be helpful to review these sections prior to reading section V.



guments. I will further examine the Illinois school board statute, an alternative to the typical "citizenship as a prerequisite to vote" statute, and how that statute more closely reflects a fluid approach to categorization.

The proposition that resident aliens are not knowledgeable of our political system is one of the major arguments against extending the franchise to that group.<sup>229</sup> Comparably, the flip side, that resident aliens as a group are as knowledgeable, or more knowledgeable, than the citizen population with respect to our political system, has been a strong argument for extending the franchise. Both of these arguments tend to subscribe an essential characteristic to the group of resident aliens; that resident aliens are or are not knowledgeable about our political system. Accordingly, the argument does not concern whether resident aliens as a group have certain defined characteristics that are present in every member of the group, but what characteristics *are* common to every member of the group.

The postmodern gauntlet therefore exposes that the arguments for and against extending the franchise to resident aliens are both underpinned by "essentialism."<sup>230</sup> This is true, even in those cases where the courts may try to hide behind "rationality tests" or other deferential devices.<sup>231</sup> Despite the fact that a court may believe that it is merely deferring to the logic of the legislature, or other entities, it is still making the decision whether a classification has a rational basis.<sup>232</sup> For example, in his dissent in *Sugarman*, Justice Rehnquist reasoned that "[i]t is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect 'government' to treat us."<sup>233</sup> Why isn't that an irrational assumption?

The fact that the class of resident aliens is made up of a wide variety of persons discredits the argument that ascribing any universal characteristic to resident aliens is rational. For example, one could envision three resident aliens who have differing characteristics relevant to the franchise:

Let's call the first resident alien Juan. Juan's characteristics are as follow: Juan is a visiting professor from México whose field of expertise is American Studies (knowledge of American government); he greatly admires the American government, its people, and plans to apply for citizenship (loyalty); Juan also spends

229. See *Sugarman*, 413 U.S. at 661-62.

230. See section III(b) (explaining the essential characteristics subscribed to Blacks during much of American history).

231. See *Sugarman*, 413 U.S. at 660.

232. See David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 198 n.118 (1983).

233. See *Sugarman*, 413 U.S. at 661-62.

his free time volunteering at the burn victims unit of the local hospital (moral character).

The second resident alien is Tucker. Tucker's characteristics are as follow: Tucker is a logger from Canada who has never been to the United States before now. Tucker believes that America is a monarchy and that George W. Bush is its King (knowledge of American government); he hates America and has come with the intent of assassinating its King (loyalty); and Tucker spends his free time clubbing baby seals (moral character).

The third resident alien is Madeline. Madeline's characteristics are as follows: Madeline is an illiterate native of France who has no understanding of what type of government is used in the United States (knowledge of American government); she loves living in the United States and attends local school board meetings in the district where her children attend school (loyalty); and Madeline is involved in community development projects (moral character).

The modern arguments for extending the franchise to resident aliens perceive Juan as personifying the essential characteristics of the resident alien class. He is loyal, knowledgeable of American government, and has strong moral fiber. His characteristics are seen as fixed and not fluid. In contrast, Tucker is the personification of the resident alien classification used by proponents of the modern arguments against extending the franchise. He is dangerous, unknowledgeable, and evil. His characteristics are seen as fixed and not fluid. The third example, Madeline, causes problems for modern theory. She fits into neither of the categories espoused by the modern arguments. She is moral and loyal, but not knowledgeable.

The existence of *all* three of the fictitious resident aliens causes problems for modern arguments in general. If all three of these examples were actual resident aliens, the proposition that the resident alien classification *itself* has essential characteristics breaks down. Moreover, if one thinks about the fluidity of human characteristics, the fixed nature of the hypothetical resident aliens becomes an asinine proposition because of their simplicity. The essential characteristics of the examples are "social constructions" which do not necessarily have grounding in reality.<sup>234</sup> For example, Juan could develop a drug problem, thereby destroying his attainment of the moral character requirement. Further, Tucker could learn that the United States actually has a

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234. Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM L. REV. 263, 263-68 (1997).

democratic process, and that political activity within that process is more effective than assassination, thereby meeting the loyalty and knowledge requirements.

An even more “thorough” empirical understanding of the resident alien population would be unhelpful. Empirical studies that focus upon the resident alien classification presupposes that social construction is based in reality. To demonstrate, at first glance, an empirical study showing that 90 percent of all resident aliens are unfamiliar with the system of government in the United States may lead to the conclusion that resident aliens should be denied the franchise. This example shows the power of the resident alien classification and how the social construction becomes the baseline against which all things are measured. Logic should dictate that 90 percent of the group who were unfamiliar with government structure be denied the franchise, but not the other 10 percent. It is easier to essentialize every resident alien as ignorant, despite the “reality” of the study. The ascription of essential characteristics to the resident alien classification is illogical because of the diverse and changing constituency of the group itself. Further, such a venture is a practice in futility since no study could find the essential characteristics of such a group because no person is exactly like another; accordingly their “similar characteristics” are imperfect reflections. Demonstrative of this notion is the fact that, even a single person’s identity is fluid and changes from day to day.<sup>235</sup> Hence, these examples show that the current fixed and static categorization of resident aliens into a rigid class should be rethought. In an attempt to find a possible cure to this oversimplification of categories, I consider two current statutes that take radically different approaches in bestowing the franchise.

b. *Static v. Fluidity*

The Colorado statute governing elector qualifications<sup>236</sup> is representative of the current national standard. The statute limits voting rights to those persons who are citizens of the United States.<sup>237</sup> Alternatively, the Illinois common schools statute<sup>238</sup> allows that “[e]ach parent voter shall be entitled to vote in the local school council election at each attendance center in which he or she has a child currently enrolled.”<sup>239</sup> Therefore, citizenship is not a voting prerequisite in this instance. “Parentage” is the im-

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235. See Litowitz, *supra* note 177, at 43.

236. See *supra* note 3.

237. *Id.*

238. 105 ILL. COMP. STAT. 5/34-2.1 (2006).

239. 105 ILL. COMP. STAT. 5/34-2.1(d)(iv) (2006).

portant characteristic, not whether the parent is a citizen.<sup>240</sup> The parentage classification is seen as more closely related to the ends sought in excluding others from the franchise than the pure citizenship approach because a parent is seen as more likely to have interest in, and be knowledgeable of, the local school board regardless of citizenship. If Madeline and the other hypothetical resident aliens had children, they would be able to vote under this statute.

I believe that this approach,<sup>241</sup> as opposed to the pure exclusion of resident aliens from voting, is more useful even if still incomplete. It is more closely related to its goal of enfranchising only those who have a direct interest in the school board elections. However, while the parentage classification reflects a more tangible quality — blood connection between the person allowed to vote and that person's child — it is still a classification that is open to broad and often incorrect generalizations. For example, a parent may or may not have any knowledge about the issues that are of import in the local school district. A parent also may or may not have any interest in his child's well being. Finally, a parent may or may not have an interest in improving the quality of education within the district.

While these uncertainties may raise some concern, something must be tried, and "categorization is the boon and bane of human existence."<sup>242</sup> Naming and labeling the world is necessary for practical reasons, but such categorization breeds imperfection.<sup>243</sup> Therefore, "understanding is always a form of misunderstanding and seeing is always a kind of blindness."<sup>244</sup> Thus, we must engage in the game of categorization, but remain aware that the game is imperfect, and that the categories must be constantly changed to reflect the fluidity of human characteristics.<sup>245</sup> In the legal area concerning the right to vote, the Illinois statute more properly reflects the fluidity of human characteristics because it

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240. A postmodern argument could be made that "parentage" as a classification is open to the same criticisms as those leveled against the resident alien classification. For instance, one parent could greatly care about the well-being of his or her children, another couldn't care less, hence the irrationality of the classification. This extreme version of postmodernism reflects the "infinite regress" problems inherent in postmodern theory addressed in section III(c) of this paper.

241. Other municipalities that have passed legislation enfranchising noncitizens include six Maryland municipalities. Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CAL. L. REV. 271, 271 (2005).

242. Allan C. Hutchinson, *Gender, Difference, and Postmodernism: Inessentially Speaking (Is There Politics after Postmodernism)*, 89 MICH. L. REV. 1549, 1554 (1991) (book review).

243. *Id.*

244. *Id.*

245. See generally RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (Cambridge University Press 1989).

uses a narrower categorization — parentage — than the Colorado statute, which uses the overly broad resident alien classification. Therefore, the approach exemplified by the Illinois statute is more useful than the typical “citizenship as a prerequisite to vote” statute. Fluidity, combined with manageability, should be the standards against which we measure all laws in this arena. The Illinois statute comes close to meeting both these standards, while the Colorado statute only meets the latter.

c. *Will the Heavens Fall?*

Assertions could be made that isolating the application of postmodern theory to this sole issue may be an acceptable approach, but that application of the theory to broader areas of law could lead to a destabilization of the legal foundations of our Republic. This statement has some merit. For example, the Equal Protection doctrine as applied to suspect classifications has been one of the most successful projects in protecting the rights of minority groups within society. But, such rights-based analyses have been criticized by many postmodern commentators as an unrealistic rhetorical device that is supportive of essentialist notions.<sup>246</sup>

The Postmodern Project is one of deconstruction.<sup>247</sup> As opposed to seeing rights-based analyses as merely supporting the status quo by ascribing “fundamental rights” to a group of persons that have no essential characteristics, or by labeling that same group of persons as a “suspect classification,” a different approach could be taken.<sup>248</sup> For example, taking the earlier example of Blacks in the United States,<sup>249</sup> the Equal Protection doctrine could be seen as a remedial tool used to deconstruct the abstraction of “blackness.” Therefore, Blacks need not be seen as having any essential characteristics, but simply that the Equal Protection Clause is necessary to *resist* the ascription of negative essential characteristics to Blacks by racist forces within society.

When living in a world of social constructions, where some of those constructions are seen as useful and some not, it is unnecessary to rid ourselves of all of such constructions. Human life absent all social constructions would be inconceivable.<sup>250</sup> For as Shakespeare once wrote:

246. See MARTHA MINNOW, *MAKING ALL THE DIFFERENCE* 216 (Cornell Press 1990).

247. See, e.g., LITOWITZ, *supra* note 6; Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987); DERRIDA, *supra* note 165.

248. See generally DERRIDA, *supra* note 164 (discussing the western tradition of hierarchies).

249. See section III(b) (explaining the essential characteristics subscribed to blacks during much of American history).

250. See LITOWITZ, *supra* note 6, at 32-33 (discussing incidents in which prominent postmodernists acted in a way that seems to contradict their theories).

All the world's a stage,  
And all the men and women merely players.  
They have their exits and entrances,  
And one man, in his time plays many parts,  
His acts being seven ages.<sup>251</sup>

## VI. CONCLUSION

Postmodern critiques of modern theories are comparable to suicide bombing in many ways. The ability of postmodern critiques to deconstruct modern legal theories and expose their biases is powerful. Still, postmodernism is based on many of the same logical foundations and presumptions that make up modern theory. Applying the postmodern critique to postmodernism itself shows the biases it itself relies on.

Excluding members of society from the franchise for the sole reason that they occupy an artificial classification created by the "powers that be" is unproductive. New, more fluid approaches should be applied to such legal problems so as to minimize the ascription of essential characteristics to such groups. Essentialism, and any unquestioned objective Truth, is even more unproductive. It is important to remember that although the world is made of social constructions and multiple narratives, those constructions and narratives are within our control. They may be created or destroyed when we wish.

Colorado Congressman Tom Tancredo (R-CO), an outspoken opponent of illegal immigration and ex-presidential candidate, has argued that our country should adopt a new narrative.<sup>252</sup> Referring to arriving immigrants at an anti-immigration rally in Carlsbad, California he stated, "[a]ll I ask is that once you get here, you disconnect from the old, connect with the new and become American."<sup>253</sup> There is, and has been since the beginning of time, a battle for control over societal constructions and thus reality. Who will define "American" in the future?

Rorty has said that "postmodernism is philosophically right, but politically silly."<sup>254</sup> This is probably right, but by pointing out that the Emperor has no clothes, the viewer does not suggest that she is fully clothed. Nor does the fact that the viewer herself lacks clothes lead to the inference that the Emperor is in fact, fully clothed after all. Although postmodernism and its progeny do not provide a map for the future of the franchise, they tell us

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251. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 4, sc 7.

252. Elena Geona & David Graham, *Carlsbad forum draws protesters - and 150 law officers*, available at <http://www.signonsandiego.com/news/northcounty/20050812-9999-7m12forum.html> (last visited Jan. 25, 2007).

253. *Id.*

254. RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 18 (1999).

where not to go.<sup>255</sup> When a category has become stale and above question it should be abandoned in exchange for a more fluid categorization. The logic underlying the Colorado Supreme Court's decision in *Skaft v. Rorex*,<sup>256</sup> and the prominent approach used in state election statutes governing resident alien voting nationwide, is an example of such a stale narrative that should be discarded.

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255. Rorty's "ironist" represents an academically popular and interesting way to live in a post-postmodern world. *See id.* at 73.

256. 191 Colo. 399.